

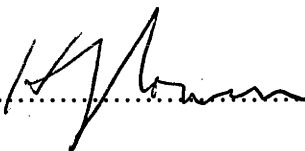
**BEYOND POLITICAL CIVILITY: ESSENTIAL  
INTERESTS AND PUBLIC SERVICE INTEGRITY**

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This thesis represents the original work and research of the undersigned. No part of this thesis has been adapted or copied from another person's work except where due acknowledgement is made.

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## ABSTRACT

It is commonplace to expect that individuals and organized groups in the political domain will be confronted with two main obligations: 1. To take a principled stance towards each other by virtue of co-existing in such a domain, and 2. To take a principled stance towards the state in that domain, and vice versa. One of the most prominent principled stances that individuals and groups make to each other and to the state, and vice versa, is that of political civility. All the operative political entities within the political domain are expected to show a sufficient amount of respect towards each other.

The literature on political theory has overwhelmingly held the position that political civility matters to individuals and the state for instrumental reasons, namely that civil relations promote well-ordered societies in which such values as freedom, equality, peace, justice, self-determination, communal decision-making, economic prosperity and the like are realized. Civil relations do this by facilitating harmonious deliberation within the polity that enables the achievement of such goals as effective consultation, problem-sharing and solving, rights-protection, community welfare, and the effective exercise of the rule of law. This process of civility is most prevalent within the political theories of liberalism, republicanism and the recent work done on the notion of deliberative democracy. Liberalism values civic unity on the basis that it protects individuality; republicans and deliberative democracy theorists on the basis that it harmonizes areas of conflict in a pluralistic world so as to produce outcomes consistent with the common or public good. The former tends to favour institutional mechanisms based on rights and the rule of law as a way of protecting the interests of individuals, whereas the latter views favour mechanisms involving dialogical engagement to achieve such a goal and the goal of maintain common goods.

This thesis asks whether the procedural operation of civil relations is sufficient in meeting our normative expectations about the role of the state and its relation to the

citizenry. In particular, I will assess the nature of liberalism's commitment to the rights of individuals and the contractual relation that exist between individuals and the state. I will also assess the type of civil and procedural relations that lie at the core of republicanism. Republicanism, and the spirit of deliberative democracy theory, places great faith in the idea that dialogical or deliberative engagement between individuals and the state will produce outcomes that serve the interests of all. I express scepticism in relation to this process and its intended outcomes. Specifically, I hold that we need to monitor whether the operation of deliberative procedures sufficiently caters for outcomes that protect the essential interests of all citizens. Firstly, I present the view that we can have serious doubts about the extent to which our faith in civil relations as a determinant of just outcomes is justified. Secondly, in response to this concern, I present an argument for why the protection and enhancement of essential interests should be accepted as a principled stance, along with political civility, that, at the very least, the state ought to take towards its citizens. I offer an account of ideal preference utilitarianism as a way of comprehending what our essential interests are. This view stipulates, on the one hand, that no outcomes ought to prevail in a society that are detrimental to an individual's basic biological welfare, a form of welfare essential for the performance of preference expression, and, on the other hand, that there are states of being that are of intrinsic disvalue for sentient beings. These are what I take to be the essential interests that we all share.

Furthermore, I argue that utilitarian essential interests can be formulated in such a way that they can effectively become a feasible goal for the state to pursue. I offer this argument in the light of views, held by some, that utilitarianism cannot adequately provide a fair distribution of human needs. One way of protecting such needs using a utilitarian reference point is in the area of public service on the part of policy-makers. Under this notion, state policy making officials are justified, I argue, in promoting and implementing a concern for essential interests in their institutional practices. I include in this group of officials a certain category of public servants and judges, and I argue that conscience utilitarianism can guide public service policy formation and act as a constraint on the exercise of judicial decision-making. Our understanding of the normative principles that ought to underpin political society will be extended to include,

on the part of the state at least, professional principles that are in line with conscientious deliberation.

In conclusion, I draw out the extent to which this thesis extends our understanding of the state-citizen relationship as it has been traditionally presented by such political theorists as liberals and republicans. Citizens as members of a polity, and not merely as parties to a social contract or as functionaries in a symbiotic relation with sectional interests in a republic, are entitled, I hold, to be served by a state that is sufficiently geared to protect their essential interests. The idea of the state as an institution that can play a discerning role in this fashion is not established in the political theories I have mentioned here. This thesis does not deny the importance of such theories as they exist as contributions in political analysis, but it does present a new way of thinking about the role of the state and its obligations to citizens.

# CONTENTS

<b>CHAPTER ONE: APPLICATIONS OF CIVILITY</b>	<b>1</b>
1.1 A Characterization	1
1.2 Civility as a Social Norm	4
1.3 Civility as a Moral Norm	7
1.4 Civility as a Political Norm: Civil Proceduralism	14
1.5 Political Civility and Rationalism	17
1.6 Apolitical Civility: Civil Society	21
Summary	25
<b>CHAPTER TWO: LIBERALISM AND POLITICAL CIVILITY</b>	<b>27</b>
2.1 Moral Reasons for Political Civility: The Primacy of Individual Freedom	27
2.2 Kantian Civility and its Influence on Nozick and Rawls	34
2.3 Prudential Reasons for Political Civility: Civility by Contract	39
2.3.1 Hobbes and Political Civility	39
2.3.2 Locke and Political Civility	41
2.4 Political Civility by Social Force	43
2.4.1 Constant and the Political Civility of the Moderns	43
2.4.2 Adam Smith and Political Civility	46
2.5 Individuals, the State and the Metaphysic of the Right	49
2.5.1 Political Civility and the Obligations of Individuals	49
2.5.2 Political Civility and the Obligations of the State	51
2.6 Rights	53
2.6.1 The Right to Life	53
2.6.2 The Harm Principle	55
2.6.3 The Right to Welfare	59
Summary	60
<b>CHAPTER THREE: REPUBLICANISM AND POLITICAL CIVILITY</b>	<b>63</b>
3.1 Liberalism and Republicanism: A Theoretical Clarification	63
3.2 Pettit's Republicanism: The Primacy of Freedom as Non-Domination	68
3.3 Pettit and Republican Civility	75
3.3.1 Pettit and Honour as a Regulative Ideal	77
3.4 Dagger's Republicanism and Political Civility	79
3.5 Sandel's Republicanism and Political Civility	81
3.6 Sunstein's Republicanism: The Rule of Law and Political Civility	84
Summary	87

<b>CHAPTER FOUR: PROBLEMS WITH CIVIL PROCEDURALISM</b>	<b>90</b>
4.1 Challenging Classical Pluralism	90
4.1.2 The State and Political Economy	94
4.1.3 Challenging Neutrality	98
4.2 Liberalism and Welfarism	104
4.3 Republicanism and Welfarism	110
Summary	119
<b>CHAPTER FIVE: UTILITARIANISM AND ESSENTIAL INTERESTS</b>	<b>121</b>
5.1 A Utilitarian Account of Essential Interests	121
5.2 Knowing Essential Interests	134
5.3 Essential Interests and the Fact/Value Objection	138
5.4 Essential Interests Compared and Contrasted	145
5.5 Essential Interests and Legitimacy	155
Summary	160
<b>CHAPTER SIX: IMPLEMENTING ESSENTIAL INTERESTS: THE ROLE OF PUBLIC SERVICE INTEGRITY</b>	<b>161</b>
6.1 Responsibility and Essential Interests	162
6.2 Public Service Integrity	164
6.3 Conscience Utilitarianism	166
6.4 Implementing Essential Interests	172
6.4.1 Role-based Function of the Public Service	172
6.4.2 Influence-based Function of the Public Service	175
6.5 Examples of Public Service Discernment	179
6.6 Essential Interests and Judicial Governance	186
6.7 Essential Interests and Judicial Independence	193
Summary	196
<b>Conclusion</b>	<b>197</b>
<b>References</b>	<b>199</b>



## 1. APPLICATIONS OF CIVILITY

This thesis looks at the nature of an obligation that exists between citizens and the state. Traditionally, I argue, the nature of this obligation has been minimal. A substantial part of this minimal obligation between citizens and the state is that each ought to exemplify political civility to the other. In this chapter I set out a characterization of civility in general, pointing out its overall function as norm of human behaviour. Civility will be seen here as a behavioural norm limited in application to those capable of taking rational and voluntary action, and will be expected to have universal appeal to this category. I look at how this universality requirement implicates civility as a concept inextricably linked with the concept of justice, and how this fact constitutes a precondition for the existence of a moral community. These general features of civility assist in producing, in practical terms at the very least, a sufficient amount of social cohesion within diverse social networks.

I then move on to narrow the focus by looking at political civility in particular. The effectiveness of common civility as an aid to social cohesion overlaps into the political domain. Political associations and interactions are served well by civil behaviour between agents. The reason why such civility in the political realm ought to be adopted by all those who participate in it is that, by so doing, all will be able to protect their own self-interest commensurate with others doing the same. I show that the best way of protecting one's own self-interest in a political context, whether one is an individual, association or the state, is by conforming to certain norms of rationality that facilitate a communicative process of civil and deliberative engagement.

### 1.1 A Characterization

Civility is a conception of human behaviour concerning the appropriate relations between people. It exemplifies the behavioural practices required for amenable relations. Civil behaviour is necessarily a positive form of human interaction in that it

inherently seeks harmony between persons. It is similar in this respect to such conceptions of behaviour as courtesy, politeness, patience, tolerance, tactfulness and punctuality. All of these are underpinned by a basic respect for others and the need for well-ordered interactions between people. Courtesy is a pervasive aspect of civil behaviour, and it reflects the moral respect for persons. Examples of civility as courtesy are many. I am civil to others when I apologize for bumping into them at the supermarket; when I refrain from taking food from the fridge that is not mine; when I ask for my neighbour's permission to retrieve my football from their backyard; when I approvingly acknowledge the arrival of someone I have invited to my place; when I inform a friend that my plans have changed and I cannot meet her at the arranged time; when I remain silent and let someone speak whose turn it is to speak; etc. But there is an understanding of civility where it doesn't sound correct to call it courtesy. Take a case where I politely censor someone for butting into a group discussion out of turn, or I do the same to someone whom I spot littering. I would want to call these cases of civility but I do not consider them instances of courtesy. What makes them civil is that they are forms of censorship that do not offend, or are not intended to offend, the people who are breaking the norms. In this sense we might say that civility implies graciousness.

Civility relates to behavioural practices in both private and public domains. In the private domain of civility, I may be polite to my brothers and sisters, aunts and uncles, and to others who share in close personal relations with me. A behavioural norm such as this binds the identity of a social unit and makes an institution such as the family more grounded. The norm is also used to bind other social institutions such as friendships, recreational and workplace associations, and the like. The reasons why people join together in their private lives with others is done on a basis where there can be a multitude of causal factors—both intentional and unintentional. But what solidifies such bonds, no matter what their origins, will be the norms of civility.

Yet civility also applies in a public domain; it can involve respectful social behaviour between persons when those persons are distanced from each other in a particular way. For example, I am civil to others when I respect the social rules associated with

queuing. Or when I follow social conventions such as cleaning up after myself after eating a meal in a public place, or refraining from making loud objections when I miss a bus due to circumstances of my own creation. Such norms of social behaviour are tacitly accepted by members of the same social community. Civility here only applies to relations between persons as they exist at a civic level—at a level of engagement with each other for the sake of social solidarity; specifically where such solidarity is not secured by any personal involvement between persons.

The motivations to behaving civilly can be varied. It is enough to say that I am being polite, say out of a sense of obligation to family members or out of sincere affection for them. It is enough to show politeness to strangers in public due to habit, on the one hand, or a deep respect for cultural norms on the other. The norms of civility tolerate motivational-diversity in this sense; even though the motivations for civil action may vary greatly it is only the social cohesion of the outcome that is of concern regarding the maintenance of a civil environment. There is a sense however in which we can say that forms of habitual behaviour of this kind are quasi-intentional. I may wait patiently for someone who is blocking my way because this is the way I have been taught to behave in such a context. However, even though I may act out of no direct respect for those in difficulty, it seems plausible to say that I have retained the habit of treating these people the way I do, in these circumstances, due to a tacit notion of respect. If I really did not respect others this would override my habitual behaviour and see a change in my response to this scenario. In this sense my actions here are performed with a degree of respect that is implied by the fact that I retain this type of habitual behaviour. No matter what the motivation, however, it is expected that civility in a community will reflect positively on those bound to it and to those who are treated with such respect. On this point all will be expected to agree. Civil action is intended to lessen any fears held about the need to share public space with others, and to act as a foundation for interacting with others in a way that enhances a sense of security for all.

We can understand a general definition of civility better if we consider a definition of its opposite—incivility. Uncivil behaviour tends to be detrimental to ordered social functioning. Uncivil behaviour violates community norms. It is behaviour that produces

a negative response between persons in the public domain. Disrespect to others here amounts to treating them as beings who are unworthy of due acknowledgement and consideration.

A barbaric society, for example, is one that is not governed by the norms of respect between strangers and friends alike. The way we consider and treat each other in such a society is left to the contingencies of brute force rather than the norms of standardised behaviour. Barbarism is constituted at the core by an absence of standardised, rule-governed engagement; a state of being that makes cruelty and humiliation more likely. A society that is barbaric is normally one that uses the existence of unfettered power to treat others inhumanely. Less extreme examples of incivility are found with cases of rudeness. Rude behaviour can be performed in either a rule or non-rule governed way. I can know the norms of civility and deliberately violate them, or I can violate the norms of civility unintentionally by being apathetic towards the normative force of such rules. In either sense, rudeness inherently implies offence and disrespect towards others. It is inherently a violation of everyone's expectation that others will relate to me from a stance of predictable respect. Rudeness violates this expectation and hence violates a sense of security for the individual in the way she/he relates to others. This is what the act of rudeness does in itself; it is another dimension to the act of rudeness as to the specific harm it does to another by insulting them.

### 1.2 Civility as a Social Norm.

It is important to add to the characterization an understanding of the way in which civility operates as norm within a social context at the public level. Social rules, for instance, are constraints that make one set of options more appropriate to conform to than others. The rule is the guideline that makes the option appropriate. For example, the social rule that one ought to wait patiently whilst queuing, and not push in out of turn, operates so as to avoid and sanction the disorder created by que-jumping behaviour.

Civility is a social rule that exists in a way that is distinct from such other kinds of rules, say, for example, procedural rules such as the rules of evidence. The latter are codified within the institution of law with clear institutional guidelines about their nature and application; each participant in the legal process knows when they have been satisfied and knows the sanctions that will result if they are not met. However, civility is a rule or norm in a more informal sense. The rules of civility are not codified or implemented at an institutional level, rather they exist informally in the social domain. By this I mean they are more culturally acquired expectations about behaviour that are learned by the participants in a specific society.

Even though civility is an informal social norm learned in a cultural context rather than an institutional one, it is still bound by certain requirements. One is that the norm of civility and the practices of civil behaviour need to be spread equally throughout society. Civility, in other words, is expected to have universal appeal and application. Civility is a non-compartmentalized social practice of respect. For example, civility is a gender-neutral notion. We do not hold that civil behaviour such as caring and respect should be a task unique to females or males. Nor does civility operate within the principle of a division of labour. Civility is not to be tendered out into the professions, say, of nursing, social work, religious ministries, etc. We do not expect that only some are obligated to be civil and others not. All are expected to conform to the cultural expectation of civility.

Civility as a social norm, however, can be open-ended in the following sense. What we take to be civil action can change over time. Opening doors for women was once considered to be a civil form of action—an action expected of men in relation to women even when both were unknown to each other. The civility of the action could be explained in terms of males reinforcing the welfare of the social order by emphasising the importance of women to its survival and reproduction. Although such an explanation could be more critically assessed, it is one that could be upheld in a civil society tied by paternalistic bonds. But civility as a social norm in this sense is no longer applicable. Changes in our perceptions of women and their role in society have altered the suitability of this norm of civility in modern, western society.

But it should be noted that civility and universalisation connect in a unique way. We do not expect every individual of society to exhibit the norm of civility; instead the norm is only expected of those who possess minimal rational autonomy. We are not expected to be civil towards those who do not fit into this category. We are not expected to be civil towards trees and rocks, for example. But this does not mean that civility only makes sense in the relations between fully rational agents. An adult is expected to be civil to an infant but we don't expect an infant to be civil until she/he is taught the necessary norms. Civility need not overtly happen within reciprocal relations between rational agents. However, the institutions of civility itself will make sense to rational agents on the basis of producing reciprocal benefits for all. Each of us is culturally programmed to sanction such behaviour should it occur. In giving praise for the performance of civil action a minimal sense of rational autonomy is assumed. We approve of the diligent ordering of emotions when we identify and praise the practice of civility, and use of an appropriate method of censorship when we see its norms being violated by those who are rationally capable of following its guide. We praise, in other words, the correct rationing up of the world when civility is exercised, and show disapprobation when the infringement of the norms of civility are transgressed.

Civility in other words has its rewards. The rewards of civility are those of being thought well of by your peers and receiving from them, in return, civil behaviour or respect. This makes life more pleasant. I know that I will not be censured by others if I hold them up due to an accident. Here I will receive empathetic and gracious treatment if others are disposed to act with civility. This gives a security not only that I will be treated appropriately by others in this sense, but also that others are so disposed to think in this way across the board. Civil action enhances publicly responsible thinking and behaviour. It helps to create and maintain a public consciousness.

The richness of civility is found in that it is expected to be a voluntary action. We do not talk of people being coerced to be civil. Civility is meant to spring from a generous disposition and enacted spontaneously. Civility and justice come together when we see that the more admirable cases of civility will be those where the voluntary actions of

respect for others is motivated by a desire to reinforce the social bonds that weave the fabric of a community together. This is the ideal at least. However, those who do not adhere to the civility norms may have to be disciplined by others so as to redirect their behaviour away from the uncivil and towards the civil.

Civil action will also have the effect of demarcating the boundaries of social identity. By being civil or respectful towards others we are assuming that the instantiation of civil action reaffirms the identity of both parties in a community of shared values and expectations. There is the assumption that both parties to the civil action are aware of this and that the instance of civility experienced strengthens the likelihood that the norm will continue within that society. It is expected that the act of civility will occur again either between the agents concerned, or between either of the agents and other members of the society similarly placed. Civility then will assume a strong sense of solidarity and continuity within a society. However, having said this, the expectation of civil action to others will cut across societal and national boundaries. We are also expected to treat those of different national origins outside our national boundaries with due civility.

### 1.3 Civility as a Moral Norm.

Civility is a concept and dimension of character or action trait that is inextricably linked with certain moral constraints. It captures a sense of the way in which all people ought or deserve to be treated. Civility, in other words, exists as a moral norm. Moral norms of behaviour are not necessarily constructed on the basis of what it is socially prudent to do, although a moral norm could be constructed in this way. Rather, a moral norm can be constructed on the basis of what we ought to do where this is determined by what is, in a normative sense, the right action to perform in relation to persons. For example, the sanctions against incivility must be proportionate to the offending transgression. It is a requirement of justice that disapprobation will be proportionate to the civility norms themselves. It would be counterproductive for there to be heavy and disproportionate penalties for being uncivil. A short, sharp and public rebuke to someone who is violating a civil norm should be enough to shame that person and remind them, and

those who witness it, of the importance of obedience to the social norm. For example, speaking out of turn at a public meeting will be a civility violation deserving of such a penalty. It would be inappropriate to rebuke such a violation of civility with acts of physical violence.

Also, we expect that civil action is only properly exercised when it is directed at morally salient outcomes. Being civil, for example, to the innocent victims of one's crimes is not a proper instantiation of civility. Likewise, civility would not be appropriately instantiated if we showed civility towards people we were deceiving. Deception is inherently uncivil. Deceiving someone violates the status of others as autonomous entities. Deception of the innocent may produce good outcomes for people but its existence violates the value of civility. The wrongness of corruption for example is found in its inherent incivility. It involves a misappropriation of resources; it involves unfair distributions in the sense that they result from a non-inclusive and non-informative decision procedure. Corruption bases the distribution of resources on means that are unaccountable. Accountability is an essential feature of civility. A corrupt society may do better than an uncorrupt society in producing a greater equality of resources for all, but it will be uncivil because it denies to people the right to be treated as autonomous citizens. However, it should be noted that the wrongness of corruption is not captured totally in the sense of its being uncivil. The lack of respect that corruption portrays needs to be seen also in conjunction with other serious factors as the violation of trust and the sense of indignance that acts of corruption generate.

Civility seeks justice also in the sense that it is directed towards moderation and tolerance. People deserve a fair hearing and should be free from a social environment in which they are pressed or hounded for responses or answers, or mocked and humiliated for holding the views that they do. This is not to say that a civil society will not be a critical society. Each, as we will see later in this chapter, is expected to subject their views to scrutiny, but the views they hold themselves deserve a *prima facie* level of respect. Toleration in a civil society is not based on scepticism nor fear of disorder, but rather out of a respect for the views of others.



Civility, as we have seen, can be a social trait that has prudential value for the self-interest of rational agents. The motivation to civility can be generated by the payback that one expects by being respectful to others. The deal is that if I pay due respect to the interest of others they will, in turn, pay the same respect to me. But civility as a moral norm can take on a different guise. Take, for example, the conceptual bond between civility and justice found in the notion of civil disobedience. Legitimate or civil disobedience honours justice in the sense that it inherently respects persons and social continuity. Legitimately violating the obligation to obey the law is carried out only under certain conditions—conditions that uphold the framework of civil life. Firstly, the disobedience has to be justifiable on grounds that all in the community can take to be reasonable. Examples of such grounds are the following. Those performing civil disobedience may seek to jolt a majority in a society from their apathy or ignorance of certain facts that we would expect them to have if they were to make informed political decisions. For example, activists who raid chicken farms and take pictures of mistreated stock justify their violation of the law on the basis of informing others of the realities of factory farming. The assumption is that the unnecessary suffering of animals would be seen as immoral to any reasonable person. In this sense, the civility of disobedience is found in that it promotes and respects rational autonomy. It seeks to ‘inform a misguided majority’. But civil disobedience can also be performed not on the basis of informing misguided majorities, but on the basis of informing misguided minorities, say elected representatives, of what in fact majority opinion is on a matter. If activists have good reasons for believing that a government does not recognize the wishes of the majority on a certain matter, then it is justified in disobeying the law.

However, the general point is that disobedience is justified in the cases above on the basis that there exists in these cases reasons that would be supported, rationally speaking, by the welfare of the majority. Violation of the law, in these instances, will not damage the civil norm of ‘respect for the law’ because of the amount of support behind it. The act of disobedience is necessarily public. The perpetrators commit the act with the intention of getting caught and claiming responsibility. There is no intention to cheat the law, as it were. This means that the level of disobedience cannot be violent. Disobedience that harms others violates community standards of respect for the person.

It also violates the effectiveness of the act of disobedience as a reference point in future dialogical engagement between citizens. Disobedience performed in the name of 'civility' is not effective if reference to it evinces views of distaste and disapprobation by the public due to its use of excessive violence. In order to be an act of civility, disobedience needs to be moderated to such an extent so as to make the act itself worthy of public comment and deliberation.

These points have implications when it comes to the issue of sentencing civil disobedients? Cohen writes that punishment is based on three principles: deterrence, reform and retribution<sup>1</sup>. The state punishes convicted citizens on the basis of using their punishment as a disincentive to others to commit the same crime, to assist the criminal in becoming aware of the harm done to her/his victims and to maintain social security for all; and to re-educate the offenders so as to reintegrate them into society. There is also a sense in which sentencing ought to count as a symbolic reaction by the state to the wrongness of the transgression itself. Yet, in the case of disobedience where the transgression of the law is based on civil motivations, there is no clear evidence that deterrence, reform and retribution is required. The impact of punishment on civil disobedients in terms of their freedom and status should be minimal. As Cohen writes, "...if the ultimate object of the law is to encourage citizens to build a peaceful and harmonious society in which one's fellows are respected and principles of justice manifested, there is no need to punish...civil disobedients severely."<sup>2</sup> For the reasons just stated, we can conclude that there are good reasons for holding that the state is obliged to respond to instances of civil disobedience in a civil way themselves. The state contributes to the harmony of social order and public values if it recognises its moral obligation not to inflict harsh punishments on civil disobedients. The fact that a law is broken with civil intent should be a mitigating factor when it comes to the sentencing of such "crimes". It should be seen as an opportunity by the state to honour the morally disobedient. We can at least say that civility requires us to ensure that judges retain discretionary sentencing powers over acts of civil disobedience, and such acts should never be subject to mandatory sentencing laws.

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<sup>1</sup> See Cohen (1971) p. 77.

<sup>2</sup> Ibid. p. 82.

There is however, I argue, a sense of civility and disobedience that goes beyond calculations of reciprocity between persons. This understanding seeks to make the public aware of a substantive moral good—say, the protection of animals against torture. For instance, the disobedience is civil in the sense that the violation of the law needs to be commensurate with morally acceptable standards of behaviour. Shooting whaling ships with missiles and taking the lives of those on board is not an acceptable form of disobedience. Protests against torture and pain cannot violate its own standards. What the reference to civil disobedience shows is that civility is not only normatively bound in that it needs to respect the rights of all to make choices in a democracy based on full knowledge, but is also a morally bound concept. Civility, in other words, is not only tightly linked with strong social norms that generate solidarity, but also with strong moral norms concerning just behaviour and treatment.

There is another sense in which I want to refer to civility as a moral norm. It is the sense in which civility is understood as a moral virtue. Civility is a specifically moral term for Cheshire Calhoun<sup>3</sup>. Civility is in essence a term that demands that people are treated in a way that we *ought* to treat them; in a way that they *deserve* to be treated. What is it about persons, for Calhoun, that implies this moral dimension to civility? Calhoun holds that individuals are beings that deserve to have their self-esteem respected. This position derives from her observation that moral scepticism is true. If scepticism is true, then there is no universally applicable ‘socially critical morality’ or knowledge about moral facts that warrants us to suppress the rights of individuals to express their viewpoints on the nature of the good life, and their opinions on others. Self-esteem is respected to the extent that we do not subject people to regulation by a ‘socially critical morality’ narrowly construed.

What needs to be in place instead, according to Calhoun, is a civil moral order. Civility, in this sense, is primarily a display of respect to others in order to facilitate the

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<sup>3</sup> Calhoun (2000). Calhoun’s reference to civility as a moral norm is similar to Richard Boyd’s notion of mutual respect as a moral norm that appears under his theory of homeostatic consequentialism. Here, mutual respect is a human good that has value in that it tends to “mitigate possible conflicts between various individual goods.” Boyd (1988) p. 203.

operation of a moral community (i.e. a community that is sufficiently interactive so as to enable peaceful and constructive engagement over moral issues and disputes). For example, homosexuals in the presence of homophobes owe it to the latter not to deny or question their right to hold on to and articulate their fears and opinions on homosexuality. Conversely, homophobes must respect the esteem of homosexuals to enjoy the same right of expression. The participants in this scenario are owed respect on the basis that there is no moral knowledge about the 'rightness or wrongness' of sexual orientation. Morality is not a search for facts, for Calhoun, but is rather a necessarily communicative performance between persons. Morality is something that exists in a context of dialogue between competent agents rather than something that is enforced from 'known' principles. Civility protects the lines of communications in this moral network; it ensures that we think well of others at least to the extent of being prepared to listen and engage with them in such a manner that does not spurn them from conversational processes.

It's also important to note that if civility is founded on moral scepticism, then it means that the former is held to be a non-substantive concept. Calhoun holds that there is a difference between *displaying* civility and *being* respectful, tolerant and considerate. For example, Calhoun informs us, someone can display civility in relation to the viewpoints of gay people even if they disagree with their lifestyle, yet refuse to eat food prepared by gay people in their daily living. Civility then only requires a minimal sort of proper treatment to others, and is not an extended moral term in the sense of focusing on the ways in which we actually ought to, where 'ought' is understood in a substantive sense, treat people. Gay people may be offended and demeaned by the knowledge that there are people who do not want to eat food prepared by them, but the prevalence of such experiences, for Calhoun, are consistent with living in a civil society. For Calhoun, exemplifying civility as a virtue means treating others with a respect that is owed to them qua their moral personality, and not in the sense of directly assessing the rightness or wrongness of the moral norms that happen to prevail in society. She points out that "Existing social norms may sanction as...legitimate, treatment that is in fact demeaning."<sup>4</sup>

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<sup>4</sup> Calhoun (2000) p. 263.

Another moral feature of civility has to do with the empathy it encourages towards others in one's group. Communicative civility has been ascribed a moral relevance by Cheshire Calhoun. For her, civility is a virtue, or a lauded trait of excellent character, due to the fact that the respect for others it produces enhances the harmonious interaction and exchange of viewpoints that is an essential condition of a *morally* reflective and ordered society. But, it should be noted, this only implies a thin notion of empathy with others. Civility requires that we empathize with others on the grounds that they are rational agents who seek to interact with their world in a dignified manner, but we are not expected, in the performance of civility, to identify totally with the plight and welfare of others. Civility, in other words, facilitates the minimal goal of safeguarding our common social life together<sup>5</sup>. Moral life she holds is deeply social, and civility has instrumental value in the sense that it enhances the good functioning of our social life by make communicative practices effective and respect-affirming.

Civility is not only a rule-governed, social performance but can also be an expression of good character. After all, I may conform to the civil norm of obeying the law through fear of its sanctions and not through any recognition of the worthiness of being 'law-abiding'. But if I obey the law because I value the respect it shows to people then I am exemplifying a moral excellence. If I am polite to others out of habit or because of the social disapprobation that would result from rudeness then I am in my actions conforming to the rule of civility, but if I am polite to others because I see them as intrinsically worthy of respect then I am exemplifying civility as a virtue.

To exemplify civility as a virtue may require other conditions. To be civil in a morally worthy sense, and not just to act out civility, will require that I act in this way across a wide range of areas in my life, and I must possess a robust disposition that will sustain this way of being civil over time. We would be reluctant to say that someone was civil in a moral sense if they only showed respect for certain others. For example, if I only allow religious people to be heard in silence but not agnostics then there is a sense in which I am acting civilly, but I am not exemplifying civility as a virtue. Also, if I show

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<sup>5</sup> See *ibid.* p.272.

respect towards members of my neighbourhood but not towards people outside it I am not being morally civil. For civility to be a moral virtue I must exemplify the appropriate motivations towards respecting others across a wide range of areas in my life and be committed to this endeavour. Being morally civil involves the appropriate outlook towards others that exists resiliently and consistently over time.

#### 1.4 Civility as a Political Norm: Civil Proceduralism

I have covered to this point the main characteristics of civility as it exists in the non-political, social and moral domains. I have shown how civil behaviour appeals to people with a concern for cohesive social existence as well as living a life that respects our basic moral duties to others. The attraction of civility extends also, however, to the norms of behaviour within a distinctly political context. Just as a society or moral community is a coming together of disparate lifestyles and practices, a political society is constituted by the coming together of disparate political beliefs, opinions, views and interests.

The reasons why individuals are motivated to show civility to each other in the political domain can originate from different sources. On the one hand, one might be motivated to treat others with political civility for reasons of protecting one's self-determined interests in a pluralistic environment. I will cover this type of motivation in more detail in the next chapter where I look at the link between liberalism and civility. On the other hand, the motivation to civility may originate from a recognition that one can only effectively formulate preferences and interests if this is done so with engagement with others in a political forum. This notion of civility holds that political interaction constitutes a form of social capital<sup>6</sup>. Here civility operates on the basis of an assumption that social networks play an effective and crucial role in human development. A worthy human value is created, it is assumed, when people are connected or socially bound to each other. People are interdependent on each other for the social skills and qualities that make a sustained and distinct human life possible.

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<sup>6</sup> Although, not all the operations of social capital are inherently or explicitly political.

Civility in this sense is a conduit for social edification in the political domain. For instance, the trustworthiness among strangers that civility produces strengthens the bonds between people and, as a consequence information flows and support networks can develop to respond to needs and create opportunities for cooperation in a diverse political environment. But, it should be noted, that the trust produced here is of a thin kind only. Civic trust, for example, means more than trusting others to be civil, but the latter is an essential part of any cohesive order aimed at my a unifying political idiom.

Detachment can be an enemy, for example, of political cohesion. Social isolation and alienation brings with it traits that are inimical to human development and social cohesion. What is more, it is assumed that these edifying networks in a society can be qualitatively moulded by deliberate planning. Such planning highlights those social relations essential for wellbeing. For example, joiners become more tolerant, more aware, more empathetic to the misfortune of others, and less cynical. Connection with others means less stress, better education opportunities, and makes people better able to cope with illness. Teachers are more enthused about their career when parents are involved and child development is enhanced when there is a stable and harmonious educational environment.

Specifically, political civility understood in the sense of social capital assumes that institutional engagement will be a positive experience for those who participate within it. They will acquire through institutional engagement with others more information of where they fit in the world, what the common interests of a society are, that they count as worthy partners in such a society due to their views being respected and thus will hold a sense of ownership of the outcome, and they will acquire via their engagement a trust and confidence in fair process.

Civility as social capital is also a mechanism that facilitates deliberative engagement. Social capital assumes that civil engagement can produce a social harmony not only in the processes of deliberation between each other, but also in outcomes for all. It is expected that there will be an acknowledgment of essential differences and sharing

experiences, and that disparate parties can deliberate towards outcomes that all can agree to. In other words, political civility as social capital assumes perfect competition: “Social capital assumes that all members of the partnership have equal interests and equal access to all resources needed for this collaboration, and it assumes that all will benefit equally from the collaboration.”<sup>7</sup> There is no justification for being hostile or abrasive towards each other. Group dynamics, it is expected, will produce the optimal moral code. All are obliged to uphold the ideals of a “good faith” polity.

It is by being civil to one another when deliberation is required—listening attentively and respectfully to the ideas of all stakeholders irrespective of inequalities in wealth, opportunity, gender, class, luck, etc.—that politically harmonious outcomes can be reached, rather than biased, political outcomes from above. Pharmaceutical companies, it is assumed for example, can be attentive to their own market interests as well as to the unique interests of consumers. An individual consumer’s voice will be heard and respected by such companies, and the consumer can expect a result that will harmonize her interests with that of pharmaceutical companies. Deliberative engagement will occur between groups that bond together for common purpose. But it will also apply to groups that do not bond. Here civility will act as a bridging mechanism that enables reconciliation and conflict resolution.

In what sense do dialogical processes produce legitimate outcomes for all? Why should we put faith in dialogue per se? Dialogue exchanges information and results in relationships of reciprocity. Strangers in a civil society have something that the other wants, and cultivating good dialogical ties enables each to tell the other about their needs and wants. Here the reciprocity is not that of an exchange of respect as I mentioned above, but of a reciprocity of information. But the dialogical strategy also needs to guarantee not only that certain information is communicated to others, but that interests are shared as a result of deliberation. How does the dialogical process ensure this? There is a minimal sense in which interests can said to be shared. No matter what the outcome each will benefit from the gesture of acknowledgement in the open dialogue. Alienation for instance will have been averted. Also averted is the need for

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<sup>7</sup> Erben, R (1999).



excessive government regulation. It is hoped that salient interests are more likely to be tracked in a dialogical process by the constraints of discourse ethics, assuming that such constraints are influencing the discourse. This is how optimal moral outcomes can result from intersubjective engagement according to the social capital approach. Civility as a tool of social capital operates on an intersubjective or pragmatic moral basis, and such a pragmatic discourse ethic is embedded within a formal-proceduralist moral theory<sup>8</sup>.

### 1.5 Political Civility and Rationalism

All deliberators in a proceduralist order of the kind just covered need to acknowledge certain rationality principles. Each should have a certain attitudinal stance with relation to the importance of reason. They must, for instance, acknowledge the necessity of reason-giving; acknowledging that reasoned deliberation involves previewing the ideas of others and reviewing one's own ideas in response. All are expected also to acknowledge the need for resolution criteria: that at the end of the day a decision has to be reached between parties and that all parties agree to live by the decision unless there is an appeal. There needs to be this level of consensual agreement even if the result is not totally what one wanted. This prioritisation of reasons is essential for deliberative engagement. Habermas says that such rationality norms are valid if "All affected can accept the consequences and the side effects its general observance can be anticipated to have for the satisfaction of everyone's interests (and these consequences are preferred to those of known alternative possibilities)."<sup>9</sup> It is on this basis that disparate groups can be expected to reach a rationally binding consensus.

So civility here seems to imply a more extended concern for 'the other' and their interests as previously thought. It is civil to accept only outcomes where everyone's interests are satisfied, and where it is up to the parties involved to inform the others of what these interests are and what would constitute their adequate satisfaction in the context of the decision procedure. Once one party is informed that a salient interest of

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<sup>8</sup> See Rehg (1994) p. 27.

<sup>9</sup> Habermas (1990b) p. 65. See also Habermas (1991).

another needs protecting, then that party is expected to see the convincing power of the better argument and adjust their expectations about the outcome so as to accommodate that interest. It is, in other words, rationality that enables one party to acknowledge the salient interest of the other and their own moral obligations. This calls for a certain amount of prudential ability on behalf of deliberators. They all need to be 'self-understanding' and receptive to the salient needs of the other. This is the assumption on which this heuristic is working.

This intersubjective heuristic only works, however, if it is the 'competent speakers' who do the deliberating for each group<sup>10</sup>. Only competent speakers will understand the nature of the intersubjective process. For Habermas it is the process of universalising that provides an "intersubjective notion of moral insight". It does this by highlighting the practice of "universal perspective taking"<sup>11</sup>. Firstly, no party enters a discourse or resolution procedure with another unless they assume that this strategy will protect their salient interests. If this were not the case then the resolution procedure would not be their best option, and they would have good reason to look elsewhere<sup>12</sup>. So, *implicit* in mutual deliberation is this concern for the maintenance of salient interests. One may not identify with those interests themselves or see them as salient in one's own context, but one can at least see the analytic connection between the salient interests of others and the need to ensure that such interests are respected in the deliberative process. Deliberation has to be inclusive so that all those who are affected by a decision or outcome will have a right to present their views and articulate their interests, and one must be coerced or manipulated into acceptance. However, there is a delicate balancing of interests at work here. All the parties in a deliberative process will be likely to favour their own self-interest first and foremost, and the ideal for shared outcomes needs to be seen in this light<sup>13</sup>.

We have seen how civility in its political context means more than exemplifying politeness or courtesy to others. The role of rationality in this sphere of deliberation also

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<sup>10</sup> Ibid. p. 63.

<sup>11</sup> Rehg (1994) p. 57.

<sup>12</sup> Ibid. p. 58.

<sup>13</sup> Ibid. p. 76.

binds individuals to a civic identity. It requires, as Selznick points out, that individuals exemplify 'behaviour befitting a citizen'.<sup>14</sup> Citizens are expected to adapt their behaviour from the realities of their private domains to those of the public. They should, to a significant degree, look beyond their differences with others and seek to find common ground on which they can settle disputes with others and formulate, in a just manner, policies in the public interest. It is in the transition from the private to the public domain that individuals become citizens. Being a citizen, and not merely a private individual, brings with it an expectation that one will acquire civic traits and dispositions that will assist in achieving the outcomes that constitute the public interest. Identifying with a politically civil polity means also identifying with certain character traits of citizenship. To adopt beliefs on the basis of relevant reasons (that is, it is rational to seek accurate reasons for the sake of seeking advantage rather than disadvantage in decision making); to seek out and accept only evidence for belief-formation that is appropriate to the task being undertaken; and to suspend judgment until a sufficient amount of such evidence is accumulated.

When citizens engage with each other within the institutions of the state they are expected to do so with a respect tolerance, open-mindedness, and due diligence to rational procedures. But citizens are not necessarily expected to bring these traits to the processes they engage in, rather the process themselves ought to inculcate the rationality norms into their decision-making procedures. Such procedures are expected to filter out subjective forces such as the power of passions, prejudices and traditional beliefs in favour of making decisions that are arrived at after the performance of rational deliberation within processes that are fair and reasonable to all. Selznick writes, "A conspicuous feature of civility is the development of "critical" or "reflective" morality, based on reason and principle rather than passion and historicity."<sup>15</sup>

The rationality norms that constrain deliberative engagement are, it should be noted, minimally rational. They are the sorts of constraints that it is reasonable for all citizens to have reason to conform to. The reasonableness of conformity here is something that

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<sup>14</sup> See Selznick (1992), p. 390.

<sup>15</sup> Ibid. p.392.

is known empirically with reference to a liberal and pluralistic domain of political action. It is, in other words, a pragmatic notion of rationality norms; the sorts of rationality norms that are adopted due to their effectiveness in acquiring order and agreement in the society in which they are adopted<sup>16</sup>. They are the sorts of norms that, *de facto*, do appeal to citizens and groups in a pluralistic society and this fact, in itself, is a good reason for adopting them and using them to bring about and assist in the legitimisation of outcomes. It is not an interpretation of rationality that assumes that there *are* substantively ‘better reasons’ or outcomes that all rational agents ought to pursue. Rather, it is an interpretation of rationality that acquires its normative strength from the sorts of outcomes it can produce in a varied and complex social order where viewpoints conflict.

We can contrast this minimal sense of rationality with a more in-depth understanding of the role rationality may play in a political order. Such an in-depth version of rationality holds that there are substantively rational ends that we can expect all rational agents to agree on if they were to be all equally well informed<sup>17</sup>. Such a view of rationality is more in line with a Kantian sense of rational ends and contrasts clearly with the pragmatic sense of rationality just mentioned. The relationship between these two senses of rationality is an underlying concern of this thesis. Some hold that the only extent to which a polity ought to embrace rationality is in the pragmatic sense, or at least that the overwhelming emphasis should be on this rather than a substantive notion of rationality. What I will show in later chapters is that we ought to think of the role of rationality in politics in a more substantive sense, and that utilitarian thinking itself is deeply committed to this view more than some have given it credit for. I do not deny that the pragmatic sense of rationality has value in promoting civic order and enabling civil deliberation, but I hold that this is not a sufficient account of the components that ought to make up a normative polity. We, at the very least, I argue, should be concerned with a political ideal that only holds to the pragmatic sense of rationality as a sufficient one for such a polity.

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<sup>16</sup> See, for example, John Rawls (1993) for the prevalence of pragmatic norms of reasoning. p. 76; 162-3; 229

<sup>17</sup> See D’ Agostino and Gaus (ed) (1998) p. xiv.

### 1.6 Apolitical Civility: Civil Society.

There is another way in which we can understand or apply civility. It is a strong feature within the modern literature on political civility that there is such a thing as a 'civil society' that exists beyond the formal political structures in a society<sup>18</sup>. I want to explore here briefly the basis on which civil society is distinguished from, yet remains related to, political society. One way of making the distinction is to define the latter in terms of a deliberately constructed, impartial sovereign structure that seeks to serve outcomes across a disparate collection of individuals and groups, whereas the former, (non-political) civil society, has been understood as a natural and unplanned array of social relations and bonds that have evolved via historical forces<sup>19</sup>. Civil society is different from political society in the sense that it is an "area of human relations which was at least potentially coherent and harmonious but not willed or purposefully created."<sup>20</sup>

However, there is a problem with basing the distinction between the civil and the political on this point. The boundaries between the planned and unplanned may be blurred. There may be certain institutions that we normally associate with civil, and not political, society that are nevertheless, to a significant degree, chosen and constructed by those who constitute them. Not only are they deliberately formulated in this way by those who are members of such institutions, but they are deliberately enhanced by the actions of the state. An example of a non-political yet intended civil entity exists in the form of, for example, the family. The family is a social institution that has evolved in response to socio-economic and religious forces. It is an institution that has been, in part, intentionally created via a legal constitution seeking political order. While the family, and the value of parent/off-spring solidarity and support throughout life, does not derive from a formal agreement between nation and individuals, it is a well-supported unit in the social and political community. Societies have attributed status and approbation to this form of social planning as a way of promoting social cohesion

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<sup>18</sup> See Lively, J and Reeve, A in Fine, R (ed) (1997) for the idea that ancient notions of civility did not make such a clear distinction between society and the state.

<sup>19</sup> Ibid. p.63, 66.

<sup>20</sup> Ibid. p. 67.

within that community. Institutions such as families are chosen by those who construct them, and they may choose them as a way of strengthening the community around them, or by instantiating the plans of a divine force to constitute society in a particular way. On this basis we can challenge the idea that a civil society is an unplanned, natural phenomenon as set out above?

However, another justification for the distinction between civil and political society may run along the following lines. Civil society is distinct from political society in the sense that the former involves associations of 'life mission', whereas the latter involves only prudential associations. Life missions I take to be apolitical associations where individuals join with others, or find themselves culturally bonded, in such a way that their connections constitute their human identity. Their lives make sense and have personal meaning largely with relation to the apolitical bonding undertaken with others. Life missions can take the form of belonging to an ethnic group, religious denomination, recreational association, rotary clubs, toastmasters, neighbourhoods, family, environmental groups, etc. There will be varying reasons for how people come to have the life missions they do. Some will be more overtly chosen than others. Habermas refers, for example, the constitution of the 'lifeworld' as made up of embedded cultural identity and unshaken convictions that have evolved from cultural knowledge<sup>21</sup>. Individuals may not overtly express choices to take on such live missions in the same way as when, for example, some individuals may consciously and overtly choose to join a recreational group or rotary club. However, within these associations there is a strong requirement that there be some form of commitment and devotion to a notion of the good life. That people associate with others with an appreciation that belonging to that group is constitutive, either in part or in whole, of how they wish to lead their lives in the way they see fit<sup>22</sup>.

Civil societies, then, are identifiable on the basis of the solidarity they exemplify in relation to their life missions. Each apolitical, civil society will formulate its own rules of membership, to distinguish itself from others, and will stipulate and reinforce the

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<sup>21</sup> See Habermas, (1970)

<sup>22</sup> Associating with others on this basis is similar to Oakeshott's notion of enterprise association.

standards of behaviour that are consistent with maintaining that solidarity. Cahoon writes, “civil society is the name for the worldly autonomy of the social, the notion that social life is existentially self-sustaining and generates its own norms of validity, distinct from the directorship of any special, supra-social agency.”<sup>23</sup> There is some concern that the rules of solidarity themselves need to be of a certain normative nature in order for a society to be civil. Gellner, for instance, argues that apoliticalism and social autonomy are not sufficient conditions for a society to be civil. What is also required, Gellner holds, is that the associations made must be voluntary ones. He holds that civil bonds are only maintained when those united by those bonds have the freedom to escape them through voluntary action<sup>24</sup>. This is a contentious point. Other institutions, such as religious entities or social groupings may overtly coerce others to choose one way of life over another, and make disassociation difficult for its members. However, looking at possible tensions within Gellner’s view here is not my concern. I only wish to expose the notion of apolitical solidarity and its relations to the idea of civil society.

Group solidarity in apolitical, civil society produces a by-product that has important implications for the value placed on civil society itself. This is the role that apolitical civil solidarity plays in counter-balancing the power of the state. Civil societies are expected to act as restraints on state control. Civil societies are expected to respect the laws produced by the state, but apolitical associations are expected to engage with the state, as it undertakes its law making practices, in order to ensure that it does not encroach on the rights of individuals and groups to maintain their apolitical identity. Civil associations are expected to do this individually in the way that they interact with the state, and with other associations. But collectively, apolitical civil entities will, when acting in terms of protecting their own life missions, contribute to an anti-authoritarian spirit<sup>25</sup>.

These are some brief points about what makes a civil society distinct from a political one. But what makes a political society distinct from a civil one? A political society is

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<sup>23</sup> See Cahoon (2002) p. 225.

<sup>24</sup> See Gellner, E (1995) p. 15.

<sup>25</sup> See Shils p. 256-7 and Gellner, E (1995) p. 32

based on associations that do not hold an expectation of a commitment to a life mission. Instead, political society is based on an association between individuals and a common state that is motivated on the basis of prudential interests. The notion of political society assumes that there is no other end for each member of that society to pursue other than the end of just association<sup>26</sup>. Participants in a political society will be coerced by law to respect this as the ultimate end of political association. Such an association is prudential for all individuals and groups in a civil society to consent to on the basis of substantive disagreements about what the good life is to live, and the fact that such individuals and groups are geographically tied together and must share common resources. It is prudential for all, then, to agree on common procedures and the locus of a common authority to settle such disputes in a way that preserves the exercise of each individual's or group's own pursuit of the good life as they see fit. Whereas there was no common authority between individuals and groups in a civil society, there is such a thing in a political society. It is expected that there will be a higher-order solidarity over the issue of just procedures for conflict dispute and interest protection that is distinct from the type of solidarity expected by civil associations in their apolitical dealings.

I have indicated how civility is a term of common respect that applies in different ways and in various contexts. I want to close by saying something about how the concept of civility will be applied in this thesis. The common respect of civility is a behavioural trait and expectation that assists in creating group identity, cohesion and continuity. In this sense civil relations can unite both political and non-political groupings alike. But, by and large, they contribute to the bonds that enable effective and harmonious deliberation within a well-defined legal and political network. In the following chapters I will focus on civility as it has been adopted by the theories of liberalism and republicanism. Specifically, I will refer to the concept in the sense that it has been adopted by these theories to enable the cohesion of political action in pluralistic societies. Both theories stipulate that one of the central duties of the state is to maintain civil relations between itself and the citizenry. Such relations are a feature on which state legitimacy is based. The enhancement of civility is a main reason why citizens have a good reason to recognize and obey the power held by the state. In a more

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<sup>26</sup> See Oakeshott.(1975a) and (1975b).



detailed sense, civil relations assist in opening up deliberative procedures between that the state and the citizenry. By providing the avenues of civil engagement in this way, the theories hold, the outcomes produced by state action in this area are legitimised. While accepting this as a worthy feature of state legitimacy, this thesis will argue that more is need if we are to capture a sufficient account of the normative standards that the state should be subject to. We need, I will argue, to go beyond the mere provision of civil engagement between the different sectors in a pluralistic society. I will hold that in addition to the conditions of civil union that have been set out by these theories, we need to establish a duty on the part of the state to consider, enhance and protect the essential interests of its citizenry. This will be a further condition that the outcomes of legitimate state action ought to meet. The state needs to concern itself not only with maintaining a civil order; it needs to also concern itself with maintaining outcomes and states of affairs that treat people in accordance with more in-depth standards of human propriety or decency.

## SUMMARY

In this chapter I have set out a characterization of civility and shown the various applications that the notion can take. I hold that civility itself is a cluster concept: it applies differently in distinct contexts yet in each case there is still a resemblance in each application that ties it with a common understanding of civility in general. In other words, civility is used in various contexts but retains a common meaning without sharing an essence in each context. The resemblances that unite the different applications of civility are, I showed, based on the understanding of civility as a behavioural norm of propriety. It is a norm, in all contexts, that seeks social cohesion between disparate groups; placing each in a positive relation to the other; and reaffirming the identity of those with shared beliefs.

I noted that while civility can strengthen private relations, its main force lies at the public level between rational agents. I also noted that civility at this level operates effectively even if civil action is motivated by differing concerns on the part of its practitioners. I also highlighted the moral dimensions of civility. Here I looked at how civility satisfies the minimal conditions of justice and contributes to the formation of a moral dialogue in a pluralistic community.

I have also highlighted how the features of civility just summarized make it an effective norm in the political domain. Social cohesion and the facilitation of political dialogue between disparate entities are vital goals in a polity. What is more, I examined how political civility can produce outcomes that are crucial for the stability of the civic institutions within such a polity. Not all civil entities are overtly political however, and I covered how there is a sense of civil society that is articulated for the reason of providing a check on the concentration and exercise of state power. However, generally speaking, to create and maintain political stability across the board it is essential that civil relations are guided by, and performed with respect towards, norms of rationality. It is crucial that these norms prevail in the operations of a polity in order to solidify the bonds of civil union.

By characterizing these different aspects of civility I want to expose the variations in meaning that the concept has in political and non-political domains. The chapters that follow will deal, however, only with the concept of civility as it is understood in the sense of its political applications. I will use the term to emphasise the nature of the civil union between disparate political entities.

## 2. LIBERALISM AND POLITICAL CIVILITY

In the next two chapters I will expose the extent to which citizens have a minimal obligation to exemplify political civility to each other and the state. Specifically, I will see how this is done by two of the main political idioms in the contemporary literature: liberalism and republicanism. In this chapter I look at the obligations held by citizens and the state in the case of the former, and I expose the differing justifications that exist within liberalism for why individuals in a political context have reason to have a minimal amount of concern, or exemplify a certain amount of political civility, to others. In general, I hold that political civility is valued in varying ways by different liberals. Three of the main reasons for why liberals have valued civility are: 1. as a political relation that is morally bound. 2. as a political relation based on a contract or rational agreement, and 3. as a political relation based on prudence.

However, I add that liberalism has an extended notion of concern for others in the political realm by also endorsing the protection of rights. Beyond the obligation to protect civil rights, an obligation that is incorporated within the reason for why it is prudential to exemplify political civility to others, is an obligation to protect certain fundamental human rights; namely the rights to life, non-harm and welfare. A main concern for all liberals is that such human rights must be protected due to their effectiveness in maintaining the overall right that all individuals have to autonomy, or to freedom of choice. I close this chapter by reinforcing this link that most liberals have to valuing human rights on the grounds of respecting autonomy, and reflect on how this underlies a liberal understanding of the role played by political civility.

### 2.1 Moral Reasons for Political Civility: The Primacy of Individual Freedom.

I take liberalism as a theory about what sort of political society we ought to have. It holds that individuals have a fundamental right to freedom that can only be overridden if it results in causing harm to others. Outside of this harm constraint, liberals believe, individuals ought to be free from interference or coercion in the way they formulate

their beliefs, organize and implement their movements and associations, earn income and possess property, express themselves via speech, etc

This commitment by liberal theory is captured within Kant's theory of persons as ends. For Kant, what makes individuals ends in themselves is their capacity to exercise free will which is of unconditional value. A constitutive feature of a free will is having a rational will—having the capacity to perform the task of choosing according to the relevant or appropriate criteria. Civility involves, for Kant, individuals in a polity viewing and treating each other as ends, as well as the state maintaining formal procedures than respect persons as such. Political civility operates here on the understanding that each individual must live under her/his own moral law while at the same time assuming that “the freedom of the will of each can coexist together with the freedom of everyone in accordance with a universal law.”<sup>1</sup> In other words, it is the freedom of each to live according to his or her autonomous will that is at the core of Kant's moral and political thought.<sup>2</sup> One of the assumptions here is that individualism is a plausible ontological notion. Individuals are held to be the primary units of reality and the ultimate loci of value. “The capacity to propose an end to oneself is the characteristic of humanity (as distinguished from animality)....”<sup>3</sup>

For Kant, free will involves choosing according to one's moral duty or in accordance with the moral law. Our moral duties under the moral law, for Kant, involve a commitment to control or filter out the influence of inclination. Inclinations or desires are a threat to respecting persons as ends because they lay emphasis on private reason—the seeking of private gratification—instead of public reason. The latter is constrained by the test of universalisation. Here we are told that morality is only

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<sup>1</sup> See Kant's *Metaphysical Element of Justice* 35/231. See also Fleischacker (1992) p. 200 for the link between civil society and the protection of individual free will under the moral law.

<sup>2</sup> Is Kantian individualism a plausible ontological position if it is based on the assumption of free will? Isn't there sufficiently plausible evidence around us that individuals are constituted, and their choices determined, by social forces prior to and greater than the individual? Think, for example, how strange it is to say that I have freely chosen to speak English. I have never consciously made or willed such a choice after due deliberation about the world around me. I have found myself so constituted by historical forces beyond my identity as an individual.

Liberals may respond to this by saying that even though this may be the case, we still have a strong sense, phenomenally speaking, of ourselves as free and rational choosers. This phenomenal experience of being a free choosers is meaningful and at the forefront of human conscious in liberal societies, and thus must be respected on this basis. Civility under this understanding of free will may require a respect for this phenomenal belief in our own agency.

<sup>3</sup> Kant (1797).

achieved if the maxims we choose can be willed as a general rule by all rational agents. Here is an example of how this universalisation restraints protects individuals as ends in themselves. Firstly, we need to remind ourselves of Kant's existential argument that individuals are, as a matter of fact, ends in themselves due their possessing the capacity to exercise free will. It is therefore irrational for individuals to universalise a maxim that would deny the exercise of free will. For instance, treating others exclusively as a means to my ends would mean that the following maxim could be universalised 'We can treat others exclusively as a means to one's ends'. But if it is universalised, then all individuals would be permitted to act in accordance with this maxim. But if all were to do so then our treatment of others would constantly deny treating others as ends, and this would violate Kant's existential view that each is intrinsically an end in themselves. We cannot will a denial of the self as ends because this cannot be universalised. We can't, for example, rationally will ourselves or consent into perpetual slavery. This would involve holding that all could be slaves which would be to will a contradiction—that free agents could will themselves into servitude. No rational agent can universalise this as they would then be denying themselves.

The existential fact of individuals as ends in themselves, and the constraints of the universalisation test on rational agents, evinces from members of a moral community attitudes to others that are morally fundamental. Such attitudes are determined by the need to respect individuals as intrinsically valuable ends. The need for such attitudes to each other in the moral domain overlaps, for Kant, into the political domain. Civility, for Kant, involves the discipline of the inclinations/impulses under the framework of rationality. Civilisation does "much to overcome the tyrannical propensities of sense, and so prepare man for a sovereignty in which reason alone shall have its sway."<sup>4</sup> If private reason prevailed then such things as the insatiability of wants (eg. seeking food for vanity) would be equally legitimate to any other motivation in the moral world. This would place us under the influence of inclination which is contrary to the moral law.

What results from this emphasis on individuals as ends in themselves, and as beings whose rational self must prevail over the inclined self, are important implications for the

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<sup>4</sup> Kant (1987) p. 97.

status of individuals in the political domain. Namely, it implies a general metaphysic of the right as a framework for political decision making. This notion of the right must constrain any exercise of public or common reason. One condition of the exercise of the right is the attribution of consent. Seeking consent not only affirms respect for the individual—treating the individual as a rational end in her/himself—but it also legitimises the outcomes obtained by the free associations of individuals<sup>5</sup>.

Evidence of Kant's views on these points are found in the following areas. Kant wrote that a civil society is one that is politically structured so as to protect the exercise of the will by individuals, and that a vital part of exercising one's choices in the world is to be free to enjoy the benefits of private property. Kant wrote, "The state of nature is not opposed and contrasted to the state of society, but to the civil society, for within a state of nature there can indeed be a society, but there can be no civil society (that guarantees property through public law)."<sup>6</sup> To structure society in a civil way, rather than in merely a social way, the members of that society need to be bound by what Kant calls "a universal rule of the external juridical relationship."<sup>7</sup> Here there is an acknowledgment by all members of the polity that they are "reciprocally bound to everyone else to [exercise] a similar and equal restraint with respect to what is theirs."<sup>8</sup> One seeks to have one's own privately willed life and property free from the incursions of others, and, once this is universalised as a rule, one ought to see that one has an obligation to treat others in the same way. Ownership of property, for example, only makes sense in relation to the way in which possession by me is secured by the recognition by others that I own that property and enjoy the right to use it as I will. Kant wrote, "...a thing can be externally yours or mine only in a civil society."<sup>9</sup>

Kant's linking of civility here to universal juridical authority creates, however, only a society where political authority is established to facilitate the universal laws of co-existence. It should be noted that this does not imply a relationship between citizen and

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<sup>5</sup> "For a citizen must always be regarded as a co-legislative member of the state (i.e. not just as a means, but also as an end in himself), and he must therefore give his free consent" Kant (1797b) in Reiss (1970), pp.166-7.

<sup>6</sup> Kant (1797b), p. 48.

<sup>7</sup> Ibid. p. 64.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid. p. 65. See also p. 76 for the same point.

state that is dialogue-based. Instead it implies a relationship in which citizens consent to authorities that are obligated to protect the private spheres of individuals. Legislative authority, in other words, can only legitimately operate on the basis that it produces and maintains outcomes that are common to all. Kant wrote, "...only the united and consented Will of all—that is, a general and united Will of the people by which each decides the same for all and all decide the same for each—can legislate." The state itself cannot operate beyond this maxim. The state only engages with citizens, and vice versa, on the basis of maintaining the conditions that are conducive to individual autonomy. "The ruler of the state...is that...person who has the executive authority. He is the agent of the state who appoints magistrates and prescribes those rules for the people by means of which each of them can, in conformity with the law, acquire things or preserve his property".<sup>10</sup> In this sense, the relationship between individuals and the state is a passive one<sup>11</sup>. However, citizens do have a way of participating in a process of deliberation with the state via the jury system, and they can elect representatives<sup>12</sup>. Yet, this is not deliberation directly between the individual and the state where the two can come together to formulate policies.

Another way of expressing this point that the state exists only to protect the autonomy of citizens, and not to specify or enforce substantive outcomes, is reflected in Kant's notion of reason. For Kant, reason has no dictatorial power. "reason has no dictatorial authority; its verdict is always the agreement of free citizens, of whom each one must be permitted to express, without let or hindrance, his objections."<sup>13</sup> The rational science of principled thinking must prevail if we are to allow the 'experiential' to influence outcomes<sup>14</sup>. Ends are subjective for Kant but rational principles need to be met so as to legitimise these ends. There are, in particular, no objective or rational ends for the state to ensure. Politics is not a matter of instantiating transcendental truths on sorts of lives people ought to lead; politics is instead guided by a plurality of non-coordinated thinkers."<sup>15</sup> Reason can only be used in self-defence—it has no force of its own that

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<sup>10</sup> Ibid. p. 82.

<sup>11</sup> Ibid. p. 83.

<sup>12</sup> Ibid. pp.82-3.

<sup>13</sup> Guyer, P and Wood, A (ed) (1998).

<sup>14</sup> See O'Neill (1989) p. 68 for the idea in Kant that thought and action can only be constrained by reason—thought and action cannot be fully determined by principles of reason.

<sup>15</sup> O'Neill (1989) p. 64.

leads us to adopt one way of life over another. For instance, spotting the failures in others reasoning is not an instance of reason forcing us to a conclusion. A person may hold views A and B where A and B are contradictory. A rational criticism of this is to point out the contradictory relation between A and B. Reason will critique the use of contradictory reasoning not because it thinks of this as an end that all must conform to, but because this a truth of reasoning to which all rational agents are subject.

Kant shows that he only affirms a rational telos and denies a natural telos when we wrote, "It is....quite certain that we can never get a sufficient knowledge of organized beings and their inner possibility, much less and explanation of them, by looking merely to mechanical principles of nature. Indeed, so certain it is, that we may confidently assert that it is absurd for me even to entertain any thought of so doing....Such insight we must absolutely deny to mankind."<sup>16</sup> For Kant it is "an open question....how much the mechanism of nature contributes as means to each final design in nature."<sup>17</sup> The idea that there are no natural ends for people<sup>18</sup> is also seen in Kant's view that if freedom were nothing but a natural state politics would be "the art of utilizing nature (the facts of human psychology) for the government of men." This political reliance on nature would then be "the whole of practical wisdom" and the 'concept of right' would be "only an empty idea," not even a "limiting condition" restricting what politics can do<sup>19</sup>. Persons if seen merely as natural beings will become tools of adaptation, and will not, in themselves, have a need for their rational capacity to be protected. For Kant, human life has to be regulated according to duty, and not according to nature.

The point to take from this is that natural well-being cannot be articulated as an objective body of knowledge. For example, Kaufman argues, take the maxim "assist the less fortunate." In what sense can Kantian reasoning come to justify such a conclusion. It does not do it by seeing the intrinsic or natural wrong in the suffering of the less fortunate, but rather asks "Can rational agents negate this maxim?". The answer to this is no. Rational and autonomous agents cannot universalise the maxim that negates the

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<sup>16</sup> Kant (1987) p. 54.

<sup>17</sup> Ibid. p. 73.

<sup>18</sup> See Riley (1983) p. 72.

<sup>19</sup> Reiss (1970) p. 117



view that less fortunate should be assisted<sup>20</sup>. Rational and autonomous individuals cannot will that they could be denied assistance if they were less fortunate. It's also interesting to note the sense in which giving aid to the poor is justified by Kant. There is some disagreement as to the precise nature of Kant's commitment here<sup>21</sup>, but there is strong evidence presented for the view that Kant believed we should aid the poor because if we did not do so social stability would be threatened, and the ambience needed to exercise rational choice would not be maintained<sup>22</sup>.

So, welfare matters for Kant not because it avoids misery or other natural states detrimental to the natural well-being of persons, but because it ensures that the conditions of rational deliberation are maintained. We all, as rational agents, have good reason to acknowledge the need for 'reaching agreement' rather than living in a world of disorientation. A world of disorientation is not what rational deliberators require in order to function as rational beings. This is not a natural fact about persons in the sense of identifying a natural telos of human existence, but rather it is a robustly contingent fact that we are rational deliberators. Hence, we are led to value organization and agreement over disorientation. Organised outcomes for persons are not forms of a 'transcendental reality'; they are only practical realities --realities we take from robust facts about ourselves.

Even though Kant's metaphysic of the right has been criticized for being too 'rigoristic'<sup>23</sup> at the cost of guiding us to substantive outcomes, it is worth noting that Kant does hold out hope or faith that a polity of rational agents constrained by the metaphysic of the right will reach outcomes of 'perpetual peace'. If each obligatory moral maxim of the right is necessarily connected to an obligatory end, namely an end that respects the autonomy of all, then there is faith that individuals can only but consent to outcomes that are not detrimental to them themselves nor to the autonomy of others<sup>24</sup>. Peace is an end inextricably linked with the moral law that founds 'the right'.

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<sup>20</sup> See Kant (2000) p. 423.

<sup>21</sup> See Kaufman (1999) pp. 30-33.. See here also for the view that there exists for Kant a duty of beneficence to individuals as ends.

<sup>22</sup> See Aune, B (1979) p.157 and Murphy (1970).

<sup>23</sup> See Williams, B (1985) and Yovel (1980) 141ff.

<sup>24</sup> See Kant (1797a) p.385 and Kant (2000) p. 433.

‘Perpetual peace and the kind of constitution that seems most conducive to it constitute the ‘highest political good,’ the entire final end of the Doctrine of Right within the limits of reason alone” “What is incumbent upon us as a duty is...to act in conformity with the Idea of (perpetual peace)<sup>25</sup> Peace, it is hoped, will be a contingently reached goal of human deliberation<sup>26</sup>.

Civility, then, under the notion of Kantian liberalism, involves encouraging political behaviour between persons that does not undermined their status as distinctly rational beings. What is more, Kant’s notion of the nature of civil union is agnostic about outcomes. So long as individuals retain their status as ends in themselves—as exercisers of rational will—then civility is satisfied. For Kant, universalism and civility are intricately linked. Each ought to live according to their own beliefs commensurate with a respect for the rational welfare of others. The free will, in other words, of each must co-exist in accordance with universal law. Incivility is when we treat others exclusively as means to our goals. Political incivility, it is plausible to assume from Kant, occurs when we let inclination triumph over the rational right. Deceiving others for the sake of personal wealth involves the irrational view that ‘wealth is more important than individuals’. No one can ‘rationally’ universalise this because it involves ‘in principle’ the elimination of the self.

## 2.2 Kantian Civility and its Influence on Nozick and Rawls.

Kant’s notion of human propriety in the moral domain, and its overlapping influence on the political domain in the form of political civility, has had two main influences on contemporary liberal thinking, namely on the political writings of Nozick and Rawls<sup>27</sup>. The two are different so it is interesting to see how they diverge even though they derive themselves from the same deontic source.

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<sup>25</sup> Kant (1797a) pp. 354-5.

<sup>26</sup> See Kant (1784) where he talks about evolutionary pressures.

<sup>27</sup> For the Kantian connection with Nozick and Rawls see Nozick (1974) pp. 32, 228 and Rawls (1971) pp. 11; 179-183.

Nozick is a liberal who holds that individuals are the primary source of value, are ends in themselves, due to their status as self-owners<sup>28</sup>. The fact of self-ownership implies an entitlement to a certain way in which individuals deserve to be treated in the political domain by other individuals and by the state. For Nozick, we own ourselves in the sense of possessing an awareness of self-guidance. We are aware of ourselves, that is, as individuals that freely choose and shape our own identity. Nozick's liberalism in this sense incorporates the phenomenological expression of freedom as a justification for respecting persons. I will in this section assume, as I did with Kant, that there is a link between the moral view of individualism held by the author and the implications this has for the degree to which we are expected to respect others in the political domain.

Coupled with this is a strong sense of our own right to bodily integrity. The 'eye lottery' brings out strong intuitions about the ownership of the self. Imagine, Nozick asks us, that a lottery is held where all those with two good eyes are placed into a draw whereby those selected would be forced to give up one of their good eyes so as to redistribute among those who are blind. Overall benefit would come from such a redistribution; we would have more people with sight than without. However, there is a very strong sense in which we say that such a redistribution is not justified. Those with two good eyes own their own bodies, and to force them to part with one good eye, even if it is done to assist those in my most need of sight, violates their fundamental right to self-ownership of their body.

If we are self-owners, Nozick goes on, we are entitled to the fruits of our own unique talents. To divide up the fruits of one's own talents in the name of redistributive justice would be a violation of an individual's selfhood. For example, libertarians criticize the state provision for welfare via taxation as a violation of individualism—it is treating individuals as instruments to the realization of goals that were not freely chosen by those individuals. Libertarians, such as Nozick, hold that the state must respect the rights of citizens to choose for themselves a life they deem to be worthy, and to associate freely with others if they should choose to do so.

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<sup>28</sup> See Nozick (1974) p. 48.

Although Nozick does not directly address the issue of political civility, we can infer with good reason that individuals are civil to one another when they respect each other as self-owners. Likewise, the state is civil to the citizenry when it respects this right. The only function of the libertarian state is to ensure the self-preservation of individuals and to protect their property rights; to protect all against “violence, theft, fraud, and to the enforcement of contracts.”<sup>29</sup> Taxation, for example, violates selfhood if it is used to fund public services beyond the minimal ones’ of protecting persons and their rights.

This means that there is a very limited idea of dialogical engagement between individuals and the state under Nozick’s account of the relationship between citizens and the state. The extent to which the state and individuals enter dialogue is to request assistance where rights are violated. We might expect a state to extend dialogical links to individuals to include what Nozick calls “Having a Say Over What Affects You” rather than merely having a say over what violates your fundamental rights<sup>30</sup>. For example, the state may plan to build a maximum security prison in your neighbourhood. Such a move may not violate your right to self-ownership or property rights ( as the state’s proposed action may be taken by using land that it owns and in the name of protecting the citizens’ rights to biological integrity) but there is a sense in which one may wish to raise concerns with the state over such a move. While Nozick says we may have a say over what affects us, he is not heavily committed to a dialogical relationship between the individual and the state.

For Rawls, I assume that political civility, the nature of the respect we owe others in the political domain, comes from a blend of Kantian facts about the rational nature of persons, and a social fact, namely that it is a permanent feature of society that there is a ‘diversity of reasonable comprehensive religious, philosophical, and moral doctrines’<sup>31</sup>. These are embedded features of a liberal democracy for Rawls, and not just “historical conditions that may soon pass away.”<sup>32</sup>

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<sup>29</sup> Ibid p. 26.

<sup>30</sup> Ibid. pp.268-71.

<sup>31</sup> Rawls (1999) p. 14.

<sup>32</sup> Ibid.

Once the citizens of a liberal democracy who possess these deep and fundamental differences realize this fact, they ought to see, as rational agents, that they all have good reason to adopt a form of public reason. These are common reasons that can be exchanged between the disparate parties in a liberal democracy, reasons that specify the guidelines for public inquiry. For example, disparate groups in a liberal democracy have good reasons to conform to norms that stipulate that public processes must be open to all or inclusive, reasonable, embrace all viewpoints as worthy of consideration, and contain public officials who are held accountable in holding up these values etc. They must also specify some of the particularities of the outcomes of public deliberation such as that all outcomes are consistent with the liberal principles of continued equal political liberty for all, equal opportunity to exercise one's beliefs, that all parties to deliberation are willing to accommodate outcomes that do not threaten their core beliefs, etc.

The derivation of political civility from this social fact of diversity explains also the motivation to take this principled stand towards others, such a motivation being, for Rawls, that of reciprocity. Individuals located in a pluralistic society have good reason, no matter what their fundamental beliefs, to live in a well-ordered society. They have good reason to treat others civilly if they know that in return they will be treated civilly. This assurance is essential. There is no point in assenting to a tax increase to improve public facilities if I am the only one who will be applying it. I require the assurance that all will pay more to make the arrangement feasible. The same kind of assurance is required with civility.

But this raises for Rawls the paradox of public reason<sup>33</sup>. Why should the citizens who value their own fundamental beliefs honour the limits of public reason if the latter erodes or conflicts with the former? For example, an ethnic group within society may not grant women speaking or voting rights in their own deliberative forums, yet as members of a liberal forum they are required to permit such rights to their female members at the level of public deliberation. Can some citizens in a pluralistic society legitimately believe that liberal pluralism and the tolerance associated with public

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<sup>33</sup> See Brown (2003) for this term and Rawls (1993) p. 36 for the facts of reasonable pluralism that underlie the paradox.

reason is a transitory stage, and hope that their fundamental beliefs will finally persuade others to conform to their fundamental beliefs and dismiss liberal values? Rawls says they should not. He argues that it is in the nature of citizenship that it is founded on the facts of persistent and fixed disagreements about fundamental values.

Eric Brown argues that the linkage between fundamentally opposed worldviews and citizenship is not an analytic one, as Rawls implies. Rather citizenship can be based on shared cultural expression rather than shared disagreement about fundamental beliefs. Take the case of the citizenship of an extremist Muslim state. Being a citizen in this sense does not mean being a citizen in liberal sense. Being a citizen of an extremist Muslim state will be an expression of one's fundamental identity and constitutive of one's divine purpose and cultural identity. The framework of citizenship will still apply—the boundaries of membership, the duties to state and others, etc. However, the content of the laws will be formulated in line with Muslim principles and conformity to such a life will be enforced by theocratic force. Brown argues that Rawls cannot derive the (liberalist) duty of civility from citizenship because the latter is a contested notion. The derivation does not occur if citizenship is understood in sense other than the one that assumes liberalism itself.

What are the implications of this criticism against the link that Rawls makes between the purported social facts of plurality and citizenship? Must he find another basis on which to justify the reasons for civil union in place of those to do with what he takes to be facts about inherent social diversity? Rawls has tempered his views on the nature of social diversity by pointing out that it may merely be a robust contingency in liberal societies, and that his theory of justice should only be assessed in the light of this context. Could he turn instead to his point concerning the respect for person, thus transforming the justification of civility from the starting point of a purported fact about pluralistic society, and returning it to a Kantian sense of facts about persons? We might say that Rawls' notion of civility is a contractarian one that is based on an inherent respect for the rational qualities of persons. We can see this in the way that Rawls entrusts the principle of impartial rational deliberation as a metaphysic of right, much in the way of Kant, to constitute just procedure and influence outcomes. Here it is assumed

that the rational self will seek self-preservation. Under the veil of ignorance, for instance, the assumption is that it is irrational not to look after oneself and one's interests. Once this is universalised then we could have the basis for political civility that avoids reference to social pluralism or diversity.

## 2.3 Prudential Reasons for Political Civility: Civility by Contract

### 2.3.1 Hobbes and Political Civility

Before looking at how we could understand a Hobbesian interpretation of political civility, I want to address the issue of the sense in which we can categorise Hobbes as a liberal. Some doubt might be thrown on this. We might conceive of Hobbes as addressing issues of authority rather than individual freedom<sup>34</sup>. But Hobbes can be said to be a liberal in the sense of not equating freedom with authority<sup>35</sup>. Hobbes is clear that liberty begins where the law (or authority) ends, and he articulates this liberty as a material state of being. "By Liberty, is understood....the absence of externall Impediments: which Impediments, may oft take away part of a mans power to do what he would; but cannot hinder him from using the power left him, according to his judgment, and reason shall dictate to him." <sup>36</sup>

We can, I argue, conceive from Hobbes' writings an understanding of political civility that is derived not as a norm that combats our fear of the concentration of authority, as we will see with the case of Adam Smith, but instead as a norm that combats our fear of the incursions of other individuals. The motivation to civil union here is one based on the avoidance of fear. Hobbes believed that it is a fact that we are all, in the state of nature, a threat to one another. "And therefore if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies, and in the way to their End...endeavor to destroy, or subdue one another."<sup>37</sup>We are a threat to one another

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<sup>34</sup> See Raphael (1984) p. 27.

<sup>35</sup> Ibid.

<sup>36</sup> Hobbes (1968) Part I. Chapter. XIV.

<sup>37</sup> Tester (1992) p. 55.

because we are material beings with selfish desires. It is a natural fact, according to Hobbes, that men desire what they want—which “cesaieth only in death”. Underlying this relationship between individuals is the following assumption about human worth. “The value, or Worth of a man, is as of all other things, his Price; that is to say, so much as would be given for the use of his Power: and therefore is not absolute; but a thing dependent on the need and judgment of another.”<sup>38</sup>

Political or civil union for Hobbes is inextricably linked with agreement or consent. Oakeshott writes, “”The word ‘civil’ in Hobbes, means artifice springing from more than one will. Civil history....is the register of events that have sprung from the voluntary actions of man in commonwealths. Civil authority is authority arising out of an agreement of wills...”<sup>39</sup> Civility, then, is a human artifice that results from the coordination problems deriving from our essentially selfish natures for Hobbes. Such natural realities, for Hobbes, create the need for the art of civility<sup>40</sup>. There is no propriety in our nature; propriety is a construct that comes about through the making of covenants. There is no justice in nature—“every man has a right to everything”. Justice only comes about by covenant<sup>41</sup>.

Hobbes endorses norms of civil compliance on the grounds that this will enable all to avoid a state of war—the basis of the contract that individuals have entered into with the state and their fellow citizens<sup>42</sup>. In addition to this, the seeking of civic peace, for Hobbes, is something that comes naturally to individuals. Hobbes writes, “These are the Laws of Nature, dictating Peace, for a means of the conservation of men in multitudes; and which onely concern the doctrine of Civill society.”<sup>43</sup> For Hobbes, the concern is for the protection of persons qua their identity as *naturally* self-preserving agents. We by nature seek self-preservation: “...no man can transferre, or lay down his Right to save himself from Death, Wounds”<sup>44</sup>. The commonwealth is the political mechanism that ensures self-preservation and freedom from the state of war of all against all. The

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<sup>38</sup> Hobbes (1968) Part 1 Chap. 10.

<sup>39</sup> Oakeshott (1975) p. 28.

<sup>40</sup> Ibid.

<sup>41</sup> Hobbes (1968) Part 1 Chapter. 15

<sup>42</sup> *ibid.* Chapter 15, p. 205. See also Chapter 15 pp.201-2.

<sup>43</sup> *Ibid* Chapter 15, p. 214. See also Chapter 30 p. 377.

<sup>44</sup> *Ibid.* Part I chap. 14.



behavioural norms that produce orderliness and respect for others in the political domain are meant to “...craft the means of civil peace and so forestall within a citizenry the emergence of pernicious dispositions that would threaten to dissolve the commonwealth.”<sup>45</sup>

However, it should be noted that Hobbes’s commonwealth is not deliberative. The sovereign, empowered by covenant, deems what is necessary for peace and self-preservation<sup>46</sup>. A law is ‘the expression of the Will of a Sovereign’ and is not an eclectic mix of legal judgment, public views, ethical consideration, etc. The sovereign has *legibus solutus* or unconditional authority to make or to repeal law<sup>47</sup>. This unconditional authority comes from the sovereign’s duty to protect citizens from the state of nature. It means that the sovereign can ‘make, repeal, interpret, administer and enforce rules...negotiate, make war, conclude peace, levy taxes...of such dimensions as he shall think fit.’<sup>48</sup> The demands of citizenship for Hobbes are minimal and go only so far as to maintain overall stability and order. As Dietz writes, “...the Hobbesian citizen exhibits precious few of the attributes that equip him for a life of participatory self-government, the performance of public service, and the cultivation of political liberty.”<sup>49</sup>

### 2.3.2 Locke and Political Civility.

Locke is specific about the proper ends of government and how the state exemplifies civility to its citizens. Civil government for Locke, as with Hobbes, comes about due to the agreement by individuals to leave the state of nature, “ Wherever....any number of men so unite into one society as to quit every one his executive power of the law of Nature, and to resign it to the public, there and there only is a political or civil society.”

<sup>50</sup> Civil society is constituted by having one unifying identity of ‘commonwealth’ upon which all members of society recognize and turn to a common authority to settle their

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<sup>45</sup> Dietz (1990) p.102.

<sup>46</sup> Hobbes (1968) See Part II chap. 18.

<sup>47</sup> See Oakeshott (1975) p. 43.

<sup>48</sup> Ibid.

<sup>49</sup> Dietz (1990) p.113.

<sup>50</sup> See “True End of Government” in Locke (1956)Chap 7. 89.

disputes. “ For the end of civil society being to avoid and remedy those inconveniences of the state of Nature which necessarily follow from every man’s being judge in his own case, by setting up a known authority to which every one of that society may appeal upon any injury received, or controversy that may arise, and which every one of the society ought to obey”<sup>51</sup>. Individuals would only give up their natural right to protect their own rights to life and liberty if this power were transferred to an authority that agreed to protect such rights for all. An absolute monarchy, for Locke, that takes on no such agreement and rules on the basis of unchecked and arbitrary power is “inconsistent with civil society, and so can be no form of civil government for all”<sup>52</sup> An absolute monarchy, in other words, would involve subjecting oneself to the discretionary judgements of others, which was the evil of the state of Nature from which individuals sought escape<sup>53</sup>.

Another motivation to civil union, for Locke, is the natural need of individuals to protect their property. Locke wrote, “ The great and chief end, therefore, of men uniting into commonwealths, and putting themselves under government, is the preservation of their property.”<sup>54</sup> The state could only take property from individuals with the consent of those individuals. However, the state was granted the power to regulate, without dispossessing, the property of individuals for the public good<sup>55</sup>. Property ownership was central to identity of individuals. The labour and resourcefulness applied to property and the productivity that resulted from it were seen by Locke as vital elements of individual expression.

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<sup>51</sup> *ibid.* 90.

<sup>52</sup> See “On Civil Government” in Locke (1956) p. 160.

<sup>53</sup> It’s worth noting with Locke the Christian dimension to his notion of constructing a civic order—the influence of divinity in the overall explanation for why we should take a principled stance to each other and to the common authority that reigns over us. Locke offers us one of the best examples of how the liberal tradition has acknowledged the threat that arbitrary interference poses for an individual’s freedom, and how civility requires the protection of the private domain of individuals. For Locke, the capacity that others have in the state of nature for arbitrary interference threatens the natural law; where the natural law is taken to mean, for Locke, the moral law that is coterminous with being God’s creatures and servants. Individuals have an interest as God’s creatures, and these interests are violated if the individual is subject to the uninhibited influences of others to ‘judge and punish’ as they see fit. In order to protect our obligations to this divine source, Locke held, we need to consent to give up our capacity to interfere with others arbitrarily to an external authority. We need, to create a form of political authority that will defend the natural, and divinely linked, rights that are essential to the workings of the moral law. For judgement day, it is essential that the decisions made in your life are the result of one’s free will, and not the result of the influences of others. Authentic decision-making is essential for divine reasons, and a civil society needs to respect this aspect of persons.

<sup>54</sup> Locke (1956) Chapter IX. P. 180. nt. 124. See also Chapter XI p.

<sup>55</sup> *ibid.* Chapter XI p. 187-8.

However, unlike Hobbes there is a deliberative component to Locke's account of the political civility shown between the individual and the state. By including the right of appeal to include matters over any 'controversy that may arise' Locke includes a greater level of engagement between citizenry and state than Hobbes. Grant writes that, for Locke, "governments are established to provide an impartial common judge" to which individuals can appeal when they feel that their rights are violated. It is in the state of nature, Grant says of Locke's thinking, that each is the judge for one's own affairs. It is the performance of this kind of action in the state of nature that threatens others because such "judgments are not likely to be reasonable because men will be partial to themselves....To remedy the inconveniences that follow from this state, government must somehow be capable of greater rationality in resolving men's disputes than men exercise on their own behalf. And this capability depends decisively on the disinterestedness and impartiality of government"<sup>56</sup> and "Rational conduct requires unprejudiced consideration of all the evidence and arguments involved in a question."<sup>57</sup> Such a concern for the impartial and reasoned judgments of the state in relation to their civil engagement with the citizenry is reflected in Locke's conception of the importance of rational understanding<sup>58</sup>. It will only be reasonable government that will maintain a civic order that avoids the prejudices and subjective judgments of the state of nature.

## 2.4 Political Civility by Social Force.

### 2.4.1 Constant and the Political Civility of the Moderns.

Constant made the distinction between the liberty of ancients and the liberty of the moderns. The former gave individuals the task of "active and continuous participation in the exercise of collective power."<sup>59</sup> Whereas the latter sought "the peaceful

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<sup>56</sup> Grant (1987) p. 181.

<sup>57</sup> Ibid. p. 184.

<sup>58</sup> See Garforth (1966) p. 12.

<sup>59</sup> Constant (1819) p. 547.

enjoyment of individual or private independence.”<sup>60</sup> Modern liberty, for Constant, required a minimal amount of laws that sought only to protect the private sphere of individuals<sup>61</sup>. It did not require individuals to partake in the day-to-day running of public business, as with the politics conducted within the Greek polis. While Constant did not use the terminology of ‘civility’ to describe the nature of the political relations between individuals and the state, I will adopt the same strategy as I did with Nozick and present an overview of the associative constraints that Constant stipulated. Such constraints, I argue, are worthy of comparison with our modern notions of political civility.

For our purposes it is important to see the basis on which Constant presents this distinction. His mission is not to accord the private/public distinction on any meta physical or ahistorical account of individual rights as we saw with Kant, Nozick and Rawls<sup>62</sup>. Instead, Constant’s justification for the liberal divide between private and public spheres is based on a consideration of, and reaction to, the prevailing social forces. Constant wrote in the revolutionary period of eighteenth century France. The extremes of democratic patriotism were in stark contrast to the established traditions of monarchical power. Constant feared the extremes of both. Democratic patriotism brought with it the fear of uninhibited majoritarianism, and monarchical power the concentration of power into the hands of the unaccountable. What was needed, from Constant’s perspective, was a civic force that existed between these extremes to temper them.

This intermediary force, was for Constant, a society of individuals who identified themselves as entities distinct from the state and from a collective, social whole. They were concerned primarily for their own welfare rather than devoting themselves to national identity or monarchical subservience. Holmes writes that De Stael wrote in the spirit of Constant by stating that public sentiment is based on an admiration of peace and the desire to obtain and preserve wealth. A society that wants such outcomes will focus more on the administrative issues concerning the state rather essentially political

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<sup>60</sup> Ibid.

<sup>61</sup> See Hoffman (1980) p. 432.

<sup>62</sup> See Holmes and Siedentap (1979) p. 32.

ones<sup>63</sup>. Individuals, in other words, are primarily interested in and should be left to pursue their own 'occupations, undertakings and fantasies.'<sup>64</sup>

Under Constant's socially sensitive account of political thought, we are expected to view "the other" as worthy of respect as an individual because such an outlook will avoid the consequences of oppression by concentrated powers. Also, the state needs to act civilly towards individuals respecting the individual's contingent rights to enjoy a private domain of existence. This ideal of modern civility towards others was constructed by Constant for pragmatic reasons. There is evidence with Constant of the demographic influences on political thought, and he placed more emphasis on the influences of these forces on political ideals. French society, circa 1798, was a society that had developed into one of mass and diverse culture, with a growing influence of commercial activity and openness to trade. Modern liberty and civility to others, for Constant, was more suited to the realities of the time; rather than the ideals of ancient liberty which were confined to societies that were "sparsely populated, territorially compact, religiously homogenous, and slaveholding warrior republics."<sup>65</sup>

A middling social entity between the state and collective identity, concerned for the protection of private welfare, serves, for Constant, as a civic force. If the attention of individuals is deflected away from issues of national concern and orientated more toward the private, then the tendency for collective totalitarianism is reduced. But this does not mean that individuals ought to have an exclusive concern for their private lives. Constant expects individuals to vote for political representatives and to present, when required, "remonstrations, petitions, and demands which authorities are more or less obliged to take into account."<sup>66</sup> Through the form of the state, citizens are able to share information and decide what is the best course of action for the public good<sup>67</sup>.

However, in engaging with the state in this way, citizens are not to identify with a communal identity; they are to retain their individualism in the light of this

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<sup>63</sup> See Holmes (1984) p. 35.

<sup>64</sup> See Constant (1988). p. 104.

<sup>65</sup> See Constant (1819) p. 421-424.

<sup>66</sup> Ibid. 2: 541.

<sup>67</sup> See Holmes (1984) pp. 141-43.

communication at a state level. The source of individual enlightenment does not lie with political association with the state, because the state is inherently a threat. The assumption is, as Kelly writes, “....for every power-holder, no matter how honourable, will find reason to transgress the rights of ordinary persons.”<sup>68</sup> Enlightenment instead lies in the exercise of free choice by individuals. Constant wrote, “Man is not simply in need of relaxation, application, domestic happiness and private virtue. Nature has also given him faculties which if not nobler, are at least more brilliant. More than any others, these faculties are threatened by arbitrary government.”<sup>69</sup> The state does not exist as an institution that persuades individuals about what sort of life to live, rather it is considered merely as a “protective agency, committed to protecting the orderly and just conduct of private affairs and to the common defence, prevented from impeding the normal advance of civilization by having its powers limited and checked.”<sup>70</sup> Political life is essential for finding solution to common problems among free individuals, but political life does not constitute the identity of individuals. Individuals have value and exist independently from their political functions.

#### 2.4.2 Adam Smith and Political Civility.

There is another liberal ‘interpretation’ of civil union I wish to present that is also understood as a force against absolutism. It is an account of political association, like Constant’s, that gives priority to privatism over public power. It is a notion of civil union in retreat in the sense that it is founded on a stance of ignorance towards “the other”, rather than one that holds that human identity is formulated by the edifying processes of political interaction. But this is not an ignorance that is justified because it is entrusted to rational persons. Rather, the allure of ignorance towards the other is based on the idea that it prevents the concentration of power into an absolutist form. Specifically, economic relations between individuals that produce this outcome are, for Adam Smith, constitutive of the principled stance we ought to take to each other.

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<sup>68</sup> Kelly (1992) p. 42.

<sup>69</sup> Constant (1814) p. 206.

<sup>70</sup> See Kelly (1992) p. 53. See Also Constant (1814) p. 231.

For Smith we should have no direct concern for ‘the other’. Our social and economic union is based on the self rather than on “the other”. But there is however an indirect concern with “the other”. Concerns for ‘the other’ in Smith’s libertarian order is only held in the minimal sense that the outcomes determined by the operations of the invisible hand will be optimal for all. Smith wrote, “Every individual necessarily labours to render the annual revenue of the society as great as he can. He generally neither intends to promote the public interest, nor knows how much he is promoting it.....He intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for society that it was no part of his intention. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good.”<sup>71</sup>

Civil union is to be constructed so as to allow the fruits of unfettered social and economic union to appear. The biggest threat for Smith is the incursion on this process of absolute state power. Political civility as a way of combating absolute power is brought out by Smith with his ideas about the institution of private property and the exercise of one’s talents as one sees fit. The holding of private property and the exercise of talents out of a concern for self-interest only provides greater security for all than a society which holds property in common and calls upon individuals to act for the sake of the public good. This is so because such provisions unintentionally create edifying conditions of inequality. The assumption made here by Smith is that it is better to be subject to the unintended vicissitudes of fortune rather than the intentional interference of others<sup>72</sup>. This interpretation of political civility is not justified on the basis of individuals being intrinsically valuable ends in themselves. Rather, it is a form of civility justified on the basis of the greater utility it produces for all by the way of security.

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<sup>71</sup> Smith (1976a) 455-6.

<sup>72</sup> Smith (1976a) Bk. 5. Part. 2.

These conditions are consistent with civil union, Smith holds, because they force some to be subordinate to others-- a subordination that produces stability for all. Smith wrote, "Men of inferior wealth combine to defend those of superior wealth in the possession of their property, in order that men of superior wealth may combine to defend them in the possession of theirs."<sup>73</sup> Material subordination thus places each individual in a polity in mutually advantageous relations to each other—the materially inferior have good reason to respect the materially superior because the latter are best equipped to protect them, and the superior have good reason to protect the inferior because in so doing the inferior remain subordinate to them.

The role of the state, then, for Smith is a minimal one: to maintain the rights of property that contingently prompt an unequal distribution of resources that, due to its production of subordination, creates civil order and security. Smith wrote, "Civil government, so far as it is instituted for the security of property, is in reality instituted for the defence of the rich against the poor."<sup>74</sup> The state is to limit itself to "an exact administration of justice"<sup>75</sup> where this is taken to mean the maintenance of order and stability, and to avoid fraud and dishonesty. The state is limited in its knowledge of market realities so is therefore not justified in determining how economic arrangements should be constructed<sup>76</sup>. The state treats everyone civically if it promotes a stability that enables a utility-maximizing society to function. A civil society is one where it is crucial that all stand in some relation of dependency to each other<sup>77</sup>. "In a civilized society he stands at all times in need of the cooperation and assistance of great multitudes."<sup>78</sup>

It is not surprising, then, that for Smith the division of labour is crucial for the maintenance of social and economic stability and civil union. Divided labour produces greater interdependence, thus it stimulates the need for all to associate with others and boost an economic multiplier effect that increases utility for all. The division of labour

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<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid. Part II p. 49, 178, 209, 445. See also *Wealth of Nations* I p. 264, 328.

<sup>76</sup> See Reisman (1976) p. 195.

<sup>77</sup> See especially Smith (1896) (B) pp. 160-1; (A) vol. VI pp.8-11.

<sup>78</sup> Ibid.



thus necessitates interaction between strangers, and it is only through such extended interaction that we can come to have sympathy for each other.

But political civility in the sense that I have applied it here to Smith is not a progressive ideal. Social security gained via subordination and interdependence between different sectors of society will not necessarily imply the rational intellectual advancement of all. Subordination will mean that the poor will likely fall into a state of torpor making them unsuitable for political participation or engagement with the state. Smith wrote of the lower-class workers that “The torpor of his mind renders him, not only incapable of relishing or bearing a part in any rational conversation, but of conceiving any generous, noble or tender sentiment.....Of the great and extensive interests of his counting he is altogether incapable of judging.”<sup>79</sup> It should come as no surprise then that Smith did not see civil union as coterminous with democratic expression<sup>80</sup>.

Nonetheless, the freedom of economic relations is meant to awaken all to the importance of showing sympathy to others. Smith wrote, “Hardiness is the character most suitable to the circumstances of a savage; sensibility to those of one who lives in a very civilized society.”<sup>81</sup> Open and free commercial activity for Smith was meant to inculcate the disciplines in citizens of self-control and moderation in relation to the interests of others<sup>82</sup>.

## 2.5 Individuals, the State and the Metaphysic of the Right

### 2.5.1 Political Civility and the Obligations of Individuals.

What we see from the above is that liberalism admits of different reasons for why an individual ought to be politically civil or identify, at the very least, with a particular form of civil union. But what we can deduce from these variations within liberalism are

<sup>79</sup> Smith (1976a)p. 303. See also Part 3. Article 2.

<sup>80</sup> For this point see *ibid* Part II p. 137, 259, 299, 342. See also Smith (1976b) p. 78, 338, 339, 358. and Smith (1896) p. 28, 54, 262.

<sup>81</sup> See Smith (1976) IV ii.9, p. 456.

<sup>82</sup> See Smith (1976b) VII.ii. Ipp. 11-14, pp. 270-72. See also. Muller (1993) p. 96.

some general principles of liberal thought. Liberalism is a political theory made up of many arguments that nonetheless link to common themes.

Liberals hold that *value* does *not* exist independently of human consciousness. It is human consciousness that rationally seeks optimal states of affairs<sup>83</sup>, that performs consent, that chooses, that desires, that reflects, etc. Individuals, liberals hold, are the rightful determinants of what is in their interests. Individuals, however, may hold that they do not have the best knowledge about what is in their interest, but they do possess the right to consent to have someone else determine this for them. But such agreements are not necessarily permanent. Political civility from a liberal perspective requires that individuals maintain the right to exit this relationship and the right to give their consent to change it in the future.

Individuals are expected to show a respect for rule of law. Being civil in the liberal sense is respecting the rights of others to non-interference. The liberal notion of civility assumes that normative individualism is true for all members of a civil society; each member of such a society needs to acknowledge that every member of that society is individuated as persons and are entitled to certain rights. In this sense, liberalism implies a duty for each individual to see the other as equal in a certain sense. Equal in the possession of rational capacity, equal in the sense of exposure to arbitrary interference, equal in exposure to the general will, equal in being self-owning, etc.

One is motivated to be civil on the basis of reciprocity—by respecting the non-interference of others I am investing in a relationship of reciprocation whereby others respect my right to non-interference. Tolerance, for example, is a civic virtue for liberals on this basis. If I tolerate the view of others I can expect others to tolerate my views. Toleration is not motivated out of a compassion for the other, but is ‘civically

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<sup>83</sup> The famous objection to this view is the prisoner’s dilemma. If I am an employer, it is in my self-interest that my labour force works for nothing. For my labour force, it is in their self-interest that they get paid for no work. We come together. Being rationally self-interested here produces a deadlock—not, in itself, an optimal outcome. Self-interest does not mysteriously or naturally work, in itself to produce an optimal outcome. But the view may only be that self-interest always works towards optimality. Both parties need to bargain here so as to reach a workable compromise. It is only human preferences and desires for optimal outcomes that forces individuals to seek another solution in such a deadlock, not the conflicting logic that produces the deadlock in the first place.

motivated’—it produces a *modus operandi* outcome that is good for stability in a pluralistic society.

### 2.5.2 Political Civility and the Obligations of the State.

Liberals, as well, hold that the state must be held in a principled relation towards the citizenry. The state, in its actions, is required to act in accordance with the rule of law. Specifically, it is called upon to act according to the principles of procedural justice. Liberal civility here derives from the normative assumption about the equality of individuals (each counts once as a bearer of the right to non-interference); and the right to non-interference implies protection of these individual rights from suppression by the majority or by arbitrary means within institutional practices.

Procedural justice produces social benefits for all. Klosko writes of the importance of procedure in relation to securing conformity to rules, adherence with precedents, consistency across persons and over time, honesty in admitting institutional flaws, acting in the spirit of fairness, treat subordinates with respect, bias suppression and neutrality, accuracy, etc<sup>84</sup>. The state exists, according to liberalism, as a procedural body to decide between competing parties. People should be left free to work things out by themselves, and the state’s role is limited to a facilitative one. Liberal political theories generally argue that the public good is best understood within a framework of rights (or liberties) and duties within which people may pursue their separate ends<sup>85</sup>. The state takes no role in determining what conception of the good life individuals should adopt<sup>86</sup>. The state is only there to resolve disputes--parties do not seek shared outcomes because society is inherently plural with vastly different moral, religious and philosophical views. In deciding which policies to adopt and implement, the state is informed by the

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<sup>84</sup> See Klosko (2000) chapters 5 and 8.

<sup>85</sup> “the state should leave its citizens to set their own goals, to shape their own lives, and should confine itself to establishing arrangements which allow each citizen to pursue his own goals as he sees fit—consistent with every other citizen’s being able to do the same.” “Jones (1989) p. 9

<sup>86</sup> See Kukathas (1996)

democratic legislature about policy goals and implements these in way that is consistent with basic rights of individuals<sup>87</sup>.

But state power in a liberal democracy cannot be concentrated power. In order to ensure that individuals and their rights are not coerced illegitimately, state power is divided or separated. The judiciary implements the rule of law—and the individual rights it contains—as a check against the powers of the executive and the legislature. Conversely, the executive and the legislature retain the right to implement the policies that are the result of their representative functions as authorised by democratic election. The legislature, in turn, checks the executive by way of constitutional procedure in the form of parliamentary practice.

The formalist or proceduralist function of the liberal state does not merely facilitate fair decision procedures with no concern for the outcomes or decisions reached by those procedures. There is a sense in which the liberal state is not merely formalist or procedural in its actions within a civil society. There is a sense in which we are justified in saying a liberal state is obligated to ensure that all outcomes of the free decisions made by individuals in their associations with each other must be consistent with the founding principles of liberalism itself. For example, the outcomes of freely chosen associations between rational persons must not violate the law; they must not violate the liberal principles of freedom of movement, speech, equal opportunity, etc. Ultimately, the outcomes reached by the free decisions made between individuals, or by the state's protection of the rights of all, must not produce outcomes that are detrimental to their autonomy. Most of all, for my purposes, the liberal state is obligated to ensure that the outcomes of free associations are life preserving.

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<sup>87</sup> For example, results cannot discriminate against the rights of minorities. See Cohen (1994).

## 2.6 Rights

### 2.6.1 The Right to Life

So far I have emphasised liberalism's commitment to the procedural relations that exist between the state and individuals. Individuals in a liberal polity are, in theory, expected to engage with the state as claimants. Their individual rights are entrenched in law and the right to access the legal institutions of the state upon purported violations of these rights, by other individuals or the state itself, is an essential requirement. The liberal state, in return, is constitutionally required to provide the legal institutions that facilitate this right of access, and must do so without discrimination or partiality. These are the core principles of civil union in a liberal polity.

However, the liberal state can be extended in scope beyond this procedural relation to one that ensures the prevalence of certain outcomes. The liberal state not only provides avenues for claims of rights violation, it also must maintain conditions of order and stability that enable individuals to exercise their rights. The liberal state is committed to ensuring that all individuals enjoy freedom from arbitrary incursions against their person and property by other individuals and other states. This commitment works under the assumption that individuals cannot exercise free choice in an environment of arbitrary invasion by others. The value of the private lives of individuals must be upheld by law, and indiscretions of the private sphere must be deterred by the threat of penalty and punishment. There will be laws against actions that cease life such as murder, manslaughter, omissions to assist, negligence, misadventure, etc.

This duty to protect the rights of individuals, to positively maintain conditions under which individuals can freely exercise their rights, extends to other forms of prioritisation by the state for some liberals, although not all. The liberal state will be expected to use its discretion to rank and favour some rights over others. For example, the right to life is seen as a fundamental right that will outweigh less fundamental (civil) rights as the rights to belief, speech, choice and property. For example, the judiciary in a liberal society can override the right of parents to choose when they take custody of

children when the latter are denied basic medical treatment by the former. Take, for example, cases where parents with extreme religious convictions spurn the use of modern medicine on their seriously ill child. In this case, the liberal state will prioritise the child's individual right to life over the rights of the parents to believe what they wish and to choose as they see fit.

The liberal state will also prioritise the right to life over property rights when, for example, it regulates the production of consumer goods to ensure that no products pose a serious threat to life. A liberal state is entitled to regulate the safety standards of protection equipment so as to ensure product quality, and to regulate the demand and supply forces in the production and distribution of drugs. A liberal state will also concern itself with regulating workplace conditions for workers to ensure that no serious threat to life prevails. Here the state uses its capacity as a legislative body to override the rights of business owners to choose and exercise outcomes according to their own conscience.

The right to life is held by liberals to be inalienable<sup>88</sup>. A right can exist for an individual in a latent sense. A right can constitute a claim of control that individuals can make over the domain of their life. In this sense, one may have the right to something—be entitled to choose as to the nature of its use—but not exercise that right. However, the right to life exists in a more fundamental sense for liberals. It is a right that individuals have even if they do not overtly express their desire to adopt its use. It is an essential right that all individuals are entitled to and which all are assumed, by the state, to want to be realised. This means that each person has a claim over the continued existence of their life prior to justifications or considerations that may be put as to why that life might be discontinued. Absent such justification and considerations, no one can have their life, and the issue of its existence or discontinuance, alienated by the arbitrary incursions of others nor the state. The distinction that Rawls makes between constitutional rights and urgent rights will clarify the point here. The former are rights that are rights of expression—the rights held equally among all citizens to believe, move, speak, own,

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<sup>88</sup> Liberals need not hold that life per se has intrinsic value. Life in itself is not of value in itself. The life of cancer cells or viruses is not held to have intrinsic value, and this life can legitimately be terminated for the sake of protecting human life.

etc. The latter, however, are rights to existence itself; they are what we might call the rights of biological integrity. For example, we can speak of urgent rights as the rights to food and clean water.

### 2.6.2 The Harm Principle.

Liberalism prioritises the right to life, where such a right is understood as the right to avoid the unjustified cessation of biological continuance, over other rights in its lexical ordering. But is there a different interpretation of this 'right to life' principle within liberalism? Specifically, can liberalism hold that 'the right to life' implies not only an obligation on the part of the state to ensure biological continuance, but also a right to a life free from harm? There is a strong sense in which the liberal state is not only obligated to protect individuals from conditions that threaten their life, but are also obligated to protect individuals from conditions that threaten to harm them, even if such harm will not result in the cessation of their life.

Mill's liberalism and harm principle implies such a right. For Mill, freedom is permitted where harm is absent. No one should be interfered with if their actions do not cause harm to others. Mill, however, does not go into detail about the sorts of actions that constitute harm to others. He believed that what constituted harm could be determined by community standards.<sup>89</sup> Rights to non-harm, in other words were to be determined by community considerations<sup>90</sup>.

However, there are principled stipulations as to what constitutes harm in a general sense. We can at least deduce from Mill's writings that it is not sufficient to argue that harm results from the failure to fulfil desire. If it were, then the failure to fulfil the desires of those who wish to see what they take to be the 'foolish, perverse, or wrong actions of others' would count as harm. But Mill denies that this is the case. The

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<sup>89</sup> Ibid.

<sup>90</sup> Ten (1981) raises the objection to this idea that opinion or tacit understanding determines what our rights are. He holds that this exposes the determination of our interest and the degree to which they are considered in the public realm to the whims of majorities. Honderich also see this problem and propose the principle of utility as a determinant of what our interests are rather than majority opinion. See also Honderich (1969) p. 181-6.

unfulfillment of these types of desires held for these reasons does not harm their possessors<sup>91</sup>.

Mill does not explicitly state what the interests are which, if violated, would constitute harm. The language he uses to describe the impacts we have on each other is varied. He speaks of 'effects', 'concerns' and 'interests' that come into consideration when alluding to harm<sup>92</sup>. Even if all action in some way imposes influences on someone else's welfare to a varying extent, Mill holds that we need to be very wary of interfering with the perpetrator of those influences because the latter has a right to freedom. Our 'interest consideration' in other words needs to be tempered by our right to freedom. The violation of the personal autonomy of the perpetrator here is just as damaging as the influences experienced by the victims of the action. In fact, Mill is more explicit about the harm caused by the violations of freedom when the state coerces individuals, rather than the non-bodily harm caused to others by those who exercise such freedom. When we coerce others to temper their freedoms we threaten the social security of all<sup>93</sup>. Mill does say "it must by no means be supposed that because damage, or probability of damage, to the interest of others, can *alone* justify the interference of society, that therefore it *always* does justify such interference." (My emphasis)

The simplest sense of the harm principle takes it that we can only interfere with or coerce others if their actions are causing physical harm to *others*. Yet Mill does hold an exception to this rule. We can coerce others if they are not making their choices on 'best evidence' and the action under question poses a serious threat to their self-preservation. The example given by Mill is that of the person who intends to cross a bridge that he falsely believes to be intact. This is preventing someone from causing harm to themselves because they lack the important information pertaining to their fundamental interest in self-preservation. No one can be interfered with in the name of promoting his or her own good. But there is a sense in which coercion in the name of saving the life of another is justified if that other is not in full possession of the facts.

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<sup>91</sup> For this point see Ten (1981) .p 54

<sup>92</sup> *ibid* p. 14

<sup>93</sup> *ibid*. p. 55, 59.



There is a ‘best information’ obligation here for the liberal state; ensuring that individuals make choices while at the same time have information about their salient interest at hand. Here we can see how the state’s influence in dialogical engagement between freely consenting parties could be justified on a Millian basis. Coercion is legitimate if it involves the delivery of important information to individuals about how to maintain their own self-preservation. But ‘the bridge’ case is a case of clear danger to self-preservation. Where does Mill stand in relation to other areas of life that may not threaten the immediate cessation of life but do affect, detrimentally, the quality of one’s rationality and well-being over time? Can we deduce from Mill’s preference for the higher rational pleasures that the state has an obligation to promote these where promotion means ‘informing’ others of the means to acquire such a capacity? There is no clear indication here as to what an interest amounts to, nor a clear emphasis on the nature of the state’s obligations in relation to the protection of higher-order interests.

However, what both the right to life and harm principles do is increase the scope of state concern. The liberal ideal of individuals being free to form associations and consent to treatment is constrained by the state’s responsibility to ensure that the rights to life and non-harm are protected for all. This will mean that liberal civility entails inclusive public consideration for every agreement reached between consenting parties. But it is only a minimal sense of inclusive public consideration at work here. There is evidence in Mill of the state taking the responsibility to offer avenues for assessing when the adverse effects of free action create a *prima facie* case for the violation of an interest, and setting up processes to make judgments on what the state response should be<sup>94</sup>. Mill does see an important role for parliamentary representatives. Mill expects elected representatives to act as effective intermediaries between citizens and the state. He wrote, “The expert representative is to expose himself (sic) to the committee of grievances and opinion and formulate a stance which can then be applied to public officials in the sense of ‘check by criticism, and eventually by withdrawing their support, those high public officers who really conduct the public business, or who appoint those by whom it is conducted.’”<sup>95</sup>

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<sup>94</sup> Mill (1974) p. 74.

<sup>95</sup> *ibid.* p. 42-43.

But Mill's expectation of representative government seems to be limited in such a way that takes the emphasis away from an open and deliberative arrangement with those who are subject to state rule. Mill wrote, "...the proper office of a representative assembly is to watch and control the government: to throw the light of publicity on it acts; to compel a full exposition and justification of all of them which any one considers questionable; to censure them if found condemnable... to expel them from office.... This is surely ample power, and security enough for the liberty of the nation."<sup>96</sup>

But he does indicate that public participation may be required to protect the interests that all have in avoiding harm. Mill wrote that if power is held by an exclusive class there is always the possibility that the interest of those outside this group are always in danger of being overlooked.<sup>97</sup> He is making reference here mainly to the interest of the working class in relation to the capitalist classes, and he adds that the 'working men's view' ought to be respectfully listened to.<sup>98</sup> Then he adds, "In addition to this, the Parliament has an office, not inferior even to this in importance; to be at once the nation's Committee of Grievances, and its Congress of Opinions; an arena in which not only the general opinion of the nation, but that of every section of it...can produce itself in full light and challenge discussion.... where those whose opinion is overruled, feel satisfied that it is heard, and set aside not by a mere act of will, but for what are thought superior reasons, and commend themselves as such to the representatives of the majority of the nation....where statesmen can assure themselves, far more certainly than by other signs, what elements of opinion and power are growing, and what declining, and are enabled to shape their measures with some regard not solely to present exigencies, but to tendencies in progress". Mill seems to hold that it is when we *plausibly suppose* that others' *interests* are being harmed that we cast public jurisdiction over the action<sup>99</sup>.

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<sup>96</sup> Ibid. p. 42

<sup>97</sup> See Mill (1882) pp.22-3.

<sup>98</sup> Mill (1882) pp. 22-3.

<sup>99</sup> Ibid. p. 132.

Mill holds that “the rights and interests of every or any person are only secure from being disregarded, when the person interested is himself able, and habitually disposed, to stand up for them.....each is the only safe guardian of his own rights and interests.”<sup>100</sup> But what does ‘standing up’ mean here for Mill? Does it mean merely voting, or does one pursue one’s interest in a more thorough or inclusive relation within state decision-making processes? As we have seen, there are avenues for complaint and grievance for citizens with relation to the state, but Mill’s philosophical analysis does not go into any depth about how either the state or the citizenry could identify specific categories of actions that are inherently detrimental to the well-being of persons. It is not clear from Mill’s writing what constitutes an interest nor what level of harm constitutes a violation of interests. Instead, Mill seems to focus more on what our rights are and sets the degree of state action on what violates our rights rather than what violates our interests.

### 2.6.3 The Right to Welfare.

Some liberals propose that liberalism implies the provision of welfare rights. Here it is held that the state must not only protect life and prevent harm, but also must ensure the outcome of an adequate level of welfare for all; and not just ensure procedural civility or the prevalence of ‘best information’ to those engaged in freely consented, dialogical processes. Welfare liberals endorse wealth redistribution as a means to promote human welfare. However, such a redistribution is done only in the name of promoting the liberal values of enhanced choice, and opportunity. The state does not redistribute wealth on the basis of satisfying welfare understood as needs or basic interest fulfilment, but in satisfying liberal requirements of benefits to individual freedom, equality, compensation for past, unjust interference. , etc.

Rawls’ liberalism, for example, promotes human welfare not on the basis of any intrinsic value that such a state of affairs has for humans, but on the basis that a state of affairs in which human welfare is protected is one that fully informed, rational beings would choose in the original position. We saw earlier that Rawls is influenced by the

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<sup>100</sup> Mill (1882) chap. 3 pp.54, 55.

Kantian notion of individuals as primarily rational beings. King and Waldron state that with Rawls we move from a general knowledge of human psychology to “conclusions about the sort of social arrangements people could live with. Faced with great deprivation and inequality, people cannot be expected to live quiet and satisfied lives. They therefore cannot in good faith undertake or agree to live with such deprivation and inequality.”<sup>101</sup> Thus, for Rawls, it is the rational nature of persons that justifies outcomes in a liberal order<sup>102</sup>.

Other welfare liberals value human welfare for different reasons. Hobhouse, for example, held that while the liberal state exists primarily to “secure the conditions upon which mind and character may develop themselves....upon which citizens are able to win by their own efforts all that is necessary for civic efficiency.”<sup>103</sup>, he holds in addition that such individuals are subject to arbitrary forces beyond their control. These forces, in turn, are such a threat to the autonomy of individuals that the state should protect all from them in the name of justice. Hobhouse wrote that for the individual “It is not his fault if there is over production in his industry, or if a new and cheaper process has been introduced which makes his particular skill, perhaps the product of years of application, a drug in the market....That is why it is not charity but justice for which he is asking.”<sup>104</sup> The demand for human welfare can be made by welfare liberals on the basis of justice in the sense of ensuring that individuals get their just deserts.

## SUMMARY

In this chapter I have examined the nature of civil union as espoused by some of the main proponents of liberal theory. I have highlighted the different reasons by liberals to justify the existence of this union in a political context. I began with a reference to Kant’s moralized notion of civil union based, as it is, on a respect for the intrinsic value of individuality. This aspect of Kant’s theory acts as the foundation for Nozick’s and

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<sup>101</sup> King and Waldron (1988)p. 441.

<sup>103</sup> Hobhouse (1944)p. 83.

<sup>104</sup> Ibid. p. 84.

Rawls' understanding of civil union in a modern context. Even though the overall position taken by both theorists are significantly different they do share this common ground. Nozick, however, does not stipulate that the civil union between individuals and the state must be based on a dialogical relation about appropriate ends or outcomes. Rawls' liberalism, on the other hand, is more in line with an understanding of civil union based on this relationship.

The liberalism of Hobbes presents us with a very different explanation for the origins of civil union. Rather than being based on moral reasons to do with the nature of persons as rational ends, Hobbes' liberalism presents fear as the primary motivation to political civility. Individuals in this context have good reason to agree to the creation of an authoritative force that will protect them from the state of nature. Civil union, in other words, is something that appeals to vulnerable individuals who have a deep concern for self-preservation. The state of nature, a state of existence where no such authority exists, is a threat to the self-interest of individuals. For Locke, civil union must also respect this ideal of individuals as self-preserving and self-perpetuating beings. The civil union between individuals and the state is created in order to protect individuals from the arbitrariness inherent in the state of nature, and to protect the property rights of all. Individuality, for Locke, is a trait that is inextricably linked with the possession of, and engagement with, property. Labour and property ownership are vital conduits for the expression of one's individual essence, hence the importance of well-defined and publicly accepted notions of civil union. Each individual has good reason to be civil to other individuals, and to the state, so as to secure such property rights.

I also covered the liberalism of Constant and Smith, and showed how both viewed civil union as an essential aspect of avoiding totalitarian control by the state and other communal entities. The emphasis here is more on the dangers associated when concentrated power is wielded over individuals, rather than with any intrinsic moral features of individuality per se.

Even though there are different reasons given by liberals for why civil union is desirable or necessary, they do share points of common understanding concerning the rule of law

and the obligations of citizenship. I have pointed out the common ground on which liberals are united. I have also indicated two additional features of liberalism that ought to be acknowledged when analysing the nature of civil union. Specifically, a liberal polity has to uphold the individual rights of all to life and non-harm. However, while liberals are generally committed to the idea that the outcomes of state action must be in accordance with the individual rights of all, they do not offer a clear indication of how to identify the conditions that harm individuals. This aspect of liberal theory is not well advanced. Welfare liberals have acknowledged that this is a major concern for liberal theory. I will pick up on this theme again in chapter four.

### 3. REPUBLICANISM AND POLITICAL CIVILITY

In this chapter I look at the kind of civil union to which republican political theory commits itself. By looking at the prominent forms of republican theory in the current literature, I will show that the basis of concerns and obligations of the state in relation to citizens is focused on exemplifying a respect for autonomy, self-determination and non-domination. This bond of concern is termed in republican theory as ‘civic virtue’ and is a socio-political trait comparable to that of political civility covered earlier. Republicans, I will show, speak less directly of basic human rights than liberals, and the way that others are deemed to be treated is subject mostly to the outcomes of deliberative process conducted between the state and individuals. These deliberative process themselves must ensure that outcomes are not detrimental to the autonomy of individuals, but I wish to note that this form of welfarism for individuals is driven, as with liberals, by the need to serve the self-determination of individuals and their interests within a social context.

#### 3.1 Liberalism and Republicanism: A Theoretical Clarification.

It’s important to begin this chapter by pointing out the sense in which liberalism and republicanism are taken to be separate or distinct political idioms. Liberalism holds, as we have seen, that state authority and individual freedom are in tension. The affairs of the individual, in other words, are distinct and separate both normatively and socially speaking, from the affairs of the community and the formal institutions created to exercise legitimate coercion over them. The kind of liberalism that best illustrates this is that of Isaiah Berlin. Berlin holds that political freedom is a negative ideal in the sense that it defines freedom as the absence of interference or coercion against an individual’s actions, preference formations, and choices. Specifically, Berlin holds, we can define freedom as the protection of this private sphere without addressing the issue of ‘Who governs me?’. Berlin writes, ‘Political liberty...is simply the area within which a man

can act unobstructed by others<sup>1</sup>". If freedom is measured merely by acts of intrusion or their absence, then the issue of who governs my life has no necessary link with my freedom. For Berlin, political freedom can exist, and in fact be optimal, in a world where the individual does not have any democratic rights<sup>2</sup>. We can imagine a scenario where a 'liberal-minded despot would allow his subjects a large measure of personal freedom.'<sup>3</sup> So, for Berlin, political freedom is one thing and the nature of the political authority that stands over me another.

Republicans, however, view political freedom as something more than a brute fact about the absence of coercion or interference. Political freedom, in addition, must involve the enjoyment of non-interference that is sufficiently secured. This means, for republicans, that the issue of 'who governs me' does matter. Specifically, those who exercise legitimate coercion over an individual do so not just in a way that instantiates the fact of non-interference, but instantiates it in such a way that ensures that I enjoy that level of non-interference resiliently. It is not enough that each just happens to enjoy non-interference for whatever reason, rather the non-interference one enjoys must be an institutionally entrenched feature of the polity to which one belongs. In a republic each is "to live in resilient, self-assured freedom"<sup>4</sup>.

So, republicanism holds that state coercion and individual freedom do not stand in this opposed relation. Individual freedom and state coercion are compatible notions under this theory. Individuals do not cede some of their freedom in order to gain greater security from an ontologically independent body such as the state. Rather, individuals are socially constructed beings whose very existence and identity is inextricably tied with a social context and public authority. Individual life is public life: we each stand not in a relation of independence towards each other but in a relation of interdependence. Traditionally, republicanism has had a strong connection to communal rather than individualistic bonds. The liberty of the ancients, for instance, held a notion of republicanism that was not individualistic or liberal. The Greek republic was of the

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<sup>1</sup> Berlin (1969) p. 122.

<sup>2</sup> Ibid. p. 129-30.

<sup>3</sup> Ibid. p. 130.

<sup>4</sup> Haakonssen (1993) p. 572.



following kind. While the freedom of ancient Greek democracies was coterminous with the possession of rights to political participation and property ownership and was contrasted with the deprivation of rights or slavery, there was no idea of individuals standing in independent relations to each other<sup>5</sup>. With ancient freedom, Constant tells us, freedom is sought within community bonds; freedom is not understood as being free from such bonds. Ostracism, Mulgan writes, was a practice of the Greek democratic model that illustrates the importance of community over individual's rights. Individuals could be ostracised from the polis on the basis of their threat to the Greek community, and this exercise of state power took place without any rights of due process for the individual<sup>6</sup>. Mulgan also points to the censorship imposed on the prominent Greek playwrights when they dared to criticize the Greek community. As Mulgan states, 'in Athens individuals were fair game, but not the community.'<sup>7</sup>

But republicanism, in its modern form, takes on a more individualistic guise. Modern republicanism is based on the idea that individuals are the primary ontological political entities, as opposed to ancient republicanism which had no such comprehension of individuals. What are the individualist features of republicanism? Harrington's republicanism informs us of how economic independence for all individuals was a necessary prerequisite of living in a republic. Individuals had to possess a sufficient amount of property to free them from bondage to land owners. Such independence via the acquisition of private property for all was a means to "release men to take part in citizenship."<sup>8</sup> Not only were all individuals to possess a sufficient amount of property as a way to empower them to participate in the republic, but the overall distribution of property to all had to be such that no one or group of people could use their ownership of property to the detriment of others. Hence, the overall distribution of property was not to allow grave disparities in wealth. There had to be, in other words, a harmony of propertied individuals<sup>9</sup>. However, this point shows that Harrington's republicanism differs from some of the mainstream forms of liberalism we covered earlier. Due to the interdependent relation between individuals, intrapersonal power is of significant

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<sup>5</sup> See Mulgan (1984) p. 9.

<sup>6</sup> Ibid. p. 14.

<sup>7</sup> Ibid. P. 15.

<sup>8</sup> See Pocock (1977) p. 163.

<sup>9</sup> Ibid p. 164.

concern to some republicans. The abilities that powerful individuals may have to influence the public destiny was a major threat to republicans, although it is not to all forms of liberalism.

Liberals and republicans also differ on their stance in relation to interpersonal ability. Interpersonal ability, or the ability that individuals may possess to influence and impact on the choices and views of others outside of formal norms, rules and procedures is, for liberals, of little concern at the level of political theory. We may all have the right to free speech or freedom of belief but an unequal possession of abilities on the part of individual right's holders to access the information that will help them to effectively operate in society with these rights is of no concern to the liberal. The issue of individual ability does not impinge on the degree to which someone is free. I may have the right to move freely about the community I live in, but if I am unable to do so for lack of money or resources this does not mean that I am unfree to do so. It merely means, for liberals, that I lack the means to act on my rights. What is more, the fact that someone else has a greater ability than me to effectively bargain against me and satisfy his interests over mine, say within the framework of a contract, is of no concern to liberals. Each party to a contract comes to it with their own natural advantages and disadvantages and the consent, if given, given to the contract is an act of will—not an issue of ability. State coercion is fundamentally in opposition to the freedom of individuals. The two come together only when a contract is entered into; only when individuals agree to give up some of their freedom to the state in return for a greater overall freedom from other individuals whose threat to them is greater in the state of nature. Republicans have a greater concern for the way people fare in a society, especially in relation to them maintaining their status as effective citizens of the polity. Here the inequalities of interpersonal ability will be of more concern to republicans. Republicans have more of a concern for how people ought to fare in a society, rather than merely with their formal status as holders of rights in a juristic framework. This concern for moral outcomes in the political context is another factor that distinguishes republicans from liberals<sup>10</sup>.

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<sup>10</sup> See Haakonssen (1993) p. 571.

This does not mean, it should be noted, that liberalism denies the existence of communal features in a polity. Isaac<sup>11</sup> holds that it is too simplistic to see liberalism merely as the exclusive promotion of the rights of individuals. He points to MacCallum's<sup>12</sup> schema that extends our understanding of freedom to include the attainment of proper ends for liberal society in general. Freedom, under MacCallum's schema, is freedom from an impediment in order that someone can be free to become a certain sort of person or perform a certain kind of action. Similar restriction on the ends that liberal individuals ought to be allowed to pursue are proposed by Charles Taylor<sup>13</sup>. Isaac adds that William Galston<sup>14</sup> specifies the goal of liberalism as to support 'liberal humanism' which, inter alia, involves a respect for equality and tolerance within a pluralistic society. The respect for tolerance may extend further to a respect for appreciation of inherently fundamental worldviews. The language of tolerance implies that disparate parties put up with the differences of their fellow citizens for reasons of modus operandi benefits. The language of appreciation, however, for liberals would not see this liberal virtue in this sense. It would see a fundamental respect for the inherent differences in humanity. The liberal community, in other words, admits of varied conceptions of the good life and certain traits of character are expected to be inculcated in the citizenry as a response to these facts.

But there is a sense in which liberalism and republicanism are separate and distinct concepts<sup>15</sup>. Liberalism places greater emphasis on individual rights in isolation from community and republicanism places greater emphasis on our inescapable social relations. We will see in this chapter more evidence of the individualistic nature of modern republicanism.

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<sup>11</sup> Isaac, J (1988).

<sup>12</sup> MacCallum, G (1967)

<sup>13</sup> See Taylor 'What's Wrong With Negative Liberty?' in *The Idea of Freedom: Essays in Honor of Isaiah Berlin*, ed. Alan Ryan (Oxford, 1979). P. 193.

<sup>14</sup> Galston, W (1982).

<sup>15</sup> Dworkin (1984) p.72 and MacIntyre (1985). P..241, 219, 220, 236. See also Pocock (1981) p.53

### 3.2 Pettit's Republicanism: The Primacy of Freedom as Non-Domination.

An understanding of Pettit's position on the nature of civil union in a republic cannot be fully understood without a general understanding of his republican theory of freedom. The principled or civil stand we take towards others is determined by, or seeks to maximize, the value neutral goal that lies at the foundation of his theory of freedom. It is to the task of setting out Pettit's republican theory of freedom that I turn first. Pettit presents republican freedom as an ideal that is conceptually distinct from liberal freedom<sup>16</sup>. He holds that non-interference is a concept distinct from that of non-domination. The latter is defined as the absence of the capacity for others to interfere arbitrarily with individuals; the former as the absence of intentional impediments to choices and actions. Pettit holds that someone can enjoy non-interference yet not enjoy non-domination. For example, I may not be impeded in my choices and actions by the intentional actions of others, but I may stand in a relation to others whereby they *could* impede me arbitrarily if they so wished.

The evil of domination is that it exposes individuals to coercive acts and relations in such a way that the implementation of such coercions need not track the interests of those concerned. If others can interfere without consulting those upon whom the coercion is inflicted then the latter will be subject to unaccountable and capricious power. There will also be important psychological costs of being subject to such an arbitrary power. One would never know when, how, or to what extent one's present security is ensured, nor what the near or long term future holds. Pettit adds that we can have interference without domination. Interference or impediment of action or the exercise of choice may occur as the result of a decision process whereby all those involved were not subject to arbitrary incursions. All parties in the process would be able to articulate how the proposed interference impinges on their interests.

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<sup>16</sup> Pettit, P (1997).

Pettit holds that liberalism with freedom as non-interference at its core is distinct from republicanism with non-domination at its core. What is more, he proposes, non-domination exists both as an institutional test as well as a social goal for the state. Let me explain firstly how non-domination is meant to operate as an institutional test. The only intuitions in society with legitimate authority are going to be those that have built into them process of non-domination. They will have within them the means by which the interests of all those affected by the coercive forces of authority are tracked. In this sense, non-domination exists as a form of legitimacy<sup>17</sup>.

Non-domination is not only a test that is to applied to state decision-making functions, but is also a goal of the state. Specifically, for Pettit, the goal of the state is to reach outcomes whereby each enjoys non-domination with a significant degree of intensity and extent. In order to reach the goal of providing each citizen with an equal intensity of non-domination, a republic gives everyone equal constitutional rights. The powers of all citizens are equally constrained by legal and constitutional forces, and this secures non-domination for everyone<sup>18</sup>. The intensity of one's non-domination is constituted by the degree to which one is legally protected from the arbitrary incursions of others.

In addition to enjoying a sufficient intensity of non-domination in our relations to others, all citizens for Pettit need to enjoy a sufficient amount of the extent of non-domination. The extent of one's non-domination is constituted by the range and nature the of undominated choices one has. The extent of non-domination refers to ensuring that the range of choices available to people and the extent to which they can act on these choices is secured. Some ways to ensure that it is easier for people to act on the undominated choices they have is to empower them to read and write; to give them greater mobility; to improve their living relations; to giving them better access to commination mechanisms and information access, etc.

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<sup>17</sup> Institutional tests of the kind mentioned exist so as to implement a relationship of what Pettit alludes to as non-imperium between individuals and the state. See Pettit (1997) pp. 112, 150, 166, 171.

<sup>18</sup> The constitutional relations between individuals here ensures a relationship of what Pettit refers to as non-arbitrium between citizens. See Pettit (1997) p. 55

There are a couple of caveats worth noting about Pettit's task of increasing the extent of non-domination. The first is that the state itself must not take this on as a major task. If the state gets too involved in the issue of redistributing resources in the name of increasing the extent of non-domination, then such a role may make the state itself a dominating agent, the state itself could become a compromiser of people's freedom<sup>19</sup>. The second, and related, point is that material equality is not a goal of the state. Non-domination can be realized and distributed equally in both its intensity and extent without there being an equality of material possessions among the citizenry. Pettit acknowledges that equalizing measures between material possessions may be required in certain cases, but he adds that there is no conceptual link between enjoying such equality and enjoying non-domination.

The only form of strict equality or egalitarianism required by republicanism, then, is going to be of the structural kind<sup>20</sup>. For a society to give more constitutional weight to some groups over others would be to subject those others to arbitrariness, and hence to domination. Those with such greater constitutional empowerment would be able to function in such a way that did not require them to take into consideration the interest of those without such power. Pettit sticks steadfastly to a strict notion of structural egalitarianism.

We may be concerned that even with structural egalitarianism in place the realities of how individuals would fare in relation to one another would be a matter of what relative power each individual possesses<sup>21</sup>. For example, those well disposed in terms of effective institutional access to the mechanisms of legal contestation will have greater relative power than those who do not, and hence would have greater power to acquire outcomes that fit with their interest than those who do not have a high concentration of relative power. In such a case, would we be justified in endorsing an unequal distribution of constitutional powers to offset the disadvantages experienced by those with less relative power?

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<sup>19</sup> See Pettit, P (1997) p.105

<sup>20</sup> Ibid. pp. 110-11.

<sup>21</sup> Ibid. p. 114.

Pettit says that we should not. He writes, “ Any anti-equality initiative will make at least two parties less equal in their intensity of non-domination. It will do this by increasing the advantaged person’s powers or by decreasing the powers of the other party or by doing both at once: in whatever way, it will worsen the power ratio of the disadvantaged party. But if the initiative is intended to raise the overall intensity of non-domination by the same margin by which it raises the intensity of non-domination of the favoured party, it is ill designed. For the shift in the power-ratio that raises the advantaged party’s absolute intensity of non-domination by interval A (for advantage) will serve at the same stroke to lower the disadvantaged person’s intensity of non-domination, in absolute terms, by interval D (for disadvantage. The weaker party’s absolute intensity of non-domination is a function of their relative powers, and the anti-equality initiative is bound to worsen it.”<sup>22</sup>

From the above we can see a nice illustration of Pettit’s promotion of non-domination as a non-moral or neutral goal. The normative task of correcting power imbalances is beyond the scope of concern for such a goal as non-domination. The goal of the state is to implement non-domination without being selective about who is deserving of it, nor to what purposes different groups have in society. The right to non-domination is based on an entitlement—all those who have an interest within the jurisdiction of public authority are entitled to equal protection from arbitrary interference.

Pettit here shares a normative commitment with libertarianism. Both hold that the only goal of the state ought to be that of protecting freedom. For libertarians, the only goal of the state is to protect the rights of all individuals to non-interference; for Pettit the only goal of the state is to protect the rights of all individuals and groups to non-domination. What individuals and groups do with their undominated choices is of no concern for the state. For Pettit, all the state does is ensures that all the actions and decisions within the polity are consistent with the interests of all who are subject to the consequences of such decisions. The republican state, for Pettit, is not founded on a substantive notion of ‘the good’. Trying to redress any imbalances, outside of those that constitute a threat to one’s extent of non-domination, in society by undertaking anti-equality measures would

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<sup>22</sup> Ibid. p. 114.

be “bound to be less beneficial than the change that could have been achieved under some corresponding, pro-equality step.” All redistributions in a Pettit’s republic can only be justified in relation to processes of change that are inclusive—in relation to decisions about redistributions that are the result of non-dominating decision procedures.

What is it about non-domination that makes it something that can be shared universally in this way, and supplied by the state on a neutral basis? Pettit holds that non-domination appeals to all on two basic levels. First of all, it is a psychological good that should appeal to all persons. We are the sorts of beings who dislike subjection to arbitrary forces or living under the capricious power of others. A life with such subjection—a life of forever seeking to adhere to or evade the controlling powers of others—is one that is not conducive to our psychological well-being.

Second of all, persons qua beings who seek psychological stability not only have good reason to value non-domination, but persons qua rational agents do also. The performance of rational and deliberative action requires a stable and predictable social environment through which one can be secure in moving. The confidence acquired from such an environment enables me to act with decisiveness and purpose in this world towards goals of my own making and desires. A benefit of such a world is that one can devote more of one’s own time and energies towards constructing a good life rather than spending them on toadying to the powerful<sup>23</sup>. What is more, Pettit adds, there will be common knowledge that each is entitled to this status of non-domination, hence each knows that they are able to ‘stare the other in the eye’ or deliberate amongst each other as equals. Taking all these benefits on board, Pettit concludes, leads us to view non-domination as a primary good—a good that all have good reason to possess no matter what their private purposes are.

If a republican state is constrained by the test of non-domination and embraces the goal of equal constitutional protections for all, then how are decisions and laws made in such a polity? The model of the republican order is that of a contestatory democracy. Based

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<sup>23</sup> Ibid. p. 85-87.



on the Roman model of governance, it holds that law making powers lie primarily with the elected representatives of the people. In more contemporary terms, the state executive exists to facilitate the representatives in formulating and implementing policies. The rule of law will be paramount and the legislature and executive is constrained by the judiciary. Each sector checks the powers of the other to guard against the pursuit of private interest and corruption, and in so doing this enables the interests of citizens to be tracked when laws are made and implemented.

But importantly for the citizens of a republican polity, all state action is open to contestation. The state must publicly propose legislation and policies but each citizen has the right to contest such proposals before they are implemented, or to contest the effects of a law already in place. Such contestation ensures that each has an opportunity to articulate how their interests are affected by the implementation of laws<sup>24</sup>. The decision made, or the law passed, may not be in the end to my liking and I may not directly consent to such a law. But for Pettit, laws and policies are not legitimated by consent, but by contest. An important part of what makes a law legitimate, for republicans, is that it is formulated without dominating anyone—law that is formulated without ignoring the rights of all to be free from arbitrary interference.

But the expectation will be that fundamental disagreement over the content of laws will be the exception rather than the norm. Pettit's republicanism shares in the spirit of social capital that laws and state actions will produce outcomes that all have good reason to agree with—that laws are more accommodating to the personal interests of all as well as to the those interest of the public. The workings of a contestatory order will do its best to ensure that all 'salient' concerns are catered for. Pettit endorses such a commitment when he supports a debate-based form of institutional decision-making over a bargain-based one<sup>25</sup>. The latter involves the contesting parties engaging with the state on the basis solely of seeking the satisfaction of their private interest. Other contesting parties are viewed as competitors and concession or compromise to them, under the bargain-based model, is considered as a cost<sup>26</sup>. The former, the debate-based

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<sup>24</sup> *Ibid.* p. 105.

<sup>25</sup> *Ibid.* p. 187.

<sup>26</sup> *Ibid.*

model, is different to the bargain-based model for Pettit. Under this model, contestants do not face each other as competitors or bargainers with the state, but as individuals and groups who share a national interest and who ‘try to agree on what arrangement answers best to considerations that they can all recognize as relevant.’<sup>27</sup> It is intended with the debate-based model that the process of deliberation itself exemplifies a form of dialogical engagement through which contesting parties appreciate and learn about the interest of others in their political community. Pettit writes, “In bargaining-based decision making, preferences are given, in debate based decisions preferences are formed.”<sup>28</sup>

What sort of institutional measure can be taken by the state and its officials to create such conciliatory environment among contesting parties? Pettit answers this question in the following way. The formulation of preferences must be facilitated by neutral mechanism, or by “considerations...brought forward as reasons that all have to countenance as pertinent, under accepted canons of reasoning”<sup>29</sup>. This means, for Pettit, that the contestants that come before the state must agree on certain neutral conditions of procedure. They must agree that the procedures undertaken with the state and between each other will be one that subjects personal preferences to scrutiny and transparency, and that agree to reach an outcome within a workable time frame. These are, Pettit holds, the neutral procedures that are consistent with the standards of reasoned deliberation<sup>30</sup>.

Pettit does not lay down any other requirement for the outcomes of contestatory democracy other than they are consistent with the enjoyment of equal non-domination for all. Faith is put in the methodology of reflective equilibrium; that all individuals will fare well as a result of inclusive engagement with the state. Pettit’s republicanism leaves the determination of substantive outcomes up to the engagement between the myriad forces within a society. As Pettit writes, “Once the contestatory mechanisms are in place everything is up for grabs.”<sup>31</sup> It is important for my purposes to highlight this

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<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid. p. 188.

<sup>30</sup> Ibid. p. 195.

<sup>31</sup> Ibid. p. 201.

point by Pettit that there are no objective or substantive goods for the state to protect or implement other than to uphold non-domination and provide fair processes of deliberation.

### 3.3 Pettit and Republican Civility

We are now in a better position to look at the nature of civil union as it appears under Pettit's republicanism. I take it that the republican account of civic virtue is conceptually equivalent to the notion of civic engagement and union I covered in the first chapter. Political civility or civic virtue for Pettit is a concept that serves the value of freedom as non-domination. Our civic virtues are to be "consistent with, and indeed supportive of, a dispensation in which everyone enjoys freedom as non-domination."<sup>32</sup>

What is a civil society for Pettit? Pettit writes of civility or civil union as applying to two domains: in the sense of individuals as they relate to the each other as political agents acting and engaging with the state; and in the sense of individuals making and forming associations outside of the state. With reference to the latter application of civility, Pettit talks of laws being made to conform to the standards of a community. A community will only give its respect to laws that cohere with their values. Pettit writes, "The laws must be embedded in a network of norms that reign effectively, independently of state coercion, in the realm of civil society. Civil society is a society under the aspect of extrafamilial, infrapolitical association; it is that form of society that extends beyond the narrow confines of family loyalty but that does not strictly require the existence of a coercive state."<sup>33</sup> For Pettit, the state's laws need to be constructed with respect to what civil society deems to be acceptable.

But Pettit also points to the state as an exponent of civic power. The state, and not civil society per se, will lay down norms and laws constitutive of its sovereign role. Only the state can make laws and exercise legitimate coercion. Arguably, the coercive force of

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<sup>32</sup> Ibid. p. 245.

<sup>33</sup> Ibid. p. 241.

states has forged in the general public a respect for the norm of obeying the laws of the sovereign. But, Pettit notes, the laws will only continue to survive as norms if society endorses them<sup>34</sup>. What is more, it will be what Pettit refers to as the ‘relevant groups’<sup>35</sup> in civil society that will lead the way in giving approval and demanding compliance to the laws and the norms that underpin them. This raises an interesting issue about justice and the sociology of civil society that I will cover in the next chapter.

What is the motivation to civility for Pettit? Why does every individual in a polity have reason to be virtuous in a civil sense? In short, for Pettit, the answer lies in that civility produces pay-offs in the form of the non-domination we each receive. Pettit writes, “The first and most important reason why a republic is going to need to have its laws embedded in a network of norms is that people enjoy a higher degree of non-domination under a regime where there are norms to support republican laws.”<sup>36</sup> Political civility, in other words, is of instrumental value to each citizen. It is rational to respect the laws and adhere to the fair procedures of a contestatory democracy because these actions endorse the institutional practices of non-domination; such an endorsement means an increase in the security of everyone’s freedom from arbitrary interference. When a citizen respects the rights of all to non-domination, she/he is also strengthening her/his enjoyment of the same. Conversely, if a citizen is dominated by another then all are dominated in the same manner; all will be equally exposed to the same force of arbitrary interference. It is in this sense that Pettit identifies non-domination as a communitarian good<sup>37</sup>.

This commitment to civility is consistent with a consequentialist notion of civility. Being civil is a matter of conforming to those practices that help to realise a value-neutral goal; being a productive cog in the wheel that achieves an outcome that all have good reason to possess. Another example of a consequentialist account of civility is that of Jeremy Bentham. Here the desired motivations and dispositions that go to strengthen civic bonds are those that serve the value-neutral goal of the greatest happiness. Bentham wrote, “...so in a constitution which has for its object the greatest happiness of

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<sup>34</sup> Ibid. p. 243.

<sup>35</sup> Ibid p. 245.

<sup>36</sup> Ibid. p. 246.

<sup>37</sup> Ibid. pp. 120-126.

all, the great object will be to maximize it...and in the reception given to whatsoever shall promise to be in the highest degree contributory to tis effect, may be seen, the most instructive test that imagination can frame of appropriate moral aptitude, on part of rulers.”<sup>38</sup> In addition to sovereign probity being based on the expectation to satisfy happiness for all, the appropriate aptitude for private civility, for Bentham, is beneficence or self-regarding virtue. For Bentham, we need to protect the citizenry from rulers who apply self-regarding virtue to the public realm—what he terms as ‘securities against misrule.’ The focus on outcomes of this sort lies at the foundation of Pettit’s notion of consequential republicanism.

### 3.3.1 Pettit and Honour as a Regulative Ideal.

It is no surprise to see that this consequential account of civility motivates civic virtue on the basis of rewards and disincentives or punishments<sup>39</sup>. The reward for civility under Pettit’s account is not only non-domination for all, but also honour for those who exemplify a respect for the norms that support this outcome. Conversely, the disincentive for incivility is dishonour. Honour, for consequentialists such as Pettit, is in essence viewed as a regulative ideal.

The role of honour for Pettit is to prompt a ‘culturally reinforced civility’ that must prevail so as to increase the security of non-domination for all. Pettit and Brennan offer the intangible hand model as a way of understanding how honour works as a regulative ideal<sup>40</sup>. Under this model, what makes conformity to rules and norms worthwhile for rational actors or prudent political agents is that civility gives one a significant amount of esteem in the eye’s of one’s contemporaries. “The intangible hand helps to nurture a pattern of behaviour by holding out the prospect that its manifestation will earn the good opinion of others.”<sup>41</sup> And “if we assume that people care about the regard of others, seeking their high regard and fleeing their low regard, then it is natural to think

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<sup>38</sup> See Roser, F (1983) p. 51

<sup>39</sup> Ibid p. 212.

<sup>40</sup> Brennan and Pettit (1993).

<sup>41</sup> Ibid p. 254.

that the intangible hand can be an important way of establishing and securing certain patterns of behaviour.... it can be an important and positive influence in encouraging fidelity to civil norms.”<sup>42</sup>

Pettit sees honour and civility here as role-based concepts. One exercises one’s civic virtue if one performs one’s role in conformity with the agent-neutral good to be realized. This way of understanding civility is found with others writers and applies civility at a communicative level<sup>43</sup>. An implication of this understanding of civility is that the notion of ‘the public interest’ will have a ‘processual meaning’<sup>44</sup>. The public interest is served when a basic requirement of shared justice is achieved, namely when each has an equal right to pursue their notion of the good within a dialogical process that tracks the interest of all concerned. The assumption is that the outcomes of this dialogical process, due to their inclusiveness, will serve the public interest. There is no a priori notion of outcomes that set the standard for the common good beyond those that constitute the principles of procedural fairness. This understanding of the public interest is similar to Cicero’s notion of ‘*utilitas communione*. Cicero wrote, “A commonwealth.... is not a collection of human beings brought together in any sort of way, but an assemblage of people in large numbers associated in an agreement with respect to justice and a partnership for the common good.”<sup>45</sup>

What is also exposed is how Pettit’s consequentialist republicanism is based on an empiricist account of rationality. Rationality does not concern itself with ends, but rather on the proper ordering of the deliberation that takes place in order to decide on what those ends will be. This notion of rationality is in the Humean tradition where irrationality is only a failure of the belief *formulating* process, not a failure of the actions one decides to take or the sort of ends we pursue<sup>46</sup>. We cannot be irrational about the desires we have for particular ends, and the role of civil engagement with others within a contestatory process will be an attempt to seek a conciliatory result

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<sup>42</sup> Ibid.

<sup>43</sup> See also Galston (1991) and Spragens (1981), (1990).

<sup>44</sup> See Mansbridge (1983) for this term.

<sup>45</sup> See De Republica I 25.in Zetzel, J (1999)

<sup>46</sup> Assuming of course that one is not acting involuntarily against one’s beliefs e.g. in an hypnotic state.

between the conflicting expectations about ends. There is no explicit rational critique of ends.

### 3.4 Dagger's Republicanism and Political Civility

Pettit is not the only republican to take a procedure-based standpoint with relation to civility. Richard Dagger offers an account of civil union where we ought to respect others because in doing so we protect the autonomous status of individuals. Dagger is concerned about the detrimental effects of a society where the relations and discourses between individuals, and individuals and the state are based largely on 'rights talk'. His concern is that such a society becomes insular and ignores those conditions or outcomes that are in the common interest of all. Dagger does not deny the importance of rights for individuals, but he wishes to bring rights back into a close relationship with the notions of civility and autonomy as a way of maintaining a concern for the public, and not just the private, good. Having rights, for Dagger, provides the framework for one's autonomy, but one cannot be autonomous unless one recognises and respects the crucial bonds that make such a liberal polity possible.

The nature of the civil union between individuals and the state is, for Dagger, constituted by a manner of behaviour that upholds these crucial bonds which preserve individual autonomy. Civility, as with Pettit, is a role-related concept where certain excellences will enhance the ability to be publicly-spirited citizens, and in so doing respects the rights of all to maintain their own sense of autonomy. Dagger holds that if the common good is taken to be nothing more than the maintenance of 'cooperation, social cohesion and solidarity' and the preservation of each individual's right to self-determination, then each individual has good reason to see that autonomy is not a private good but is instead a part of a cooperative enterprise.

Take for example, Dagger asks us, a situation where society is corrupt. In such a society private interest dominates the public realm. Here there can be no equal or effective development of autonomy or self-determination for all. Corruption or factional

dominance makes each of us dependent on the whims of those with the power to influence outcomes in society. One cannot be self-ruling or self-determining if there is widespread factional dominance that pursues only the private interests of its members. This is why one should seek to participate on a public level; to endorse public activity so as to avoid creating the conditions for corruption. Dagger writes, “Thus the autonomous person has a reason to exhibit civic virtue, at least when the community or polity as a whole plays a significant part in fostering personal autonomy.”<sup>47</sup> Civil union then for Dagger, as with Pettit, is a prudential matter. Dagger quotes Rousseau on the citizen’s motivation to civility, “He loves virtue, unquestionably, but he loves it in others because he hopes to profit from it.”<sup>48</sup>

It’s also important to note that Dagger’s account of civil union is non-perfectionist<sup>49</sup>. A perfectionist ideal would demand that a polity “attempt to maximize some form of human excellence of virtue”. But Dagger disassociates himself from this. He holds that there is no universal “yardstick against which every effort is to me measured.” Instead, all that a liberal republic does is “aim to promote the civic virtues that enhance the individual’s ability to lead a self-governed life as a cooperating member of a political society.”<sup>50</sup> It’s interesting to note here that Dagger adopts some of Rousseau’s thinking in articulating his notion of civility. But there is an important difference that is worth noting. Rousseau did have in mind the idea that civic participation would inform individuals about their ‘real natures’.

Dagger does not go into great detail about how decision making processes work in a liberal republic so as to ensure that the rights of autonomy and self-determination are protected for all. He does make a general commitment to deliberative democracy and sees a place for civic participation through the means of ‘town meeting and neighbourhood assemblies.’<sup>51</sup> He states that campaign finance restrictions, deliberative opinion polling, the restriction of wealth disparities and interest group dominance, power decentralization, compulsory voting, the fostering of civic virtue in the arts,

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<sup>47</sup> See Dagger, R (1997) p. 17.

<sup>48</sup> Rousseau (1960) p. 24.

<sup>49</sup> Dagger, R (1997) p. 194.

<sup>50</sup> Ibid. p. 195.

<sup>51</sup> Ibid. p. 152.



media, workplace, voluntary associations and the like would assist in empowering people's autonomy and, hence, their level of well-being<sup>52</sup>. Not only can autonomy be promoted by cultivating civic virtue at the societal level, it can also be served by improving the civic relations between state officials and the general public. Dagger mentions the nature of engagement between citizens and municipal officials, school principals, teachers, etc<sup>53</sup>. However, little is said about how the state itself could adapt its institutional practices and public training of officials to make such deliberation effective among the citizenry.

### 3.5 Sandel's Republicanism and Political Civility

Michael Sandel is a republican whose notion of civil union is not of the communicative or procedural kind. Firstly, Sandel is suspicious of liberal proceduralism<sup>54</sup>. The liberal positioning of 'justice, fairness, and individual rights for all' admits of a neutralism that ignores, for Sandel, important social or societal goals. The liberal notion of a just or civil society is, according to Sandel, one that does not specify certain ends crucial to the nature of the particular polity in which they are set. He only demands that each has a right to pursue their own interests with the obligation to respect the rights of others.

Sandel identifies the following assumption behind this neutral proceduralism. It is that we are each identified as unencumbered ends in ourselves. We each have, the assumption goes, the capacity to exercise choice about who we are to become; a capacity to choose and an expectation about choice that exists independently from our historical or traditional realities. "For the unencumbered self, what matters above all, what is most central to our personhood, are not the ends we choose but our capacity to choose them."<sup>55</sup>

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<sup>52</sup> See *ibid* for the notion of autonomy p.191.

<sup>53</sup> *Ibid* p. 199.

<sup>54</sup> See Sandel (1996) in Goodin, R.E and Pettit, P(eds) (1997).

<sup>55</sup> Sandel (1984b) p. 250.

What is required, Sandel argues, to make republicanism a more accurate or coherent account of who people are and what sort of decisions they ought to make, is a recognition that the self is an 'incumbered' entity. The self, in other words, is an entity embedded in a community and has certain obligations to reinforce the social bonds that make her/him what she/he is. In addition, Sandel, like Dagger, offers an account of civil union based on autonomy, or what the former terms as self-government.

The account of self-governance that Sandel presents is one that takes place within a communitarian context. First of all, we each need to recognize the context in which we are to govern ourselves. We each need to recognize a social fact about ourselves, namely that a political community is more than a mechanism for administering the rules of impartial justice. Rather, a political community is a community with a shared history and with a shared commitment to maintaining the norms that have made the society what it is. The robust social and cultural forces that last the test of time in a community are those that, due to their durability and longevity, require respect and protection within a republican polity.

I interpret Sandel's theory in such a way here to conclude that the state is civil, and individuals are civil to each other, when they make their decisions with respect to these communitarian facts. The state needs to maintain a 'political economy of citizenship' through which it fosters for each individual an ability to govern themselves with respect to their communitarian identity. What is more, the state needs to ensure that economic arrangements do not damage this communitarian identity<sup>56</sup>. Sandel holds that republican government cannot stand in isolation from individuals with no concern for the development of their civic abilities. Instead, it has to assist in promoting such abilities in the name of overall welfare.

What are some examples of the crucial communitarian bonds that serve as the framework for self-government? To show this I think it is important to set out exactly what Sandel means by communitarian here. There are two senses of communitarianism. The first sense of communitarianism is one where there is a recognition of the unique

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<sup>56</sup> See Sandal (1996) p. 124.

facts that make a society what it is culturally. For example, national heritage, indigenous music, national employment, family and marital fidelity, respecting parenthood in the law, self-employment. etc<sup>57</sup>. In Australia and New Zealand there is a strong concern to preserve national identity in arts, film, literature, architecture, and the like. A communitarian would argue that in order for members of these states to be autonomous they must be inculcated in the values and traditions that make up their unique cultural identity. Therefore, the state must protect and promote these areas of our lives. So, such things as property-rights restrictions on national heritage sites and buildings is required; there would need to be opposition to the dangers of free trade agreements on national identity and national quotas, public ownership of certain forms of media would be required.

Secondly, there is the sense of communitarianism that holds that there are facts that need to be adhered to if communities are going to function effectively (this need not take on the special character of the particular community). Sandel writes here of the socio-economic conditions of citizenship. For example, that citizens must be free from the stresses of life so as to be active and take part in public duties<sup>58</sup>. This means that work or labour would be progressive or that citizens should be protected from working conditions that are detrimental to the cognitive and psychological capacities required for citizenship<sup>59</sup>, be protected from the detrimental forces of deceptive advertising<sup>60</sup>, enjoy an environment of decentralized economic power free from monopolistic influence<sup>61</sup>.

It's important to note the sense in which Sandel justifies these provisions for the protection of self-determination for the individual. Self-determination is valuable or is owed to persons on the basis that it serves an established national or communitarian purpose. We are, factually speaking, members of a community that lives out its identity—its identity is not formed solely by formal rights. We are members of a community whereby each individual shares its destiny.

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<sup>57</sup> Ibid. pp.338-349.

<sup>58</sup> Ibid. p. 191.

<sup>59</sup> Ibid. p. 170

<sup>60</sup> Ibid. p. 222

<sup>61</sup> Ibid. p. 212.

### 3.6 Sunstein's Republicanism: the Rule of Law and Political Civility.

I conclude this section on civility and republicanism with an overview of Cass Sunstein's position on the nature of the principled stance that the state should take towards citizens, and that which citizens should take between themselves. Sunstein's notion of this stance takes place largely within the framework of the rule of law. I will set out the extent to which Sunstein equates civil union with good legal procedure. The principled stance we ought to take towards each other is not determined first and foremost, in Sunstein's republicanism, by facts about persons, social facts about pluralism or the intrinsic value of our autonomy. Rather such a principled stance is guided by certain legal and constitutional facts.

Before looking at Sunstein's legalism, I want to set out the sense in which we can call Sunstein a republican. For Sunstein, it is a requirement that each individual possesses political rights. What is more, it is vital that these political rights are held equally by all. The reason why we owe individuals these rights is that they control and limit governmental power. In other words, as with all the republican theorists, civil empowerment is of value in that it contributes to our political freedom. Sunstein highlights certain prescriptions required to reach legitimate outcomes in a republican polity. Generally speaking, in the spirit of civility as social capital, deliberative process must formulate preferences in the public interest. The way this can be done is by legal processes and background norms that interpreters of statute should adopt<sup>62</sup>. Sunstein assumes that the norms, which he accepts are relative to time and place, lead us to promote deliberative government<sup>63</sup>. What justifies this is what can be identified in constitutional sources as evidence supporting the pursuance of deliberative engagement. The separation of powers, for example, implies deliberation and openness. They are guides to interpretation of statute and to how government agencies should think about

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<sup>62</sup> See Sunstein (1990) p. 160.

<sup>63</sup> Ibid. p. 161.

their constitutional role. But they are only guidelines that should be used when interpretation is called for<sup>64</sup>.

For Sunstein there are constitutional facts that can be drawn upon to formulate constitutional principles. These principles in turn inform the judiciary of certain interpretative norms. Let me cover briefly what these constitutional principles are and the norms they imply. Sunstein holds that the following are constitutional principles that we can derive from the nature of the US constitution. The constitution is inherently deliberative thus it implies the interpretive, judicial norm of enhancing and protecting deliberative processes. The idea here is that the constitution is inherently opposed to the dominance of a private interests determining the lives of the public. What interests there are in society, held by those who hold legitimate authority or those outside of this, needs to be checked or held accountable. This implies the interpretive norms of authorising judicial reviews over power holders<sup>65</sup>, avoiding the empowerment of the politically unaccountable to make important decisions that affect the public<sup>66</sup>, all reasons expressed by the legitimate power holders must be done so in a public-regarding way<sup>67</sup>.

Sunstein's assumption appears to be that people acting in concert through the law is the best way of ensuring that all lead 'satisfying lives'. For example, judges have implemented the 'aggressive statutory construction' principle via their rulings on social welfare. In the 1950's welfare support for children was tied to the condition that paternity was established. Benefits were terminated to mothers if they failed to support the process of determining the paternity of the child. The courts ruled that the congressional legislation did not intend to leave the needy child without any means of subsistence if the mother was unwilling to name the father". The court ruled that if this were intended, the congressional legislation would have explicitly accounted for it. Even though in this case the court turned to legislative intention in making its decision, it certainly privileged the needs of the vulnerable—in this case the children<sup>68</sup>.

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<sup>64</sup> Ibid. p. 161.

<sup>65</sup> See Sunstein (1990).

<sup>66</sup> Ibid. p. 170.

<sup>67</sup> See Sunstein (1993) p. 17.

<sup>68</sup> See Melnick (1994) p. 98.

There is no coherent account of what it means to live a ‘satisfying life’ under Sunstein’s republicanism; no explicit moral principle that can guide official state action. The only provisions we know are those gained indirectly by legal interpretation, and those that result from effective, equal and deliberative processes.

Before closing this section on Sunstein’s republicanism I will cover one aspect that he addresses to do with the notion of welfare. Sunstein holds that there are interpretive norms that can be derived from constitutional facts that favour the promotion of welfare or well-being for persons. Sunstein holds that a republic caters for human well-being based on this constitutional source. Here is how the argument goes.

Sunstein holds that we can derive from the constitution a principle of impermissible ends<sup>69</sup>. The constitution informs us of what ends are impermissible to persons. We have seen already that ends that are contrary to the spirit of the public concern or deliberative democracy are impermissible due to the favour they could give to the influence of private interests. But this has further implications. Underlying this is an assumption about political equality—namely that all citizens are entitled to equal protection under the law. What does equal protection imply? It implies equal protection of basic or minimal levels of well-being; or what Sunstein calls a right to be free from a state of desperation<sup>70</sup>. Sunstein informs us that this is why property rights are justified common law rights granted by the judiciary to the citizenry. People are assisted in securing their well-being by possess the rights to private property ownership.

What is more, it is assumed that freedom from subjection to private interests is crucial for well-being, and hence the ability to participate effectively in a deliberative democracy is equally as crucial for one’s overall freedom from dependence and desperation. One is more likely, the assumption goes, to maintain one’s basic interest in being free from despair if one is empowered with the skills of citizenship. Sunstein holds that there are states of human existence that are inherently inimical to the exercise

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<sup>69</sup>Ibid p.31.

<sup>70</sup>Ibid. p. 137.

of good citizenship, and hence can be constitutive of the interpretive norms that the judiciary adopts. Such states of existence are addictive behaviour, freedom from ill-health and unsatisfying lives, having a good education, adequate and secured supply of food, shelter, and medical care<sup>71</sup>.

It is important to reinforce the idea here that Sunstein's understanding of the principled stance that state officials ought to take towards the citizenry—the civility owed to citizens that derives from constitutional principles—has value in so far as it serving a civic function. The well-being of persons, in other words, matters to the state because it serves the civic function of citizenship and a cohesive political order for all. The state is also expected to draw upon such constitutional principles—especially with respect to its institutional functions in the area of a respect for deliberative democracy. However, there is a sense in which the state is not as closely tied with the constitutional principles as the judiciary given that the latter is meant to act as a check on the former.

## SUMMARY

In this chapter I have set out the nature of civil union between individuals, groups and the state as presented by republican theory. The nature of this union is significantly different in part to that encountered in the previous chapter covering liberalism, although there are points of overlap in terms of the respect for law and the need to avoid arbitrary coercion. I have focused on modern conceptions of republicanism in particular in the form of the theoretical standpoints presented by Pettit, Dagger, Sandel and Sunstein. All are republican in the sense of acknowledging that the normative principles guiding the relations in a polity must recognize the inherent social context of individual and group identity. There needs to be for republicans, in other words, a strong recognition of the role that the 'common good' plays in determining the normative parameters that demarcate the extent of private enterprise. Not only this, but each of us in our private lives is obligated to acknowledge certain public duties and exemplify a respect for the common good.

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<sup>71</sup> Ibid.. P. 137

The nature of civil union for Pettit is determined by the overriding goal of realizing a sufficient amount of non-domination for all. This is achieved primarily, for Pettit, through structural equality within a political domain that is institutionally or procedurally geared to track the interests of all. The latter is to be done through the processes of law and contestatory democracy. Such processes track the interests of citizens with the support of open and deliberative engagement between the state and the relevant parties to the state policies under consideration. All parties in a polity come together under clear and fair rules of engagement to share ideas and express viewpoints so as to produce outcomes that are in the interests of all. Each participant in this process can be expected to exemplify civic virtue on the basis that it will pay-off them by promoting their enjoyment of non-domination.

The notion of civil union for Dagger is founded on the basis that it is a necessary condition for the achievement of self-determination for all. The best distribution of self-determination for all cannot be achieved in isolation, and all must recognise their obligation to seek self-determination in a way that is consistent with the public good (or in terms of the general goal of the right to equal self-determination for all). This understanding of civil union lies also at the core of Sandel's republican theory. For Sandel, civil union must take place on the basis that it enables self-government for all. To be self-governing, according to Sandel, one must know the nature of 'the self' in terms of its communitarian origins. Who we are as individuals is determined in large part by historical and cultural forces unique to our shared history with others. The civil bonds that bind individuals and the state, therefore, must be of the kind that preserve and enhance our communitarian identity.

Sunstein's republicanism, I showed, also places emphasis on the ideal of the self its subjection to a social context. The nature of the civil union between individuals and the state in a polity, for Sunstein, is based on certain legal realities. From the law, and constitutional law in particular, we can derive normative principles that inform us of the nature of civil union. From an observation of robust legal practices we can acquire



certain normative principles, such as the requirements of deliberative engagement, respect for law, equal protection, property rights, and the like.

What this chapter has shown is that republicans are united on the basic theme of closely linking the private realm with the public. Along with the theoretical commitments of liberalism, republicanism has played a prominent role in formation of western political theory. The chapters that follow are made in response to the points covered so far that have established such dominance. The next chapter presents a critical response to the general assumptions underlying some of the key aspects of liberal and republican notions of political civility. By questioning these assumptions I will create the opportunity to explore a different way of justifying our civil relations in a political context.

## 4. PROBLEMS WITH CIVIL PROCEDURALISM

Liberalism and republicanism are united on the view that the state exists as a neutral institution that imparts impersonal goods upon all equally. For liberals, the impersonal good of non-interference for all is imparted by the neutral state; for republicans, the impersonal goods of non-domination and autonomy. In this chapter, I challenge the notion that the state limits itself to the role of distributing such impersonal goods equally to all. By questioning the assumption that it does, I will bring the liberal and republican trust in civic proceduralism under question. Under this notion of trust, shared outcomes amenable to the interests of all are expected as the result of fair and just decision-making procedures between the state and the citizens. But if the state itself is a partial operator in the polity, and not a neutral or impartial one, then we can question whether the outcomes of ‘fair’ procedures sufficiently cater for the tracking of the real or essential interests of all. Liberalism, I argue, is better placed than republicanism to respond to this fear of procedural partiality. Liberals explicitly uphold welfare rights in the face of concerns about state partiality. I argue that republicanism does not offer a sufficient response to such a concern.

### 4.1 Challenging Classical Pluralism.

The idea of political civility as a form of social capital, and its operation within the public realm, is based on the expectation that reasoned engagement between the various groupings in society will produce outcomes agreeable to all. Each will have a reason to endorse the outcomes of a dialogical process due to the neutral rules of reasoned engagement that all participants deliberate within in order to reach such outcomes. If decision processes are transparent, allow the free flow of information, are fair and known by all, then the outcomes that result will be acceptable and legitimate.

This idea is based on the theory of classical pluralism. Pluralists hold that the state should seek the unitary ideal of ‘goal consensus, the harmony of interests, and the

implementation of power as a neutral and positive force.”<sup>1</sup> Citizens come together with the state and “interact with potential synergetic outcomes.”<sup>2</sup> The force of reason is expected to be a great unifying and equalizing force among the different members and powerholders within a society. Pettit writes, the attraction of the process of contestation is that it is open to anyone who can make a general case against the line of public decision making; you do not have to have any particular weight or power, at least not in principle, in order to be able to mount a reasonable challenge to a reasoned decision.”<sup>3</sup> The state’s role, it is expected, is to facilitate the debating process to ensure that the force of argument prevails and not the force of economic clout or political advantage. It is the “accepted canons of reasoning”<sup>4</sup> that ensure that all participants in a contestatory democracy are focused on what we have good reason to deem as the essential interest of person. Two contesting parties, for example, may want different outcomes, yet both will be expected to see the value of agreeing to an outcomes that shares the interest of both.

Pluralists may agree that it is idealistic to believe that all individuals and groups in a society have equal structural capacity to influence the policy formation processes of the state and its institutions, but they do assume that all groups and individuals will have a roughly equal capacity to at least raise their voices in protest when they come across a policy proposal that they see as contrary or detrimental to their interests. Pluralists reject the idea that such a process of contestation is inhibited by the disparities of wealth and influence in society. Mulgan, for example, argues that there is no evidence of a unitary power elite that effectively controls the decision making processes of the state nor overwhelmingly influences outcomes for their own benefit.<sup>5</sup> He argues that instead of united power elites in society inflicting structural dominance, there is rather a ‘heterogeneous network’ of power holders. He asks us to consider the diversity of business interests such as the tensions between the interests of the primary and tertiary sectors; owners versus investors; importers versus exporters, and small business and corporations on issues such as tariff protection.

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<sup>1</sup> See Rawls (1993) pp. 218.

<sup>2</sup> See Giddens: *The Constitution of Society in Chua*. Critical Perspectives on Management Control.

<sup>3</sup> See Pettit. (1997) p. 188.

<sup>4</sup> Ibid.

<sup>5</sup> See Mulgan (1997).

Both liberalism and republicanism are based on this idea of classical pluralism. Both assume that social reality is deeply divided along the lines of conceptions of the good life, ethnic identity, religious belief, economic and class interests, historical origins, natural abilities, and political beliefs. Such divisions lie across all individuals and groups in a polity. The way to respond to this social reality, for both liberals and republicans, is to create a decision-making process that is inclusive of all parties while at the same time retaining the rights of individuals and groups to autonomy. The value of this delicate balance between inclusiveness and individual and group autonomy for both idioms can be seen in their united opposition to what we might term 'unitarist rule'. A unitarist polity would be one where there was a single authority that exercised the authoritative use of coercion over all without the latter being included in deciding which policy or goals should be enacted, and without the latter holding any rights to protection from authority. For example, a unitarist authority might one composed of an ethnic or religious elite implementing coercion over the members of a polity according to traditional ethnic law or religious doctrine.

Is the pluralist explanation of the effectiveness of dialogical networks, and the ineffectiveness of power differentials to unfairly influence outcomes, plausible? Schattschneider writes, "The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upperclass accent."<sup>6</sup> The wealthy and well-resourced members of society can use their qualifications and backgrounds to engage more effectively with social and political institutions than those less well resourced<sup>7</sup>. Think of professional unions or associations, such as the Medical Association or Teachers' Union, and how effectively they can engage with the state in pursuit of their interests. A rubbish collector or sewerage plant worker offers just as important skills to the public welfare yet does not get the same benefits as those better able to use their resources for their own interests<sup>8</sup>. How effective are low wage workers in contesting the wage and salary earnings of professional groups?

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<sup>6</sup> Schattschneider, E (1975) p. 35.

<sup>7</sup> See Mulgan (1997) p. 137-138.

<sup>8</sup> See Kariel, (1961); Lovi (1969); Bachrach, P (1967); and Reisman, D (1955).

Decision-making and bureaucratic workings are complex and multi-layered and the ability of one sector of society to contest another is affected by this. Contestatory networks favour the interest of organized and easily identifiable groups in society. Unorganised social groupings such as patients or airline passengers, for example, have essential interests. Yet it is more difficult for them to unite into a single voice of reason to put their case against the established power structures of pharmaceutical companies and airlines respectively. Lindblom argues that there will be “gains for union labour at the expense of non-union, gains for organized agriculture at the expense of smaller unorganised farms, or gains for producer groups at the expense of consumers<sup>9</sup>. Lindblom writes, “every organized interest will take at least some of its gains at the expense of “unrepresented millions at the bottom of each natural economic grouping.”<sup>10</sup>

Think of other ways in which economic inequalities affect the capacity that people have to engage with the state. There will be a bias in favour of those with connections to the workings of the state, and a disadvantage to those external to such operations. Take, for example, employment flow between the private and public sectors and the overlap of skills that make communication between these two sectors compatible. Jane Kelsey reminds us that those outside ‘the system’ face a series of practical hurdles. They need to know, she writes, that “a Bill has been introduced; be able to locate a copy; read and understand its legalese; and find the human, financial and information resources to prepare a submission in time to meet an often impossibly tight deadline.”<sup>11</sup>

Kelsey also reminds us that the process of contestation in the form of appearing before a select committee will often be merely a perfunctory process. A short meeting by a citizen with the “Bill’s originators who have already been through extensive negotiations with the economic and political power interest behind it will have little effect. Even if the views expressed by the public do resonate, there is no guarantee they will be implemented given that higher tactical political manoeuvring with relation to the

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<sup>9</sup> See Lindblom (1993) p. 141.

<sup>10</sup> Ibid. See also Johnson (1968). Here Johnson covers the problem of elite domination by contesting groups in a pluralistic mechanism, namely that groups come to dominate individuals. “.... equal rights for groups implies the grossest inequality of rights for individuals.” See also Dahl and Lindblom, (1953) pp. 504-5.

<sup>11</sup> Kelsey (1993). p. 167.

Bill and where it stands in the political climate won't later or dismiss it."<sup>12</sup> There is also a palpable advantage for those interest groups that engage with the state frequently as opposed to those who occasionally or rarely do so<sup>13</sup>.

There may also be psychological restrictions on people's ability to access the procedures of a contestatory democracy. Think of those who do not feel comfortable or competent enough to express themselves in such a forum, maybe coming from a background where activism is treated with suspicion and disapproval from their support network (e.g. spouse, family, workplace). Or think of the student that is being sexually harassed by a lecturer. There may be formal structures of contestation in place to respond to this wrongdoing but the lecturer may be able to pull the weight of her/his position behind her/him to make contestation unpleasant and unfeasible for the student, and that the prospect of a student working in a workplace environment after such contestation may be unattractive to that student. If contestatory processes are going to favour one personality type or skill-base over another then it is important to acknowledge this and review our assessment of the legitimacy-function of such a process. The value of such processes may be publicly symbolic—knowing that one has the right to contest if one wishes---but it is worth considering the more practical aspects of such a system and the extent to which it delivers the ideals it promises.

#### 4.1.2 The State and Political Economy.

Pluralists believe that the state is a neutral referee between the competing interests in society. The state's role is to facilitate fair and reasonable forms of dialogical engagement where only relevant facts are considered and transparent and mutually agreed decisions are made. An objection to this view holds that the state itself has interests and purposes of its own that favour some worldviews over others<sup>14</sup>, namely the

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<sup>12</sup> Ibid.

<sup>13</sup> See Galanter (1974) for the difference in effective influence between those who engage on a frequent and regular basis with the state, and what he calls the 'one-shotter' or those who are only likely to do so once. See also Galtner (1983).

<sup>14</sup> For the idea that this is the nature of state institutional power see Lukes on the mobilization of bias in such organizations. Lukes, S (1974) See also Bachrach, P and Baratz, M.S (1970)

view of the importance of economic growth and advancement. Under such a view it is argued that state power itself is dependent on the process of capital accumulation that provides the state with revenue<sup>15</sup>. This revenue recirculates to produce conditions conducive to the effective operations of a capitalist economy. Foucault calls such relations “discursive formations.” They are “historically situated fields of knowledge that a state uses to reproduce itself with and protect its established interest.” Such formations will influence the state’s position on what counts as reasonable in dialogical exchanges between competing interest groups; what counts as a reasonable discussion of welfare, safety, health, etc. Foucault writes of the domination that occurs within such state functions. His attack takes place on two levels. The first is to do with the role of knowledge and language. States will always take up the position of establishing epistemic authority in its institutional dealings with citizens<sup>16</sup>. The state, for example, in laying down and implementing the rules of neutral procedures can’t help but take a partial standpoint on what is to be considered as normal or abnormal belief; what counts as an acceptable form of engagement and what does not. The state will take a position on what is to count as a salient and serious concern to be pursued, and what does not<sup>17</sup>.

It is important to note the importance of this geneological investigation into the nature of interests in a deliberative polity. Foucault argues that “the art of government.... is essentially concerned with answering the question of how to introduce economy...the correct manner of managing individuals, goods and wealth within the family...the welfare of population, the improvement of its condition, the increase of wealth, longevity, health, etc.<sup>18</sup> He adds, “the core categories of civil society—law, rights, autonomy, subjectivity, publicity, plurality, the social, show that.... far from articulating the limits to domination, they are instead its supporters.”<sup>19</sup>

What evidence is there that the state is partial in the way that Foucault suggests, and not merely a neutral referee facilitating the fair processes of dialogical engagement? Doubts about the plausibility of such neutrality are strong in the literature. Walzer holds that

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<sup>15</sup> See Offe, C and Ronge (1975) p. 250. See also Giddens and Held (1982).

<sup>16</sup> See Cutting (1994) for this term.

<sup>17</sup> See Dreyfus and Rainbow (1983).

<sup>18</sup> See Burchell (1991) p. 103.

<sup>19</sup> Ibid.

the state is a traditional artifice of entrenched power structures, and it has to “interface with a capitalist economy and operate in a culture where money is effectively a dominant good, transmutable into political power and social influence.”<sup>20</sup> Walzer points at the imbalance of influence in relation between the state and the public when he adds, “In the eyes of government officials, therefore, businessmen do not appear simply as the representatives of interest groups do. They appear as functionaries performing functions that government officials regard as indispensable.”<sup>21</sup> “The interests of the state are linked with the interest of economic elites in ways in which the state is not linked with each citizen. Consequently, government officials cannot be indifferent to how well business performs its functions. Depression, inflations, or other economic distress can bring down a government. A major function of government...is to see to it that businessmen perform their tasks.”<sup>22</sup>

Dryzek locates the problem by stating, “States in capitalist economies are becoming less democratic to the extent that public policy becomes dictated by the need to compete and flourish in the transnational political economy.... public policy is constrained by fear of upsetting actual or potential investors.”<sup>23</sup> Dryzek goes on to state that government and the business sector live in an interdependent relation to each other. The state protects private property and upholds a stable currency on the global scale, and the capitalist sector provides investment and production, which in turn increases national wealth<sup>24</sup>.

Lindholm refers to the notion of polyarchical constitutionalism and the idea that people with power and authority can have, over and above the formal rules of institutional engagement, access to informal power networks that enable them to get what they want. Lindholm refers to this informal feature of institutional practice “extended use”. For example, Lindholm gives the example of an incumbent congressman who can use her/his authority to acquire campaign funds that others in society find very hard to acquire<sup>25</sup>.

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<sup>20</sup> Walzer (1983) p..10.

<sup>21</sup> *ibid.*

<sup>22</sup> *ibid.*

<sup>23</sup> Dryzek, J (1996) p. 3.

<sup>24</sup> *Ibid.* pp. 24-26.

<sup>25</sup> See Lindblom (1993) p. 141 for this point about the collusion of elites. See also Presthus, R (1964), and MacPherson, C.B (1971).



Let me give some more examples of the points just raised about the power differentials in a democracy. Look at the collusion between the military and the private sector. The state has an interest in securing the private interests of technology producing companies that give it greater power militarily. Think of the way the state takes it upon itself to further the quality of trade relations for its exporters. The state also supports and implements universalised production standards that add operating costs to business which, in turn, tends to hinder the viability of diverse and small business development.

The prominence of the ideology of political economy is seen in the way the public service has adapted in some places. Jane Kelsey maps how the ideologies of private business came to significantly influence public sector strategies and goals in New Zealand in the 1980s<sup>26</sup>. She points to how the public sector ethos transformed into one that sought a balance between profit-making and public service delivery. The interest of citizens were placed in the hands of state-owned enterprises that were given their brief, through statutes such as the Public Finance Act, to return a profit to their shareholders—the state. Ministers of the Crown and chief executives drew up performance agreements or corporate plans that specified the outputs that were to be attained over the financial year<sup>27</sup>.

The chief executive acquired the responsibility for the employment of her/his staff. This effectively gave the chief executive the power to employ officials best suited to meeting the goals of the corporate plan. It was prudent, therefore, for executives to bring in workers of a more corporate mind. This altered the institutional environment in which policy formation took place, and changed the way the interest of citizens were catered for in New Zealand society<sup>28</sup>. Kelsey argues that these reforms had detrimental effects on the functioning of a deliberative democracy. There were still official processes of contestation in place, but the wider political realities meant, Kelsey argues, that the state

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<sup>26</sup> See Kelsey (1993).

<sup>27</sup> *Ibid.* p. 61.

<sup>28</sup> *Ibid.*

Treasury had a significant influence on what policy directions a government department should take<sup>29</sup>.

#### 4.1.3 Challenging Neutrality

The practical concerns I have raised above about the presence of power differentials in deliberative processes should concern those who place great faith in civil proceduralism. There is little coverage in the literature on republican political theory on the presence of such problems. It's important to note how such practical realities can influence the way that the 'neutral rules of dialogical engagement' work in a deliberative process. It is important to see the affects that power differentials could have here as so much of social capitalism rests on a faith in such processes.

Think of the culturally determined value assumptions that can be said to lie behind the "neutral rules of engagement in a dialogical process." There will be cultural assumptions about how long the dialogue should proceed before a decision is made, how long each person can speak, who gets to speak, what language is used and what form the expression should take. Such norms are value-laden and in a liberal democracy will be constructed in relation to the pressing needs of economic interest.

Take some of the other rationality norms. Take the determination of what is to be understood as transparent proceedings with a free flow of information and a consideration of relevant issue only. A liberal democracy in a corporate context will favour certain exceptions to these norms over other considerations<sup>30</sup>. For example, the protection of commercially sensitive information for one or more of the contesting parties may be allowed by the state, or the acceptance or rejection of anecdotal evidence may be arbitrarily applied. Rulings on these matters will be justified by 'reason giving'—the state will remind deliberators about the importance of not threatening business stability by disclosing commercially sensitive information to the proceedings.

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<sup>29</sup> *ibid* Chapter four.

<sup>30</sup> See Dean (1991) p. 13.

It is important to note that the state has discretionary power here and there are the greater needs to commercial interest that the state serves.

I should make a point about the nature of my analysis in this section. There is a strong push in the literature towards the virtues of a deliberative democracy. But unless these ideas acknowledge the role played by informal and underlying forces of influence, then such a system can never be totally assured. If the state is, *de facto*, a partial entity as Walzer, Lindblom and others claim, then in what sense can we say that it fairly undertakes a neutral role in facilitating citizens towards shared outcomes? I do not dismiss the value of building a democracy that is more deliberative—non-arbitrary power must surely have greater pay-offs for people's security than a closed system of government. But it is important to assess the nature of such a system and to see whether it produces a morally optimal outcome. It's important to assess whether civility offers a sufficient account of our principled stance towards others. In particular, we should be concerned about the extent to which partial forces in a polity influence the processes undertaken in that society to track the interests of others.

I specially want to highlight the potentially conservative nature of a deliberative network. Pettit holds that civility is produced in large by the dictates of 'relevant parties' in society. He argues that such 'relevant parties' will establish the civility norms via their approval and disapproval. For example, Pettit adds, the 'relevant parties in society' will hold that civility requires us to demand that all parties in a republican state ought to see an obligation to contribute to a regime from which they benefit. Free-riding, in other words, will be deemed as an uncivil action. Pettit, however, is not clear on how these norms evolve or are generated, nor who the 'relevant parties' are who construct it. We can speculate that it is a norm that the entrenched power structures or stakeholders in a society—the intellectual and economic elites—endorse. This raises some discomfort with Pettit's account of civility. It is, I argue, an essentially conservative ideal if it takes this to be the way civility is generated in a society. It endorses a polity where the traditionally established groups will be most effective in maintaining their interest and confronting those that challenge them.

Iris Young challenges the ideal of a civic polity united by a neutral state<sup>31</sup>. Young argues that an objective or impartial standpoint for any form of moral, normative or political assessment is not possible. She holds that such assessments or forms of reasoning cannot be removed from the particularities of context and feeling<sup>32</sup>. What is more, Young holds that this assumption about impartiality, when used as a foundation for state power, produces negative consequences. For instance, power that is legitimised due to its impartiality nonetheless discriminates against and isolates others<sup>33</sup>. Young sets out how impartiality avoids matters of difference in society and seeks to create a unifying force. Young terms this process as the ‘depoliticalization’ of a society<sup>34</sup>. Such a process means that differences among the members of society are sidelined in favour of the state’s view of people as economic entities. Citizens are viewed not as people with distinct origins and experiences, but rather as abstract entities in the form of “taxpayers, health services consumers, parents, workers, residents of cities”<sup>35</sup>.

The categorization of people into economic abstracts enables the state, Young argues, to exercise power in accordance with the principles of welfare capitalism<sup>36</sup>. The latter assesses ‘welfare’ exclusively in relation to the furtherance of material life or the ‘growth imperative’<sup>37</sup>. The nature of the relationship between citizens and the state is one bound by the obligation of the latter to provide distributive justice to the former. The focus with such a relationship, Young argues, is with such economic issues as pay hours, benefits, and union rights rather than with a concern for work values, ultimate ends, and a critical analysis of the decision processes themselves. The welfare of citizens are determined by the needs of a capitalist society; one where the ends of economic growth determine the way the state treats its citizens.

Young holds, in addition, that welfare capitalism contributes to the hegemonic power of the state. State bureaucracy is rationalized in such a way to uphold a value system that favours exclusively the economic ends of society, and eliminates a concern for human

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<sup>31</sup> See Young (1990)

<sup>32</sup> *ibid* p. 102

<sup>33</sup> *ibid* p. 100

<sup>34</sup> *ibid.* p. 66

<sup>35</sup> *ibid.* p. 73

<sup>36</sup> *ibid.* Chapter 3.

<sup>37</sup> *Ibid.* p.71

needs<sup>38</sup>. Such things as the provision of education, the protection of the environment, and the regulation of lifestyles are rationalized in such a way as to produce outcomes commensurate with economic ends. Young holds that this way of conducting public affairs is too narrowly construed. It does not recognize, in her view, the influence that the origins of decision-making procedures plays on the way people are perceived and treated by the state<sup>39</sup>. Such a conception of state power implicitly ignores many facts of social existence that do not fit into economic models.

In order to rectify the partiality of state power Young offers the following solutions. She wishes to democratise many of the decision-making procedures of the state<sup>40</sup>. She holds that there needs to be institutional mechanisms through which citizens can engage with issues concerning their own ends and means. For example, decision-making should, in her view, become more locally orientated rather than conducted by a centralized bureaucracy. At the local level it is expected that there will be a greater capacity for the expression of diverse viewpoints, more services implemented and supplied by the people who are stakeholders, and a greater awareness by all of the varying needs held by people in different social and cultural contexts. By deconstructing public decision making in this way Young hopes that people will live more satisfying lives; lives that are regulated by decision-making structures that serve the ends that people perceive themselves rather than the narrowly construed economic ends of a welfare state<sup>41</sup>.

Participatory democracy is, for Young, the best way to overcome the partiality of state power and refocuses our concerns towards the basic human needs of all. In this sense Young shares the concerns I have raised in this chapter about state power. But it is worth briefly stating the difference between my position and Young's. Young seeks to demote the power of state bureaucracy in making decisions over the lives of citizens. However, my task in this thesis is to retain for the state a crucial role to play in decision-making procedures. I hold that the essential interests of people are best protected when they are dealt with to a large degree by public service professionals

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<sup>38</sup> *ibid.* pp. 74-76.

<sup>39</sup> *Ibid.* pp. 76-88.

<sup>40</sup> *Ibid.* pp. 81-88.

<sup>41</sup> *Ibid.* p. 91.

engaging appropriately with the relevant knowledge sectors in society. I do not deny that more inclusiveness is required to prevent people from feeling overwhelmed by state authorities, but I would not go as far as Young to decentralize decision-making itself to a local level. Even if this were to be done there would have to be provision, I hold, for the inclusion of professional and expert knowledge to ensure that the decisions made were done so with informed consent. I argue in this thesis that the state plays a crucial role in providing this informative and guiding information in the lives of its citizens.

Will Kymlicka offers another way in which the state can be structured so as to protect the interests of the oppressed, isolated and disadvantaged<sup>42</sup>. He offers this specifically to ethnic minorities that have lost their autonomy due to the dominance of majority forces. For example, majority groups tend to dominate over the control of resources in areas such as educational values, notions of the body, healing, health, immigration, land rights, language etc.<sup>43</sup> Kymlicka presents a liberal approach to minority rights by granting minorities certain group-based rights that seek to restore autonomy. He makes a distinction between group-based rights as internal and external protections<sup>44</sup>. A group-based right that constitutes an external protection for an ethnic minority is one that ensures that “the resources and institutions on which a minority depends are not vulnerable to majority decisions.”<sup>45</sup> In other words, external protections shield minority groups from majority domination by enabling the former to retain its identity and cultural resources. A group-based right that constitutes an internal protection for an ethnic minority is one that enables that minority to control or regulate exclusively the members of that group. Kymlicka holds that a liberal understanding of minority rights must only provide external protections for minority groups, and not internal protections. Internal protection is not granted to any groups in a liberal society. All members of a liberal order whether a part of ethnic majorities or minorities must possess, according to Kymlicka, the ability to review and revise their social situations<sup>46</sup>. On the other hand external protections can actually enhance autonomy. This is due, Kymlicka points out, to the fact that all individuals can only express their autonomy and free choices when

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<sup>42</sup> Kymlicka (1995).

<sup>43</sup> *Ibid.* p. 1.

<sup>44</sup> *Ibid.* Chapter 3.

<sup>45</sup> *Ibid.* p. 7.

<sup>46</sup> *Ibid.* p. 152.

grounded in their own societal culture and all the benefits that go with it<sup>47</sup>. By protecting a minority group's culture, a liberal state will also be upholding the societal culture that enables the individuals in that group to make informed decisions.

In addition to external protections, Kymlicka holds that ethnic minorities may need to have their autonomy enhanced by the provision of other collective rights. In this he includes such rights as the right to special representation in decision-making procedures or consultation programmes, a right to self-government, and such polyethnic rights such as the right to receive support and recognition in the areas of language development, art expression, educational needs, etc.<sup>48</sup> It is through the provision of external protections and polyethnic rights that we can see how Kymlicka provides a way of protecting the basic needs of ethnic minorities. The disadvantages and oppressions that many ethnic minorities face will be avoided if such minorities are given the freedom to flourish as social and cultural entities. These minorities will not enjoy internal protections, but they will retain their autonomy to shape their lives according to their own cultural identity. The crucial support networks that facilitate the crucial areas of life such as birth, marriage, work, food acquisition, death, etc will be maintained by the ethnic groups themselves free from external influence.

Kymlicka shares with Young a concern to protect the basic interests of all with a commitment to the need for participation on the part of those with a unique stake in those interests. Both are concerned with combating a centralized notion of state activity, and with enabling people to realise their interests in terms of outcomes that are consistent with their cultural identity. However, Kymlicka does not take an indepth look at the tensions that may result from an ethnic group expressing its autonomy and a liberal society upholding liberal rights. It is going to be a contentious issue, for example, if an ethnic view of biological sustenance and well-being is at odds with the liberal right to be free from harm. It is a difficult problem to overcome and any proposed solution to it needs to be sensitive to the complex and dynamic nature of the situation. However, I argue later in this thesis that the state, at the very least, ought to

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<sup>47</sup> Ibid. Chapter 4.

<sup>48</sup> Ibid. p. 37-38.

play an educational role in its relationship with the citizenry. Given that Kymlicka holds that all rational members of a liberal polity have a right to review and revise their life, I hold that there is room for an interconnection between my theory of essential interests and Kymlicka's work. My aim is to set out a notion of the state as an informative source of public authority with regards, inter alia, to matters concerning essential interests. This aim can link with Kymlicka's view that all members of a liberal polity, irrespective of ethnic membership, have a right to review and revise their lives. The theory of essential interests I set out in this thesis can cohere with this aspect of liberalism highlighted by Kymlicka.

#### 4.2 Liberalism and Welfarism

Has liberalism, as a political theory, reinforced itself to combat the contextual power inequalities prevalent in liberal and procedural democracies? It is a central concern of liberals to protect individuals and their status as autonomous beings from such coercion. The right of individuals to self-determination is held in high regard by all liberals. The way to provide the right of self-determination to individuals, however, has divided liberals. Some liberals adopt the negative strategy of realising self-determination for individuals merely by ensuring that they are free from coercion. Other liberals adopt the positive strategy of realising self-determination by holding that what is required is not merely that individuals have the opportunity, free from interference, to determine their own destiny, but that they also possess the ability to do so by the way of being empowered with the skills and resources to do so. It is a central concern of what I term welfare liberalism to protect individuals and their status as autonomous beings from such coercion. Welfare liberals acknowledge the forces of non-intentional hindrances that can be imparted on individuals such as the role played by misfortune, chance, luck, etc. Welfare liberals do not hold that freedom for individuals is the sole value of liberalism. In addition, they hold that other values such as equality, justice and welfare are of value to individuals because they promote their autonomy. Such liberals put faith in the state as a mechanism to regulate the distribution of resources so as to achieve such an outcome for all individuals.



What brought about this shift of concern within liberalism from classical or negative notions of self-determination to an understanding of welfare liberalism where the state's promotion and protection of individuality was not contrary to liberal principle? The main reason for this shift has been historical rather than metaphysical. It was the victimization of the ability of individualism to determine their own destinies in a rapidly changing, and often brutal, capitalist market system in the nineteenth and early twentieth century that initiated such a shift a liberal thinking. Bruce Ackerman indicates that the ideals of classical liberalism lived only in the political imagination of theorists, and it was the social realities of society that motivated a major re-think of the relationship between rational, self-determining individuals and the contextual sources of power that influenced their well-being<sup>49</sup>. It is one thing for individuals to be idealized as fully informed, autonomous rational beings choosing freely their own destinies in a way that is commensurate with enabling other individuals to do the same. Yet the realities of social and capitalist power, natural and constructed inequalities, and the forces of chance and luck that made some liberals more concerned not with the opportunity that individuals had to be autonomous, but with their ability to be autonomous and to fare well as members of a polity in doing so<sup>50</sup>.

The shift from classical liberalism to welfare liberalism can best be seen by the latter's adoption of a notion of distributive justice. Classical liberals justify distributions of resources on the basis of ownership rights and the right of each individual to freely consent to the terms of contract. In other words, the emphasis of classical liberal notions of justice is based on the notion of fair procedures of free choice for all. The distributions that result from such procedures are justified by virtue of their deriving from the appropriate origin. Welfare liberals, have taken the ethical assessment of distributions beyond this reductionist trust in fair procedure. Instead, welfare liberals have focused on ethical assumptions about human needs and the constitutive elements of individuality as a way of constructing an account of distributive justice. Under this account, taxation and the redistribution of wealth to the vulnerable and those in need is

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<sup>49</sup> See Ackerman (1980) Chapter 8.

<sup>50</sup> See Green, T.H. (1941), Hobhouse, L.T. (1922), Mill, J.S. (1882)(1936) and Dewey (1931) especially.

justified because it promotes the realization of individuality across populations. All individuals or rational and autonomous beings need good health, decent employment, acceptable housing, healthy living environments etc if they are to perform their role as individuals and pursue the good life. Welfare liberals, therefore, do not see taxation or wealth redistribution as violating the rights of individuals to the enjoyment of their private property or the fruits of their free choices and associations. There are specific features of individuals themselves that warrant the state to use its coercive powers to redistribute resources from the fortunate to the needy.

The provision of basic welfare for all in a world of potentially harmful forces has been expressed in more detailed form by the following liberals. For example, liberal egalitarians hold that liberal rights fit into two categories: non-interference rights and recipient rights<sup>51</sup>. The former are the liberal rights we are already familiar with--the rights not to be interfered with or coerced by the state in the areas of individual belief, association, speech, movement, ownership, etc. The latter, however, are rights that each deserves to have or receive in order to maintain individual welfare. They are not rights to be left alone, but rights to have one's welfare reach a minimal level of acceptability in the areas of education, health, housing, etc.

On what philosophical basis do liberal egalitarians add recipient rights to non-interference rights? Dworkin argues that such rights can be derived from the notion of equality. The state ought to have equal concern and respect for the lives of its citizens. This means that it ought to respect the rights of all citizens to commit to their own worldviews so long as in so doing it does not harm anyone else. But it also means that the state should not allow a liberal society to produce outcomes with grave inequities; where some through their own actions or through no fault of their own suffer under conditions of economic deprivation while others, for the same reasons, do not. Liberalism, Dworkin informs us, holds that all lives matter equally in the sense that no one's salient interest should be sacrificed for their own good in the long run, nor for the overall welfare of the majority<sup>52</sup>. All people in a liberal order are entitled to live a life

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<sup>51</sup> For this distinction see Gutmann (1983) pp. 25.

<sup>52</sup><sup>52</sup> *ibid.* p. 7.

that they consider, and which is considered reasonably, to be of value. The liberal notion of equality, therefore, holds under this account that individuals are entitled to more than an equal enjoyment of the rights of non-interference; they are, in addition entitled to live with self-respect. All are entitled to possess equally with others a life that is free from degradation, excessive sacrifice for the sake of others, and free from poverty that inhibits their functioning in a liberal order. However, Dworkin merely states equality in this sense and does not present an argument for it. He states that liberalism ought to deduce 'self-respect for all' from the notion of equality, but does not give us a substantive argument for why such a deduction is justified.

Bernard Williams' egalitarianism<sup>53</sup> gives us another account of reciprocity rights. For Williams, there are human needs that are essential for all to enjoy—the need for shelter, work, the absence of illness, etc<sup>54</sup>. Human sustenance is intuitively valuable to humans. This claim is justified on the basis of our common sense or ordinary language understanding of persons and their natures. What's more, the implications of such ordinary language intuitions have implications for the principles that ought to underlie our distributive commitments. Williams writes, "the proper ground of distribution of medical care is ill-health."<sup>55</sup>

Gutman points out that Williams' egalitarianism is committed to cultural relativism. She points out that the foundation of his egalitarianism is based on the shared moral assumptions of a community of believers rather than any inherent moral argument<sup>56</sup>. She points to the fact that a community of believers, or the determinants of ordinary language moral assumptions, could hold that the absence of ill-health is not an essential human need to which each individual is entitled. She points to Plato's point that the seriously ill carpenter does not deserve medical treatment because it is unlikely that we will, in the future, be able to apply his skills to the good of the polis. Human needs may exist but according to the cultural relativist view of egalitarianism it depends on the views of a community as to the degree to which such needs are valued in relation to

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<sup>53</sup>Williams is not overtly an egalitarian. He speaks of individual needs rather than collective, and Gutman (1980) links his egalitarianism with liberal theory.

<sup>54</sup> See Williams (1970) p. 127.

<sup>55</sup>ibid.

<sup>56</sup> Ibid. p. 106.

other, competing ideals. Should egalitarianism based on cultural relativism upset us? I argue that it should. Subjecting human needs to the vagaries of community belief is to deny humans the essential moral right to freedom from harm. Again, a theme I want to emphasise is that human needs are not of value with reference to the degree in which they fulfil civic goals; they are intrinsically valuable to humans and constitute a foundational theory of human dignity. But it is not only self-determination that matters, for those not capable of self-determination matter morally to us just as much. I develop this idea further in the next chapter.

The liberalism of John Rawls also has at its core a response to the unfair powers in social contexts. For Rawls, it is the arbitrary role played by such non-intentional forces as luck and fortune and how this impacts on human welfare that moves him to present his unique liberal theory of justice. We cannot, according to Rawls, accept a concept of justice that bases its distributions according to the workings of arbitrary forces such as natural talents or favourable contingencies. What we all need to observe is that each is subject to these forces equally, even though each is not affected in the same way by them. Rawls point is that those who possess good fortune and productive talents were no more responsible for acquiring these than are the people with less good fortune and unproductive talents<sup>57</sup>. This is why the veil of ignorance sits at the centre of Rawls' theory of justice. It removes knowledge of one's position in society and gauges what it would be rational to support as a system of justice if this were so. Also, because we all share equally in this subjection to fortune, no one can legitimately claim to own exclusively their own talents and the rewards earned from the exercise of those talents. A society is justified, therefore, in making claims on the private spheres of individuals. This is the basis on which Rawls derives the difference principle that holds that the people who have gained from good fortune can only do so on the basis that the benefits they possess are not held at the expense of those with less (and those who have in no way deserved less because of their own choices).

The liberal welfarism of John Stuart Mill is played out on two different levels. The first is that of protecting the individuality of persons against social and traditional forces.

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<sup>57</sup> See Rawls (1971) 101-2. See also Sandel (1984b) p. 251.

Mill writes, "...that in things which do not primarily concern others, individuality should assert itself. Where, not the person's own character, but the traditions and customs of other people are the rule of conduct, there is wanting one of the principal ingredients of human happiness, and quite the chief ingredient of individual and social progress."<sup>58</sup> Individuals, in other words, must have their individuality or ability to self-determination protected from customary and traditional social forces. This is not to deny, for Mill, that the customs and traditions of a society should be followed, but it does mean that each person ought to retain his/her powers of individuality to be able to assess the validity of those social and customary rules for him/herself<sup>59</sup>. To be otherwise, for Mill, is to violate the natural dignity and progressiveness of persons. People must not only be free to make and express decisions in a society, they must also be empowered to enact enlightened conduct. The fear is of subjecting individuals to a state where "every one lives as under the eye of a hostile and dreaded censorship."<sup>60</sup> To combat the possibility that people will be subject to unenlightened influences<sup>61</sup>, Mill indicates that the state needs to be geared towards providing enlightened leadership<sup>62</sup>.

Secondly, we have seen that liberalism also takes the form of ensuring that all individuals, irrespective of their rational capacities, are entitled to be free from harm. John Stuart Mill's harm principle is the *locus classicus* here. Mill's liberal egalitarianism gives us a more direct argument for what it is about individuals that warrants them as deserving of equal respect. Berger holds that Mill is committed to a notion of "base equality", which is to be understood on the grounds of recognising the *prima facie* wrongness of serious human deprivation and subjection to a social environment that contains extreme inequalities of opportunity and welfare<sup>63</sup>. Political and economic existence is a shared task, Berger attributes to Mill, and the inherent interdependence of persons means that all have an obligation to endorse the redistribution of wealth so as to avoid harmful inequalities<sup>64</sup>. A civilized state, for Mill,

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<sup>58</sup> See Mill (1974) Chap. 3, 1 p.261.

<sup>59</sup> See *ibid* p. 262.

<sup>60</sup> *Ibid*. p. 264.

<sup>61</sup> The tendency of such forces to proliferate in a democracy is mentioned by Mill in *On Liberty*, (1974) Chap. 3, 13 pp. 268-9; Chap 3 18-19, pp. 274-5).

<sup>62</sup> *Ibid*. chap3, 13. p. 269

<sup>63</sup> See Berger (1984) pp. 159-160.

<sup>64</sup> *Ibid*. p. 161.

is one were there is an adequate level of social security that prevents citizens of that society becoming isolated, deprived or alienated<sup>65</sup>.

Such conditions, for Mill, harm persons psychologically. This aspect of Mill hints at a sense of inherent human worth. But Mill does add that the existence of such hardship is wrong due to its detrimental effects on individuals' autonomy and social functioning. Poverty and inequality places individuals into relationships of dependence on others, rather than interdependence between others, and this is harmful to one's autonomy and to overall social order<sup>66</sup>. Dependence on others is inherently bad—it violates human dignity in terms of failing to maintain the individuality of persons. I will respond to this point by Mill later when I deal with the issue of the relationships between essential interests and democracy.

#### 4.3 Republicanism and Welfarism.

Both liberalism and republicanism are counterbalanced, as political concepts, by principled and pragmatic forces. Liberalism, for example has a principled commitment to individualism, freedom, equality, individual welfare, tolerance, and the like. But we cannot hold this principled aspect of liberal theory in isolation if we are to understand liberalism outright. We also need to acknowledge the pragmatic concerns that contributed to liberalism's development. For example, the socio-economic conditions we saw in the second chapter that led Constant to articulate modern liberty as non-interference as a distinct alternative to the liberty of the ancients, and the effects that nineteenth century industrialisation had on the formations of welfare liberalism at the end of that century and the beginning of the next. We have also seen the pragmatic response from welfare liberals to the threat that non-intentional forces place on the security of individuality.

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<sup>65</sup> See "Civilization" in Mill (1974) p. 129.

<sup>66</sup> See Mill (1936) pp. 766-769.

Republicanism, too, is marked by a history that records the interplay between principled and pragmatic forces. As we have seen, republicans have a principled commitment to freedom as non-domination, civic virtue, rule of law, natural law and the workings of institutional checks and balances. But, likewise, we cannot understand republicanism outright until we grasp the pragmatic forces that facilitated the move to entrenched conceptual and institutional commitments of this kind. Here I will show that the forces that produced republican theorizing were not driven primarily or explicitly by a concern for human welfare. For instance, there is evidence in the literature on republicanism that such a drive to anti-arbitrariness was driven by class interests rather than by a concern for the welfare of all. Wirszubski writes that the Roman republic was modelled along such lines so as to protect the interests of the aristocratic classes against the general populace. The popular assembly was composed of those who did not possess noble birth or high rank in roman society, and “could not on its own initiative propose candidates for public offices, nor introduce bills or motions....The People had to listen to what they were told, and to cast their votes according to the motion...”<sup>67</sup> While the popular assembly possessed the power to approve or disapprove of proposed legislation, the right to deliberate about policy was left in the hands of the senatorial class and the popular assembly existed as a checking mechanism against this power source rather than a separate policy making body<sup>68</sup>. The senate was the “advisory council of the Executive.”<sup>69</sup> and both controlled the financial and policy operations of the state.

Republicanism’s tendentious drive towards the protection of established interests is illustrated in two other areas. Cicero considered the chief purpose of republican constitutions and communities to be the protection of private property<sup>70</sup>. It was possession of property that enabled individuals to develop an enlightened life<sup>71</sup>.

Kramnick also writes of the bourgeois origins of republican thought<sup>72</sup>. He notes that the expectations of civic virtue—devotion to one’s public duties-- derived from the class of

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<sup>67</sup> See Wirszubski (1968) p. 18.

<sup>68</sup> Ibid. p. 19

<sup>69</sup> *ibid.* p. 21.

<sup>70</sup> See Atkins, E.M. (1991) Bk. II. Notes: 73, 78, 79.

<sup>71</sup> See Wood, N (1988) Chapter 6.

<sup>72</sup> See Kramnick, I (1990) p.1. See also Dunn, J (1994).

independent landowners. Implicit in this preference for a class of individuals cultivated in the virtues of citizenship, is a deep fear of political participation on the part of those who are not so constituted. Republicanism, in general, has seen the need to check the unfettered workings of the majorities. This way of thinking was most evident in the republican arguments presented during the formation of the United States Constitution. Sellers notes how this period in America's history was dominated by a concerted effort by some to combat the ideal of direct democracy.

Republicanism, at its core, is driven by an underlying pessimism about individuals and groups operating in a social and political context. Not only were majorities and factions feared by republicans, but also the very nature of humans themselves in their role as private individuals partaking in public business. Republicanism tends to operate with a deep pessimism about individuals and their motives when they are operating in the public domain. Erring on the side of caution, republicanism has tended to design institutions on the basis that individuals will primarily act out of self-interest, and not have a direct or primal concern for the public interest. Machiavelli asks us to assume that all are knaves. A republic divides itself into separate powers so that the energy of self-interests drives one component of the structure to check the other, and thus make the republican system a publicly viable one. As Sullivan writes, Machiavelli had the idea that "His is a republic that positively bristles with the energy emanating from the members of each class, the patricians and the plebeians, attempting to quench their unquenchable desires at the expense of the other."<sup>73</sup>

The pragmatism of Machiavelli's republicanism also comes through when we consider another reason for why the political stability and order to factions in a polity were of benefit, namely to defend the polity itself from invasion. Sullivan again writes Machiavelli "...insists on a republic that gives a prominent place to the people....on a democratic republic on the model of Rome. His concern for the people's incorporation and for the degree to which a republic must placate their demands derives not from an interest in the self-development of the individual....or a belief in the justness of the people's cause, or an assertion of the equality among all human beings despite their

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<sup>73</sup> Sullivan, V (2004) p. 31.



social status.”<sup>74</sup> Rather, “Only a republic that allows the people some voice will be able to deploy a large army to conquer and maintain an empire.”<sup>75</sup> But at the same time as fearing the unfettered operations of majorities, republicans also feared corruption and factional power. The Upper Houses themselves were to be the domains of the propertied (males exclusively) who possessed enough wealth and status to be free from undue influence or the allure of making public decisions based on private gain.

The pragmatic use of civic virtue is also represented in Pettit’s treatment of civic honor as a regulatory device, as seen in the previous chapter. Civic virtue is interpreted and applied in a practical way in order to produce outcomes consistent with the agent-neutral value of non-domination. I also have a concern for the sufficiency of the behavioural norm of honour presented by Pettit. We saw how Pettit presents honour as a regulative ideal, an ideal that promotes non-domination. Citizens will obey the civic norms of a society if they can gain honour or social acclaim from so, and will be censored with dishonour if they fail to do so. If all have good reason to value non-domination, then rewarding those who assist in promoting non-domination for all are worthy of our respect. Conversely, those who violate non-domination by seeking to subvert the interests of others deserve our disapprobation. For example, shaming has been used as a regulative ideal. By shaming petty criminals—by exposing them in public and forcing them to experience firsthand the public hurt and disapproval their actions have generated—it is hoped that criminals will reassociate themselves with the community standards of non-domination. They will see that their actions, in other words, have violated the norms of law-abidingness and respect for the property and security of the public.

The motivation to honour for Pettit is self-interest; the honoured are those who seek honour as a valued possession. What matters for Pettit, as a consequentialist, is that non-domination is upheld as an agent-neutral good for all. The nature of the motivation to reach this outcome is not of primary concern. I hold that this account of honour is at odds with a common sense comprehension of honour. Under this account, possessing

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<sup>74</sup> Ibid. p. 32.

<sup>75</sup> Ibid. p.32

honour is not merely a matter of being held in high esteem by others. This is a necessary feature of honour but, as I argue, not a sufficient one. Instead, what is required for someone to possess true honour in the eyes of others is that they live honourably—or exercise their abilities towards goals and outcomes that are honourable.

In this sense honour is a matter of showing one's allegiance not just to what the accepted community standards of conduct are, but also one's allegiance to universally acceptable outcomes for all. Being honourable is not the same as being honoured by a community of believers. Slobodan Milosevic was someone who was held in high esteem by supporters of the Serbian state. The supporters of the regime lauded his relations with the public and commitment to the ideals of Serbian Nationalism—he led a life of exalted position. What is more, the attribution of this esteem to Milosevic may have reinforced his commitment to such principles and, in this sense, the operation of social esteem served its function as a behavioural and institutional norm. But it violates the norms of common sense to say that Milosevic led a honourable life.

Living a honourable life involves another dimension of concern—living appropriately or in such a way that one's actions attribute to persons what they deserve. It is also a tenet of honourable living that one performs this life with a certain motivation, namely a motivation to be that sort of person exactly because it brings about appropriate outcomes. It sounds odd to say, under the common sense understating of 'living honourably' that such a person would be motivated to lead such a life because of the rewards they receive from being held in high esteem by others. The common sense view is what holds sway in the awarding of public honours to members of the community for the work they do for charity. It is more likely for such persons to react to the esteem they are awarded by the community with humility and self-effacement. Pointing either to the efforts of others in making their charitable actions possible or to the nature of the work they do to help others. This sense of honouring I hold is another dimension to honour not captured by Pettit's republican account of honour as a regulative ideal. There is a sense in which we expect more of honour than its being a regulative ideal appealing to the self-interested calculations of public officials, and that it actually be something that resonates with those persons for more morally substantive reasons.

Pettit's account of honour under the framework of civility is only a narrowly construed account of honour, and I will go on in the next chapter to articulate a sense of honour, under the heading of decency, that is more attuned to the common sense understating of the term.

The point of these observations is to reflect the non-philosophical origins of republican theory, and should act as an insight into the spirit of republican thinking. This aspect of republicanism is important to acknowledge when it comes to assessing the role that republican theory should play in contemporary political climate. While Pettit holds that his republican theory is not bound by republicanism's historical origins, and can be selectively altered so as to apply to contemporary political ideals, it is nonetheless an important feature of the essence of republican thinking and of the nature and parameters of its theoretical commitments. I argue, what is more, that republicanism is narrowly construed as a contemporary political ideal to the extent that it has not updated itself to include within its prescriptions a commitment to philosophical welfarism.

Does Sandel's communitarian civility give us a better way to ensure that the salient interests of citizens are actually met in a polity? After all, Sandel does stipulate that a republic must not permit outcomes that are detrimental to the functioning of citizens as self-determining agents; agents that operate by their nature within a particular or unique political and social setting? The communitarian argument for republicanism is based on the idea that the state ought to treat people well, be concerned for their welfare, on the basis, similar to Pettit, that it produces better citizens. The state is only concerned for the welfare of its citizens on the basis that the maintenance of such welfare will produce more diligent and engaged citizens playing their part in the institutional life of the polity. Sandel is aware of the power imbalances that can influence outcomes in a polity, especially the imbalances brought about by the concentration of wealth in a minority class and effects this wealth disparity has on the ability of citizens to engage in decision-making processes<sup>76</sup>. Sandel holds that Roosevelt's "New Deal" reforms sought to address such imbalances and institutional realities by undertaking "antimonopoly and

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<sup>76</sup> See Sandel (1996) p. 255. See also p. 258 where he refers to 'industrial dictatorships'.

regulatory crusades.”<sup>77</sup> The republican goal after such power imbalances were addressed would be, according to Sandel, to restore a sense of public character to civic life. Republicans would do this by implementing a public philosophy that would reweave the fabric of a cohesive community. The state, for example, would secure employment so as to create stable and non-fragmented communities, and in so doing create the conditions for each individual to engage with others for the benefit of mutual advancement. However, the republican mission was thwarted, Sandel adds, by the voluntarist strategy imposed by Keynesian liberalism. The state empowered individuals with rights to material welfare instead of producing policy that enhanced a public morality. The liberal state implemented policies of material advancement rather than community cohesion.<sup>78</sup>

Sandel’s republicanism is more explicit about the notion of human welfare than other theories of republicanism; welfare is an important precondition of good citizenship. However, I hold that the state’s concern for the welfare of its citizens can be articulated in way that does not make reference to the benefits of citizenship. In other words, there are reasons that the state should cater for the welfare of its citizens that do not make direct reference to civic benefit. The following examples offer instances where the state promotes welfare for non-civic reasons. Take the case of the state offering health care for those with Parkinson’s disease or dementia; or the case of providing palliative care for the terminally ill; or the provision of facilities for the mentally handicapped. Or take the normative issue of how we ought to treat those we deny citizenship rights to, for example imprisoned criminals. In these instances the people involved are not expected to perform the tasks of citizenship. In addition, they do not have the capacity to be tracking their own interest nor to be self-determining, and it sounds odd to say that we promote civic self-determination for people in this position. But there is a very strong intuition that the state ought to protect such persons in their vulnerable state. Sandel’s republicanism itself does not give us a reason for catering for the welfare of these groups. The state’s role in society, I argue, goes beyond that of promoting freedom as non-domination or communitarian concerns, and includes, a more direct obligation to

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<sup>77</sup> Ibid. p. 264.

<sup>78</sup> Ibid p.268-70, p.285, p. 294.

promote human dignity. This notion of dignity exists independently of the civic realm; it can be comprehended as an essential normative principle for the state to follow that exists outside the realm of civility.

Does Dagger's republicanism provide us with a more direct notion of human welfare prescriptions over and above procedural ones? Dagger is concerned with the fundamental right of autonomy for all, and is more cognisant of the arbitrary forces that can threaten this such as power imbalances and influences of private interests<sup>79</sup>. This right, when granted to each, implies certain duties to others. For example, we have a duty to ensure that a political community exists where individuals can express their choices peacefully and in a stable environment<sup>80</sup>. Dagger states in general terms that what is needed to create such an environment is a state that is designed to create and implement 'enlightened public policy' consistent with these goals<sup>81</sup>.

However, Dagger does not go into great detail about how the state could be designed to channel policy of this nature. He suggests that civic education for school children could create an awareness among the educated sectors of the future about the importance of respecting the autonomy of all<sup>82</sup>. While this would be an important precondition of a civically and morally aware public service it is not a detailed account of how individual welfare could be catered for in public institutions. Also, the criticism I directed at Sandel's republicanism holds also for Dagger's. There is a sense in which we can demand from the state a concern for the welfare of its citizens that goes beyond protecting their status as self-determining or autonomous beings. The welfare of citizens matters for these reasons and the republicanism espoused by Sandel and Dagger is right to include this. But I hold that there is more to say about the state's concern for human welfare beyond these concerns. I will have more to say about this in the following chapters.

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<sup>79</sup> Ibid. p. 139.

<sup>80</sup> See Dagger, R (1997) pp. 46-47.

<sup>81</sup> Ibid. p. 143.

<sup>82</sup> Ibid. p.131.

Finally, does Sunstein's republicanism give us an adequate account of how republicanism caters for the fulfilment of the salient interests of all? Isn't it the case that the nature of constitutional law is underpinned by basic rights of individuals to conditions of human dignity? Sunstein's republicanism is more detailed on how salient interest of persons can be catered for. He gives the institutions of the state, especially in the form of the judiciary upholding the rule of law and constitutional principles, a more prominent role to play in the protection of interest, rather than being merely facilitative in the sense of operating the procedures of a contestatory democracy.

However, I hold that there is also a sense in which Sunstein's republicanism does not go far enough in making the tracking of salient interest of all optimal in its intuitional functions. Human dignity is partly acquired, for Sunstein, via the structure of the separation of powers. The judiciary is meant to constrain state action to ensure that it respects the human dignity of persons that is entrenched and implied in constitutional principles and the law. Under this republican model, those non-judicial components of the state, the parliamentary and the public service, do not necessarily function with an ethic for human dignity. They will operate, as we saw above, primarily for political and economic concerns. I hold that while constitutional principles may check government policy and actions, and in so doing play an important role in promoting human dignity, there are other institutional options open to us to promote the principles of dignity within the domain of the public service, and hence the formation of government policy.

In the light of the practice of power differentials in society, are the foundations of republican civility sufficient to produce a normatively sound polity? I hold that republican civility, and social capitalism in general, does not fare well in relation to the sociological analysis of state power above. There is enough doubt about the effectiveness of such rights to contestation for us to query whether a contestatory or deliberative democracy is sufficient, in itself, to cater for the salient interest of citizens.

Republican civility—the propriety of being free from arbitrary incursions—is, as with liberalism, a fearful response. Only power that is decentralized and checked against other power is effective in protecting individuals from domination from one centralized

group. The primary concern of republicanism has been to implement a regulatory framework against the exercise of arbitrary power, rather than to articulate a philosophically prominent account of welfarism that contributes to realisation of welfarist ends for persons. Such a mechanism is not sufficient, as I argue above it is not, then there are no other substantive guidelines presented by Pettit to assist the formation of policy by the state that effectively tracks and ensures that people's real or salient interest are respected. Pettit only gives us behavioural norms—norms about how to regulate political interaction so as to keep people focused on the rights of others to contestation, not on the rights of others to the actual protection of their salient interests.

### Summary

In this chapter I have questioned the assumption made by liberals and republicans that the state can effectively distribute impersonal goods without bias. In particular, I challenged the assumption made by republicans that engagement between the state and the citizenry is an edifying one, producing positive outcomes for all. I showed that the state itself is a distinct entity with its own interests, and that it often acts in collusion with other sectors of the community to further them. This creates a power imbalance and potentially leaves other sectors of the community marginalized. The recognition of such imbalances is minimal within modern republican theory. Sandel and Dagger offer a greater awareness of such influences but Pettit and Sunstein do not place a great emphasis on the impacts of state partiality. More is needed, I argued, to track the interests of all in a pluralistic society than merely the provision of open and transparent rules of deliberative engagement. States, as I will argue in the following chapters, should be geared so as to pursue more substantive outcomes for citizens.

It should be noted that I do not deny decision-making by inclusive, contestatory processes is a worthy goal of the state. Such processes have great value to those societies inculcated in democratic principles and ideals. My concern, however, is with the view that such processes are sufficient to adequately track the interests of all

citizens. It needs to be recognized that tracking the interests of all in a divided and pluralistic society is a complex and dynamic undertaking. The current literature within liberalism and republicanism, with its reference to rights, the rule of law and contestatory democracy, places great faith in the procedural structures in place to implement them. Tracking the interests of all, let alone determining what is in the interests of all, is a difficult task given the disparate views and stakes held by all in a modern democracy. But the implementation of procedural mechanisms to combat such complexity is way of 'muddling through' at least to achieve social cohesion and to cater for the well-being of all in such an environment. But I doubt whether such procedural prescriptions are the last word that can be said about how we could go about tracking the interests of all in a pluralistic world. I offer, in the chapters that follow, a case for why the creation of an enlightened public service, with its own sense of professional autonomy, should be seen as a further step to tracking the real or essential interests of all.

This addition is not intended as a way of overcoming the power imbalances I present in this chapter. It is rather a suggestion for how we could go about protecting individuals from such imbalances. Some may be sceptical about turning to the state, given what I say in this chapter, to protect the essential interests of individuals. However, I will show that we can at the very least entrust such a role for the state if it is facilitated by professional standards. Such standards are entrusted to many occupations where the official practitioners also hold many interests and are influenced by the many forces at work within their working environment. Yet we still hold that it is important to maintain standards of professionalism, and to place our trust with them that they will uphold such standards, for such practitioners as a way of protecting the essential interests of those who engage with them. It is in this spirit that I argue for the implementation of professional autonomy within the state as it operates in a pluralistic world.



## 5. UTILITARIANISM AND ESSENTIAL INTERESTS

So far I have demarcated and detailed one principled stance towards others in a political community, namely that of political civility. I have set out how this principled stance coordinates and facilitates relations within liberal and republican political networks. However, I have argued that there are concerns with these positions, namely that inadequate interest consideration can still exist even within a society that is geared for civil order. In response to this issue I argue in this chapter that we need the state to be concerned about a second principled stance towards others, namely, they need to acknowledge an obligation to uphold, and advocate in favour of, people's essential interests. Specifically, I argue that we can conceive of a politically feasible notion of essential interests on utilitarian grounds. I argue here that interest-based utilitarianism, based as it is on naturalist foundations, gives us a good foundation for understanding such a notion. I present these utilitarian interests as an important addition to our normative thinking about political society. By presenting these arguments I will offer an idealist utilitarian account of essential interests as an important addition to civil society.

### 5.1 The Utilitarian Account of Essential Interests.

All utilitarians are united by the core belief that morality is concerned with instantiating in the world a state of affairs that produces or maintains utility. Utility is understood as a positive state or a state of well-being for humans. However, even though there is general agreement that positive consequences for humans are what make actions morally right, utilitarians differ over the issue of what exactly it means to be better off or to enjoy a state of well-being. Classical utilitarians, for example, held that it pleasure or happiness as experienced by an individual that made that individual better off. Later utilitarians made distinctions between different states of pleasure and happiness and held that some produced more utility than others. Mill, for example, argued that such pleasures as the enjoyment of beauty or rational thought were intrinsically more

valuable and promoted more utility for an individual than, say, purely hedonistic pleasures.

Utilitarians have also differed over the different domains to which the assessment of utility can be undertaken. So far I have mentioned forms of utilitarianism that are concerned with what produces well-being for individuals, whereas other utilitarians have applied a utilitarian consideration of morality not on the basis of what individuals ought to possess for themselves but, more generally, on the basis of what state of affairs would produce the most optimal amount of utility across a range of individuals. Outcome utilitarianism, for example, holds that the moral thing to do when faced with normative decisions about resource distribution is to produce an optimal amount of average utility for all concerned. In other words, utility assessments can take place on a private as well as a public level.

Other utilitarians such as preference utilitarians hold that an action is morally right not because it produces solely pleasure or happiness, but because it produces in the world a state of affairs where the desires and preferences of rational actors are satisfied. Utilizing a state of affairs, under this view, is to give each person the highest level of preference satisfaction commensurate with the preferences sought by others. We can ask, as we did with the issue concerning pleasure above, whether the satisfaction of some desires or preferences outrank, morally speaking, the satisfaction of others. In other words, whether the satisfaction of some desires and preferences produce, in themselves, more utility in terms of cohering with what produces effective preference satisfaction, overriding other desires and preferences of a different nature. If this was the case, then it would not simply be the satisfaction of desires and preferences that produced utility, but instead the satisfaction of certain desires and preferences which, by their nature, would produce the morally optimal state of affairs.

I hold that there is an objective account of essential human interests that can expose for us why the satisfaction of some desires and preferences produces more utility than the satisfaction of other desires and preferences. I call this ideal preference utilitarianism. The best example of utilitarian theory in this form is presented by Peter Singer. It is a

utilitarian theory that highlights the moral importance of protecting essential interests over and above certain categories of desires and preferences. His interest-based utilitarianism holds that all sentient creatures share the vital properties of human well-being. Under this account of utilitarianism, ideal conditions are established which all preference holders, and all potential preference holders, ought to have. These ideal conditions I refer to as our essential interests. According to Singer, the essential interests of human animals are understood in the sense of "...avoiding pain, in developing one's abilities, in satisfying basic needs for food and shelter, in enjoying warm personal relationships, in being free to pursue one's projects without interference, and many others."<sup>1</sup> Under this account of utility the mission is not to satisfy the preferences on a nominal basis—the preferences of the greatest number according to base preference satisfaction or the fulfilment of such goals as pleasure or happiness. Instead it is to ensure that salient or essential interests are satisfied for all. This may involve the minor interests of a majority being overridden by the major interests of a minority.

The importance of essential interests for all potential and actual preference holders is reflected in the principle of equality that Singer attaches to such ideal or essential interests. At the foundation of interest-based utilitarianism is the equal consideration of *interests* principle. All beings with one or more of the essential interests defined above are entitled to count as one and no more than one when being evaluated. This means that such interests are impersonal. It does not matter who one is or what one does in terms of who gains favour under a moral decision involving distributions or outcomes that effect our interests. All that matters is that the essential interests in existence prevail, no matter who holds them. This may imply, for Singer, that some bearers of essential interests will be non-persons, hence the animal rights component of his utilitarian theory.

It needs to be noted that essential interests as just stated are specific interests different from other types of interests. We can, for example, be said to have a different type of interest in terms of having our wants satisfied. If we have certain wants or desires for x

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<sup>1</sup> Singer (1993) p. 30

then we will know that what goes with this is the satisfaction of conditions that make the achievement of *x* possible. For example, if my wants are for a peaceful neighbourhood then I have an interest in the activities that occur around my neighbourhood, such as what gets built in adjoining or nearby property, etc. If I want to have a peaceful neighbourhood then I have an interest in local developments. Here interests have an instrumental value towards the achievement of wants<sup>2</sup>. Or if I want to be the best table-tennis player in my area then I have a general interest in the maintenance of table-tennis clubs that can record, document and publish the local rankings within which I compete.

But essential interests are fundamentally different from interests to do with want-satisfaction. For instance, while it is necessary for one to be aware of the wants that need to be satisfied in order to identify the corresponding interests that are needed to achieve the desired outcome, one can possess an essential interest without being aware than one possesses it. Here we might talk about interests as something that exist prior to, and therefore are not in an instrumental relationship with, wants. Being maternalistic or paternalistic are examples of treating someone not in terms of respecting their actual wants, but in terms of promoting their ideal interests over and above these when they are not consistent with the latter. For example, take the case of caring for children. An interest here becomes essential, and not merely general, by virtue of its being an ideal interest that children have to be rationally autonomous. Children often want things that would be detrimental to not only their current state of welfare but also to their long term welfare in terms of becoming fully rational and independent beings. In this sense, interests are not understood as conditions that are conducive to the satisfaction of particular wants held by the individual, rather they are ways of being that an individual ought to have the best opportunity to become. These are the sorts of interests that Hamilton, for example, refers to as agency needs<sup>3</sup>. I will detail later what I take to be this idealized sense of the self, but for now I just want to note that interests of the kind I have just mentioned will be taken to be essential interests, and not merely general one's that are concerned with want-satisfaction.

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<sup>2</sup> See Barry (1965) for the view that an interest is a want-regarding concept. Chapter 10.

<sup>3</sup> See Hamilton (2003) p. 35.

Health needs lie at the core of essential interests. Most health needs are going to be constitutive of essential interests. A health need is a state of being that is crucial for one's biological integrity. Geuss writes, "'Needs' are defined relative to the successful functioning of an individual....if the 'needs' of the organism are not satisfied, it will malfunction. A human being needs a certain minimal intake of calories, proteins, vitamins, etc. This means that if a human being does *not* obtain that minimal level of nutrition over an extended period, it will malfunction, become lethargic, have lowered resistance to disease, perhaps die."<sup>4</sup> It seems straightforward that all human needs are also essential interests. No matter what an individual may desire, or even if she/he is not capable of expressing wants, it is in the essential interests of all sentient creatures to have their health needs protected and satisfied<sup>5</sup>.

Is it the case that all essential interests are health needs? Here I want to say that they are not. Something can be in our essential interests to have—something that is essential to our well-being in a specific social context—without it being a health need. For example, it can be argued that it is an essential interest, in certain cultures, for a child to be raised by its biological mother, but we would not say that it is a human or health need that this be done. Children can be raised by people other than their biological parents. There are clear advantages to being raised by one's biological parents, but it is not that case that one is deprived of a basic human need if one is not. Human growth and development is just as viable with parents and social networks that are removed from one's biological origins. Likewise, we can say that such interests as being autonomous or rational are essential interests but not human needs. We can protect the basic needs of others without their being fully rational or autonomous.

But this is not to deny that an essential interest can be something like a desire to be raised by one's biological parents. If there is a contingently established stigma, for example, in one's cultural context associated with not being raised by one's biological parents then we might say that it is in the essential interests of a child to have the best

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<sup>4</sup> Geuss (1981) p. 46.

<sup>5</sup> See also Hamilton (2003) on the notion of vital needs. p.27.

opportunity to be so raised. Avoiding a life where one is subject to undeserved stigma qualifies as an essential interest in this context. Or take the case of what Hamilton refers to as social needs.<sup>6</sup> There can be contingent social needs that are not inherently health needs. For example, to be an effective member of one's social community, and to function as an effective social being, one may need to acquire certain skills of technological competence in the form of computer training, or one may need to have access to efficient and trustworthy mobility devices. One can maintain one's essential health needs without such social goods, but, nonetheless, it is a requirement of one's essential interests as a preference holder to have such social needs satisfied.

To show how interest-based utilitarianism differs from classical forms of utilitarianism, I want to conclude this section by showing how the latter views suffering as inimical to ideal human functioning, and not merely pain which needs, according to the classical tradition, to be outweighed by such properties as pleasure or happiness in order to be morally justified. It is the capacity to experience pain and pleasure that entitles such creatures, which includes human and non-human animals, to be protected from suffering. For example, creatures that do not possess the capacity to formulate rational preferences, such as rabbits and chickens, are nonetheless entitled to avoid suffering in their lives. Such creatures may not be able to comprehend the way in which the pain states they encounter are detrimental to their overall interests, but nonetheless it is the experience of the pain states themselves that are intrinsically disvaluable for Singer.

It is important, as an aside, to set out the different dimensions of pain and suffering. Specifically, it's important to make the point that pain is not in itself contrary to one's health needs, whereas suffering is. Firstly, there is pain that is physiologically beneficial. Pain avoidance has been deeply grounded in the utilitarian tradition. Bentham stated that "nature has placed mankind under the governance of two sovereign masters, pain and pleasure."<sup>7</sup> The goal of utilitarian moralism was to seek the acquisition of pleasure and the avoidance of pain. However, pain itself, I hold, is a physiological state that is not intrinsically bad for biological functioning. Pain is after

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<sup>6</sup> *ibid* p. 31.

<sup>7</sup> Bentham (1907)

all a vital neural state that plays a crucial role in regulating the homeostatic operation of the body. The absence of pain would be detrimental to the biological functioning of the body.

There is pain whose existence is not morally troubling due to its being consented to. The pain that a marathon runner subjects herself to is endured by the runner for the benefit of achieving her goal of winning or finishing the race. Or, the pain consented to and inflicted in the case of sado-masochistic acts is not morally troubling because the pain is experienced in order to achieve a certain level of sexual pleasure. In these cases involving consent, the pain experienced is monitored and controlled by those upon whom the pain is inflicted, and is done in the name of achieving the satisfaction of preferences, thus it poses no moral problems from a utilitarian perspective.

There is pain that is intrinsically disvaluable for sentient creatures. Let us take, first of all, sentient creatures that are not capable of consenting to or monitoring the degree of pain to which they are subject. The infliction of pain on such creatures produces unpleasant sensations for them. The experiencing of such sensations is itself morally undesirable. The malnourished dog or an animal that is destroyed due to a long and lingering death experience the intrinsically disvaluable forms of pain. The pain experienced here neither promotes homeostatic balance nor achieves a higher goal of attainment for the victims.

Intrinsically disvaluable pain can also be experienced by sentient creatures that are rational or self-conscious. The prisoner that is put to death by electric shock experiences prolonged, unpleasant pain states. The wrongness of this form of pain occurs not only during the expectation of it, but as it is experienced by the victim during the act of execution. The intrinsic wrongness of inflicting such pain and distress occurs in the short period before and during the acts of execution, but not afterwards. There is no sense of the pain inflicted here being detrimental to the long term interest of the victim. We might want to question whether, in this instance, the victim actually experiences the intrinsically disvaluable state of pain. We might say, for example, that the victim in this

case deserves, in a moral sense, to be inflicted with such pain due to the pain he/she has illegally inflicted on others in the past.

All of the cases above deal with the value of pain states experienced in specific acts. But there is, I hold, an understanding of suffering that should be articulated in relation to these points. Suffering, I hold, can occur on two different levels 1. where the circumstances under which the pain inflicted on others produces distress in the victims, and 2. where essential interests are violated—even if there is no experience of pain states nor an awareness, with the corresponding negative responses, of one's essential interests being degraded. In the latter sense I define suffering as disablement rather than distress.

Suffering in the first sense, where distress is produced in the infliction of pain, means that there is a considerable degree of awareness on the part of the victim of the pain that the discomfort experienced is unjustified or reprehensible, to be prolonged and repetitive, uncontrollable, degrading, or that it will be detrimental to one's long term interests. For example, one suffers distress and not just isolated pain states if one is unjustly imprisoned, physically abused once an hour during every hour of the day at irregular times, knows that one's incarceration has little hope of immediate cessation and that the prolonged experience of such conditions is bound to have harmful psychological effects.

The second sense of suffering occurs when no such awareness prevails, but where there is, nonetheless, an equally evident force of disablement on the part of the victims. Suffering here is not an expression of distress on the part of the victim, but rather is to be understood as an instance of a decline in ability to function and maintain one's own bodily integrity. One is detrimentally effected in isolation from the awareness of the victim is the victim's short and long term essential interests. For example, take the case of the child whose diet that consists mainly of takeaway food is detrimental to her long term interest of sustaining a healthy lifestyle over her life. She does not experience pain at present but her expected long term interests in maintaining good health are seriously eroded the more she eats fast food and refrains from exercise. Even though she does not



suffer distress her current states of bad eating and no exercise there is a sense in which she is suffering. Her long term, essential interests are potentially disabled by her current actions even those though actions do not produce any anxiety or misery.

To see this point more clearly, it should be noted that the experience of pain nor an awareness of suffering is neither a necessary nor sufficient condition of experiencing a decline in one's quality of essential interests. This is the case due to the fact that one can have one's basic biological capacities eroded without the presence of such factors. One might be placed painlessly in a biologically malfunctioned state of existence. For example, someone could painlessly remove one's mobility capabilities. Or someone could constantly drug someone into a state of immobile ecstasy, and in so doing removing their awareness of their incapacities. In both cases we can still say that the previously mobile and rational person suffers. Having one's capacity to lead a purposive life or a life directed towards one's own goals eroded is to subject that person to suffering.

It is important to note that I do not include under the heading of basic biological functions what I call the extended biological functions of humans. It may be the case that a natural function I may have—one I am especially gifted with—is to be extremely proficient at high jumping, or that I can throw a tennis ball a long way. But these biological functions that extend beyond those that we all have qua biological beings, and which will depend on natural talents and the development of such talents, is of no concern to a utilitarian account of essential interests. Essential-interests utilitarians, I argue, will hold that we treat sentient beings appropriately only when we protect their basic natural functions: the functions necessary for survival. While extended natural functions may make life more enjoyable to live—for an athlete say and the people who derive enjoyment from watching him/her—it is not necessary for human survival to have these functions. Only base functions serve survival hence only they are listed as a requirement for showing decency to others.

It might be objected that there are no universal facts of persons, and that what a person is an evolving and unfixed notion. The libertarian, for example, might argue that

personal development is a matter for the free choice of individuals, and that a life where people choose courses of action that may be detrimental to their biological development should be tolerated if they are freely chosen.

Sher seems to agree that our identity as humans and persons is not entirely fixed, but he makes an interesting observation when he states that the “facts of personhood” (like rationality and a desire to understand the world around us or exercising reason-based plans) are not inherent capacities in persons but rather they are contingently ‘near-universal’ features of human existence. There are also such things as, he argues, contingently near-inescapable social bonds (eg. warm relations, parenting, friendship, moral goodness, awareness of beauty). Sher believes that in these areas there is value independent of enjoyment, desire and choice<sup>8</sup>. So while we may be tempted to say that biological identity is not fixed, it is fair to say that there will always be contingently robust facts about biological wellbeing that need to be satisfied.

My account of natural biological functioning does not hold that the natural state of humans is static. The biological functions of humans alters as they evolve. Teenage girls in the affluent west, for example, are experiencing their first menstrual cycle at an earlier stage on average than twenty years ago. Changes in diet and lifestyle are altering the timing of the biological function of reproduction but the basic function remains the same. Another example is the biological function of body hair. As clothing has become more and more prominent in human society the need for body hair for warmth has reduced. The result is more hairless bodies and the evolution of a reduced natural heating system for the body.

Am I saying that cases such as this are contrary to the essential interests of humans? That to allow diet and clothing to alter natural functions such as menstruation and body cooling is tampering with what people really deserve qua biological beings. The answer to this is no. The basis of this reply is an appeal to consequentialism. The rightness or wrongness of an alteration in the biological functioning will be decided on the basis of whether or not the alteration brings about suffering to the individuals involved. The

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<sup>8</sup> See Sher (1997) p. 11

detrimental results will be obvious and palpable whether in the short or long term. The development of clothing and the eventual reduction of the body's natural heating system is not uncivil because an essential biological function—maintaining body heat—is enhanced. Likewise, the time period of reproductive cycles may change due to social or economic forces, but the healthy performance of such cycles is what matters from the perspective of substantive civility. Consequentialism fixes right or normatively legitimate actions according to their conformity with *agent-neutral value*. There is then little problem associated with connecting indecency with acts that violate value-neutral qualities of persons, namely the basic natural necessities that maintains life.

Another point to note is that essential interests can be violated without the current moral norms of a society condemning such actions. Take the case of the marital rape and retrospective moral evaluations. In the 1950's, it was illegal to perform sexual acts on women without their consent, but it wasn't illegal for a married man to have sex with his wife without her consent. There were no legal or moral norms in place during the 1950's that prohibited or sanctioned the practice of marital rape. But take the case of a victim of marital rape who seeks some form of compensation from her husband for the forced sex acts he performed in the 1950's. We do not say of this man that he committed an immoral act in the 1950's—at the time there were no moral or legal norms informing him of the immorality of his actions. Nonetheless, there is a sense in which we can say, retrospectively, that the women's essential interests in maintaining her biological integrity were damaged in the 1950's, even if the full scale of her awareness of the psychological damage done to her may not have fully surfaced, in her mind say, until moral and social norms altered so as to bring to light the immorality of such actions.

On this basis it is quite straightforward to establish standards of interpersonal comparisons among humans. While we might accept that pain thresholds will differ across populations or subjective beliefs, the physiological condition of non-suffering—the absence of unnecessary, excessive pain or interest erosion that is detrimental to one's effective, biological continuity, is universally held to be of value. This physiological value holds even if one is not consciously having the psychological

state of appreciating non-suffering, we are being decent to others when we ensure that the physiological state of non-suffering prevails. Given the choice between inflicting pleasure or excessive pain on humans it is self-evident (given the nature of humans) that the avoidance of suffering outweighs positive pleasures.

Evidence of the interpersonalised standardisation of suffering in moral theory is found within the dictates of negative utilitarianism. There is, as Barrington Moore points out, more room for epistemological agreement on what constitutes misery than what constitutes happiness<sup>9</sup>. The latter cannot hold unless there is an absence of the former; on this we can all agree. In other words, we can claim to know that the avoidance of misery is a morally universal goal while at the same time being agnostic about whether there are any universal reasons for believing that there is a unitary understanding of happiness<sup>10</sup>.

Misery here is equated with the experience of conditions where one's basic biological functioning is seriously inhibited. For example, it is a base function of being a human that one avoids excessively stressful environments—say, the blaring of noise over a certain amount of decibels. It is a base biological function of humans that their actions are consistent with their biological realities. I weigh 78kg therefore I cannot lift a three tonne weight. It is a base biological function of humans that we have access to spacious areas or that everyone needs to get regular and frequent sleep. Forcing one hundred people to live in a room no bigger than the average house size violates the base biological fact of humans that they need space to move. There is no room for subject discretion, as there was with indecency at the level of social relations, in these areas as to the value that these states of affairs have for humans. These states of affairs are detrimental to humans irrespective of the subjective beliefs held by the victims towards their condition.

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<sup>9</sup> See Moore (1972). Chapter One.

<sup>10</sup> However, it should also be noted that the negative methodology being used here to define the term 'decent' does not imply that decency can only be realised via negative action. To be decent to others may not only require that we refrain from inflicting misery upon them, but it may require that we act towards them so as to prevent or eliminate imminent or existing misery respectively.

Smart does not find negative utilitarianism or the avoidance of disutility a very attractive goal<sup>11</sup>. Here is why he believes this. He holds that negative utilitarianism would have to be consistent with the extermination of the human race. Smart asks us to imagine a benevolent tyrant who will destroy the world and all those who live on it in order to eliminate human misery, thus eliminating disutility from the world and satisfying the goal of negative utilitarianism. This consequence, Smart argues is unpalatable and hence negative utilitarianism should be thought in the same way. He further concludes that it is probably best to see negative utilitarianism only as a subordinate rule of thumb and not as an ultimate principle of human action.

I hold, in response to Smart's objection, that negative utilitarianism need not be reduced to a subordinate rule of thumb. An understanding of the sort of ideal utilitarianism I covered earlier should help here. Destroying the world and hence all disutility is not consistent with ideal preference utilitarianism, namely because it thwarts existing preferences to continue life and the plans laid out for it. Interest-based utilitarianism is based on a respect for the natural functions of individuals, functions that have intrinsic value for each individual. A vital part of our natural functioning is that we are purpose-driven beings, and eliminating such beings for the sake of removing things with the capacity for disutility is wrong because such beings possess positive goals. Being committed to the preservation of one's rational and biological capacities is an essential interests for all.

We are now in a position to see where negative utilitarianism should fit in. It eliminates disutility so as to *create* the conditions for the ideal existence of personhood. The removal of disutility is not a good in and of itself, and this is where Smart is mistaken to attribute the destruction of the human race as something that is implied by negative utilitarianism. I don't think Popper ever had the sort of negative utilitarianism that Smart attributes to him—the sort where it is the sole and ultimate goal to remove disutility<sup>12</sup>. Popper wanted to protect Kantian individualism and this means respecting the individual as an end in him/herself. Destroying the world and eliminating things that

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<sup>11</sup> See Smart and Williams (1973).

<sup>12</sup> See Popper (1966).

are ends in themselves is not going to be the kind of negative utilitarianism that a Kantian would be interested in. Rather negative utilitarianism is a view that seeks to remove those circumstances that threaten the status of individuals as ends.

The moral importance of the natural state of non-suffering highlighted by Singer, I hold, has important implications for an understanding of a normatively constructed political order. Specifically, it gives us, in contrast to the act and rule utilitarian accounts covered above, a utilitarian understanding of political and moral propriety that is interpersonally standardized. In these cases, it will always be the case that the acts in violation of essential interests will cause humans to suffer, and the presence of such suffering will itself constitute disutility irrespective of the subjective beliefs held about whether persons in particular circumstances do or do not actually suffer. I argue that causing people to suffer in this way is universally indecent, and will always be an instance of violating an objective moral fact.

## 5.2 Knowing Essential Interests.

I will now deal with the issue of how interest-based utilitarians can come to know what our essential interests are, and how they acquire moral guidance from them? To answer this question I will look at two assumptions about human psychology that utilitarians can use to determine what we ought, morally speaking, to do. The first is that utilitarians assume that all rational actors are motivated to act for self-regarding reasons. Classical utilitarians held that it is a fact that we are all motivated to act for the sake of our own pleasure or happiness. Preference utilitarians hold that it is a fact that we are all motivated to act for the sake of satisfying our own preferences. Implied in this is the assumption that rational actors who wish to have their preferences satisfied, or live a life full of rewarding pleasures and happiness have good reason to endorse a normative system that protects their capacity to formulate and express such preferences. The second is that there is an idealized sense of self-interest that assumes that we not only naturally pursue pleasure, happiness or preference satisfaction, but that we, as rational

agents, also naturally pursue our own welfare or essential interests. Under this notion, psychological utilitarianism holds that rational humans naturally act so as to improve their welfare, and to avoid conditions detrimental to their welfare. Effective preference formation and expression cannot, for example, occur in a state of suffering. Suffering, is by its nature, debilitating and degrading.

Here unnecessary pain and suffering is not only consistent with the function of effective formation or pleasure and happiness pursuit, but is also inconsistent with the essential functioning of sentient beings. We can deduce this simply by observing the evasive action taken by sentient beings when threatened or inflicted with acts of unnecessary pain or suffering. Utilitarians gain moral knowledge through the performance of empathy or compassion under this latter view. Pains and sufferings are held to be universally negative states of affairs. This is, after all, what partly lies at the foundation of the 'each to count as one and not more than one' maxim of utilitarian thinking. It is only the fact of experiencing unwanted pain or the detriment of one's essential interests that counts in moral assessments, and not other facts such as whose pain it is or whose essential interests are damaged.

It's important for the purposes of clarification to make the distinction between interest that are essential and interest that are important or objective. Objective interests for rational actors may be of the kind that Raymond Geuss talks of where we have an interest not only in expressing preferences but also in formulating them with the best possible or perfect knowledge. Interests might be important to us such as the interest each of us has in having the best opportunity to achieve the life-goals we set ourselves, or interest might exist in another form such as the interest the dead might be said to have in being honoured or remembered well. Essential interests are different from the kind of interests just stated. While the interest just stated are important to the people who hold them they are not essential. We can reasonably be expected to live a life of non-suffering without have perfect knowledge ourselves of the factors pertaining to the choices we make, and we can live a decent life without having the maximal opportunities to flourish as musicians, artists, sportspeople, etc.

The strength of our moral entitlement to essential interests is something that separates the latter from other forms of interests. We can be said to be morally entitled to have important or objective interests realised over frivolous or minor interests. But there will be a *prima facie* moral entitlement to have one's essential interests considered and ranked above all other interests. It should be noted that one's freedom from misery and suffering or bodily and psychological degradation will outweigh others moral considerations on a *prima facie* basis. Why do I say only on a *prima facie* basis. The reason is that there will be cases where essential interests will be overridden by lesser interests. For example, I have an interest in maintaining my status as an autonomous decision-maker, therefore it is not justifiable to force me to give a healthy kidney to someone who needs it more than I do. Even if I can do without the kidney and still lead a life of effective biological functioning, and the recipient of my kidney would gain a life of effective biological functioning rather than a life of degradation, it is not morally justifiable to force me to give up my kidney.

However, it's not the case that we can conclude from the above that the right to free choice trumps the right to have one's essential interests protected. The freedom to choose among luxury goods is not unjustifiably thwarted if I am taxed so as to provide poverty relief or basic medical resources for the ill. Free choice does not trump biological integrity outright in a normative sense. In the kidney case the healthy person has a right to his own bodily integrity—this is what prevents us from forcing him to give his kidney. Disabling another so as to remove their kidney violates their right to choose what they wish to do with their body. However, we do not say that the healthy person is morally obliged to give his kidney to the needy person. The healthy person has a right to freely choose to maintain his bodily integrity, even if so doing means that he/she denies bodily integrity to someone else.

This last point, I hold, is crucial for our understanding of the essence of an interest. A theory of essential interests must have a specific ranking module that informs us of how to rank preferences. A brief argument will show why the universal, background preference of avoiding suffering outweighs the expressed positive preferences of individuals. Take the expression of such positive preferences as the preference to have a



wide range of consumer choice across product ranges or the preference to spend one's spare time studying astronomy. These are explicitly goal-orientated preferences hence their positive nature—they require the presence of specific outcomes in the world in order for the preference to be satisfied. The satisfaction of these preferences is contextually crucial to the welfare of the holders of these preferences. Having a wide range of consumer choice increases the quality of decision satisfaction for the consumer; contemplating the wonders of the universe brings a sense of intellectual fulfilment for the astrology enthusiast. These individuals will fare well in the sense that their preferences will be satisfied in this context.

But it is another thing to address the issue of what it means for an individual to fare well in his or her life, and not just in terms of having his/her positive preferences satisfied. Having a preference for a wide selection of consumer choice or to enjoy astrology is of little worth if one does not fare well in the vital aspects of one's life. Nor is the satisfaction of such positive preferences as the preference to be in possession of the latest model in luxury yachts going to be equivalent to the satisfaction of having one's preference to be free from the stress that results from uncertain income prospects. The cost of having one's preferences thwarted is intrinsically higher for the latter than it is for the former. Losing out on a luxury yacht upgrade is not as vital to one's fundamental interests as losing out on employment or income security. For the yacht purchaser, income security is highly stable and any loss of preferences over and above such vital interests is not going to outweigh those who are losing out on the satisfaction of vital interests in all parts of their lives.

Importance-functions that expose moral knowledge can also be seen in the following example. Imagine that someone has a button in front of them. They are permitted to make only one of two choices: push the button and save thousands of people from torture or not push it and receive a piece of chocolate cake. What is more, the person in this scenario is well fed and is not in desperate need of food; the consumption of the cake would be a luxury to this person. What *should* this person do? Does this person have *better reason* to act one way instead of another? It would be, normatively speaking, implausible for this person to rank the pleasure of eating the cake above that

of the pain that the thousands of people would incur. Major interests cannot, from the perspective of synthetic justification, be sacrificed for the sake of minor ones. It is a fact that in this scenario the pleasure of cake-eating is a minor concern when weighed against the pain of torture for thousands. What tells us that it is implausible to argue that this pleasure should be satisfied at the cost of these pains? The answer is that we know, via experience, that this pleasure has less cost on human welfare than the costs of torture. It is an experience that we expect all rational agents to identify; the world needs to be rationed in such a way so that such pleasures are always outweighed by the avoidance of such pains in all such scenarios.

To argue for my view that suffering is intrinsically morally wrong, think of the opposite view—that suffering itself is not intrinsically morally wrong. Can it ever be the case that we are justified, morally speaking, to remain indifferent or amused in the presence of suffering? This sounds odd. An intuition containing indifference towards suffering can never be a moral intuition, according to my account. All moral intuitions must assume suffering as something of disvalue to humans, otherwise they would not be moral. Morality requires that we not only be other-regarding, but that we regard others in the sense that we wish them to fare well.

### 5.3 Essential Interests and the Fact/Value Objection.

The allure of the utilitarian account of essential interests—what should pull us to see it as a vital attachment to any normative theory of political society—is that it appeals to, *inter alia*, universal natural facts about persons. The psychological facts of the importance of non-suffering to effective preference formation, and the intrinsic undesirability of unnecessary pain sensations have implications for how we ought to act, morally speaking, in response to such matters. But there is a standard philosophical objection to an argument of this kind. There is a strong objection in the philosophical literature to inferring values from facts<sup>13</sup>. Hume says there is no logical connection or

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<sup>13</sup> “Perhaps the simplest and most important point about ethics is purely logical. I mean the impossibility to derive nontautological ethical rules—interpretations; principles of policy; aims or however we may describe them—from

implication between a fact about the world and how we ought to value such facts. For example, we might consider the fact that torturing innocent humans causes extreme pain. However, we cannot logically deduce from this fact that torturing humans is wrong, or that we have good reasons for holding that we 'ought not' to torture humans.

The fallacy holds in the following way. Hume holds that it is a fallacy to deduce values from facts in that in a logical syllogism it is impossible and illogical to derive moral prescriptions from 'ought free' premises. What is needed, Hume's argument holds, in the above example before we can conclude that we ought not to torture humans is another premise containing a value assumption, namely that it is wrong to inflict unnecessary and extreme pain on the innocent. Only then are we justified in logically inferring the conclusion that we ought not to torture innocent humans, because then we would be inferring an 'ought-conclusion' from a premise containing an 'ought reason'.

There is another type of objection to the fact/value relation in my argument for the normative salience of essential interests. G.E. Moore's version of the fact/value distinction hold that there is no synonymity or definitional relation between moral terms and facts. Moore argues that it is a fallacy to define moral terms with reference to natural properties; this, he holds, just cannot be done. Moral terms defined solely with reference to natural properties will always leave an open question about whether the natural properties themselves are constitutive of the moral meaning of the term itself. For example we might say that pleasure is good. But if the natural is synonymous with the moral then this translates as pleasure is pleasure; leaving open the question of whether pleasure is itself good. For Moore, moral terms such as goodness are indefinable. Instead, moral terms are known intuitively by common language users.

Another objection to the idea of inferring values from facts points to the absence of motivational force within natural facts themselves. The core of the objection is that facts about the world do not contain within them motivational force; facts inform us about the way the world is and do not purport to state how we ought to react in behavioural terms

to it. Facts about the world do not have in themselves ‘attitude-guiding’ features, the objection goes, therefore they cannot provide *in themselves* a motivation to hold beliefs or act in a certain way. All that factual claims do is state how the world is; they do not contain any prescriptive force about how we ought to think about the world.

The fact/value distinctions posed above present a problem for my account of essential human interests in the following sense. I assume that there are facts about the world—facts about essential human functioning—that ought to guide our moral thinking about how we think and act in the world. However, how can I justify this inference in the face of the objections from Hume who held that it is a logical fallacy to deduce ‘ought’ prescriptions from natural facts; Moore who held that moral values cannot be synonymous with natural facts, and those that hold that facts have no motivational force? Would I be forced to concede to the likes of Moore and non-cognitivists that this is not possible, and that instead we come to know the moral worth of essential interests not by looking at facts in the world, but by formulating intuitions, desires or attitudes about what is the morally appropriate response? Does the view that facts do not have motivational force negate the possibility of utilitarians arguing for the objective value of essential human interests?

It’s important to show that my appeal to the ‘natural facts about persons’ withstands objections of this kind. Firstly, let me distinguish my naturalist account of the moral import of essential interests from Hume’s objection. Hume offers reasons for why there is no *logical* connection between facts and values. But my account of essential interests based on a reference to natural properties is a form of naturalism that can survive the objection that there is no logical inference from facts to values. Hume rightly argues that deductive inferences cannot or do not allow ought-specific conclusions to follow from ought-free premises. But, I argue, that even though this is true it does not mean that we can never have an inferential relation between facts and values. All that Hume argues in this instance is that we cannot have inferential relations between facts and values that are deductive. I will shortly explain the sense in which values can be derived from facts in an inferential sense.

I offer the same type of response to Moore's objection to those who claim to derive values from facts. Moore rightly points out, in my view, that there can be no definitional relation between natural facts and values. Facts can never conclusively define values because if they did so there would still be an open question about what we, morally speaking ought to do. But, again, even if we accept that there can be no definitional relation between natural facts and values it does not negate the possibility of there being some type of inferential relation between natural facts and values. Inferring values from facts is a task distinct from defining moral values exclusively in terms of natural facts.

Here is the sense in which I hold that there exists an inferential relation between natural facts and values. The inference that can exist between the descriptive and the evaluative is abductive<sup>14</sup>. Abductive inferences are distinct from deductive and inductive inferences. Abductive inferences are inferences that are guided not by logical entailment or enumerative force as with deductive and inductive reasoning respectively, but instead by an inference to the best explanation<sup>15</sup>. Conclusions can be abductively inferred from premises on the basis that they are reasonable explanations of the content of the premises. But, it must be noted, what counts as a 'reasonable explanation' or an 'acceptable interpretation of the best explanation' will not be found solely in the contents of the premises, as is the case with the logical entailment of deductive inferencing. Instead, abductive reasoning acknowledges the operation of a common sense faculty of reasoning, external to the premises of an argument. In other words, there are commonly known salience norms that operate in accordance with abductive reasoning that provide information about what features of the issues before us are relevant for consideration and realization and which are not.

Essential-interest utilitarianism assumes the existence of primary conditions of human well-being—natural facts about persons and their biological nature. For example, it assumes that humans are naturally disposed to non-misery, a life of order, predictability and regulation, to relations of social and biological interdependency at complex levels,

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<sup>14</sup> See Pierce (1958) for this term.

<sup>15</sup> Abduction and induction are similar in that neither holds conceptually to entailment inferencing. But they are distinct in the sense that the former inferences towards that which we have the most reason to believe or that which contains the best explanation of the evidence under consideration, whereas, the latter inferences towards that which had the best enumerative or aggregated evidence for believing.

to self-preservation, and the like. It's a common-sense fact about the world that these primary human needs have a natural efficacy for humans. These natural facts about humans infer, I argue, the worthiness of one way of valuing the world over another when we reason using the method of abduction. These common-sense facts give rational agents good reason to adopt them as the content of their normative commitments. Such values are inferred from these natural facts about human needs on the basis that they provide the best explanation, all things considered, for why such natural facts are so prominently placed. So, for example, we infer from these primary natural facts about persons certain morality functions that can be applied to our moral systems.

Coincidentally, it comes as no surprise that our moral network is contingently geared towards a respect for primary human needs. For instance, moral networks promote and regulate order and power; they involve inherently other-regarding social practices in that they seek to apply order across persons; they are inherently positive in that they are geared towards a propriety of human conduct conducive to effective human survival overall; and they are inherently 'discourse-favouring' in that all moral judgments seek to select and favour one viewpoint above others on the basis of providing better reasons for believing one thing is more morally appropriate than another<sup>16</sup>.

This is not to deny that moral networks are constructed by a community of human agents. We can agree that morality is a human construct but deny that its validity is dependent on contingent subjective beliefs. It is important here to make a distinction between the existential nature of morality, which can be said to be constructed by human endeavour, and the truth-instantiating nature of morality. The latter defines what it is that makes a moral claim what it is, as distinct from other claims we make about the world via our beliefs properly fixed as moral claims and not as other claims. Moral claims, for instance, may be causally linked with the prevailing beliefs of a community. Aggregated subjective beliefs, in other words, may determine the moral standards that exist in that domain. On the other hand, with the truth-instantiating dimension of

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<sup>16</sup> See Shafer-Landau (2003) for the view that non-cognitivists cannot escape the performance of favouring or demarcation in their moral judgments. p.34.

morality the fixing of natural facts to moral beliefs can be done independently from any particular subjective beliefs that an agent may have about the world around her. In other words, what makes one state of affairs in the world more worthy of aptness in the process of abductive reasoning will not be that it is merely desired or preferred by a subjective judge on the matter. Rather, what makes certain facts apt in an abductive sense is what it is reasonable for a community of believers to endorse.

So, for example, by comprehending the primary facts of human need and their efficacy rational actors are expected to infer the normative claim that one ought to 'protect that which is efficacious to our essential functioning as humans and persons'. Abductive inferences inform us that it is reasonable to believe this normative claim given the existence of the natural facts, even if the natural facts themselves do not overly prescribe an evaluative conclusion. However, the fact that human needs are biologically efficacious does contain within itself evaluative force if it's the case that the moral network seeks such robustly contingent outcomes such as self-preservation. In other words, it is reasonable to hold the normative view that conditions efficacious to human welfare should be protected given that it is a fact in the world that certain natural conditions are efficacious for human survival. Abductive reasoning informs us that this is the best or most apt conclusion to draw from these facts about human existence. I want to add that my view does not necessarily hold that there are mind-independent, moral facts in the world with their own moral content. I do not hold that there are such entities as moral facts in the world independent of us and to which we apply reasoning in order to discover. The moral salience of certain natural facts in the world can be prioritised over other others facts due to their efficacy within the particular moral order we have constructed.

Let me give an example of how abductive reasoning permits the derivation of normative value from natural facts, and how this makes morality a matter of truth and falsity. Let's say that one could only choose one of two choices. Either one could choose to partake in a luxury pursuit, or one could choose to save the life of an innocent person<sup>17</sup>.

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<sup>17</sup> I assume here that the option of choosing the luxury-pursuit is one that exists for somebody who is enjoys a high level of well-being and is not in desperate need of luxury.

Knowing that morality is about promoting salient human interests leads us to perform the latter in favour of the former. It is a sound moral judgment, therefore, to protect innocent life when the choice is to do this or partake in a luxury activity because, *ceteris paribus*, protecting innocent life is inherently the morally appropriate thing to do. It would be a mistake of rationality, a mistake of properly rationing the world up in accordance with the norms of abductive reasoning, to choose the luxury activity over the life-preserving one. In this sense, moral judgements are capable of truth and falsity ascriptions. The belief that preserving innocent life has greater normative value, in this context, than the belief that one ought to satisfy one's desires for luxury, in the context of this choice scenario. Importantly, what makes it true that life preservation has this greater value in this context is not that someone believes it to be so, or has a pro-attitude towards it being so. Rather what makes life preservation trump luxury satisfaction in this context is something inherent in life that makes it more important, normatively speaking, to preserve for the innocent than what is inherent in the pleasure derived from luxury satisfaction<sup>18</sup>. What is more, the ethos of morality itself promulgates that everyone has good reason to see that this is the case, and we can argue with others as we would argue about disputes over facts in a situation where someone would rank luxury-satisfaction over protecting the innocent.

We can now see the sense in which utilitarian essential interests can be understood as appropriate factors in the process of abductive reasoning. Essential interests for persons are facts about persons that will always be worthy of qualifying as plausible moral claims. Claims about what it is morally plausible to consider are subject to truth and falsity, we can get such claims right or wrong, and they will be right or wrong not in the sense of violating conventional beliefs about right or wrong, but by either conforming to or violating what is in our human interests. The force of such reasoning is effective given that object of moral networks is to protect and enhance salient human concerns.

This view about morality exists despite Hume's objection that we cannot logically infer moral conclusions from non-moral premises. Salient human interests exist in the world

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<sup>18</sup> See *ibid* on the notion of stance-independence. Here Shafer Landau makes the point that moral truths exist independently from actual perspective.



and guide us in separating true plausibility claims from false ones irrespective of the fact that moral terms cannot be derived from non-moral premises. Once we know the contingent truth that moral networks enhance human affairs positively, then we can know what does and does not constitute a valid moral claim. Likewise, with Moore's objection to naturalism. We can still hold that there are mind-independent moral facts about the practice of morality itself within social networks, and accept that non-moral terms, natural properties are not synonymous with moral terms and properties. Also, we need not be committed to the view that natural facts in themselves have motivational content or force. The reason why such facts are identified as morally salient, or ought to be so identified, is due to our common sense intuitions and experiences about what it is needed for the sustenance of biological integrity.

#### 5.4 Essential Interests Compared and Contrasted

The maintenance of essential interests is of value to us because it instantiates an objective state of human dignity. It is important, for instance, to note the subtle basis on which the utilitarian view about the value of essential interests differs from that of other claims made about the moral primacy of human needs. Shue<sup>19</sup>, for example, argues that subsistence has value for individuals due to the fact that these individuals cannot enjoy rights in general without the maintenance of subsistence rights. The rights to freely speak, move, believe, associate etc. cannot be realised unless we each enjoy basic subsistence. The severely malnourished don't have a voice, they do not function at an adequate social level, and it is this, for Shue, that locates the disvalue of such conditions. Subsistence rights, then, have instrumental value for Shue. For him, we ought to prioritise basic human needs because such needs serve the political ideal of individualism.

But I argue that under the utilitarian account covered above, the absence of subsistence is a wrong in itself—it produces an intrinsically bad state of affairs for sentient beings. Failure to obtain what is necessary for subsistence is not wrong primarily because it denies humans the rights to move, speak, believe—although these are good reasons for

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<sup>19</sup> See Shue (1980).

acknowledging the undesirability of non-subsistence. Eyesight is good for us qua human existence—not qua its function in enabling us to satisfy preferences or desires. Such factors privilege the discourse of essential interests over other rights.

This point is important for my analysis because it means that the guarantee of subsistence rights for all need not be based on a justification that they serve liberal or democratic rights. The protection of essential interests has no necessary connection with democracy, for instance. Non-democratic regimes—say those composed of chiefs that are appointed via a process of hereditary succession—may be decent in the sense of adequately protecting its members from suffering. A society that does not respect the rights of individuals to the freedom of speech, movement, assembly etc and whose authority does not rest on the consent (nor the contest) of its members, may still be one that respects essential interests relative to that society. The non-democratic authority that constitutes such a society may do well in protecting the basic human well-being of its members by producing good biological functioning of all its members, and by respecting the integrity of its members.

It is also worth noting that essential interests can be minimally catered for in this instance without them extending to ideal interests as these are understood by preference utilitarians. A society may fail to ensure for all its members equal opportunities to develop their rational capabilities to become effective preference holders and to express those preferences diligently. As long as such a society does not permit the existence of suffering or misery in terms of degrading biological development then such a society will cater for essential interests. However, this does not deny that in a society or culture that does value effective rational autonomy as an essential interest—as a condition of well-being—that the protection of such interests will be required for that society to realize essential interests sufficiently. The minimal requirement of essential interest, in other words, is that misery and suffering be avoided, an extension of this, on utilitarian grounds and relative to a society that values rational autonomy, will be definitive of essential interests in that society only.

Think also of decent treatment that is warranted to those who are not capable of possessing or exercising liberal rights. Would such treatment be granted to such people if subsistence rights only had value if they promoted other rights? Take for example the situation with those who are immobile and suffering from dementia and severe forms of Alzheimer's disease. People who fit into this category are unlikely to effectively exercise their rights to association, movement, speech, and the like. But there is a very important sense in which we say such people are morally entitled to subsistence. If basic rights are identified and valued only in relation to other rights, as Shue argues, the people in these categories would not be entitled to these basic human needs. However, it makes sense to say that the protection of people in this situation is undertaken in a decent society on the basis of care and comfort being intrinsically valuable to the welfare of persons. Adequate subsistence matters for these beings irrespective of the issue of rights satisfaction. Subsistence matters for humans in terms that can be expressed outside the domain of rights fulfilment.

Essential interests understood from an ideal utilitarian position can also be contrasted with Hamilton's work on needs in the political realm. Hamilton's account of needs and their place in the political spectrum, especially in the sense that they relate to a rights-based civil society, is in the spirit of what I present here. However, there are significant points of difference that I want to note. Hamilton associates the rights-based political realm, the realm that he sees as an insufficient network for the securing of human needs, with utilitarianism<sup>20</sup>. Hamilton is cynical about any attempt to provide for needs from a meta-theoretical understanding. Utilitarian theory, from Hamilton's perspective, tends to "generate the unconditional prioritisation of subjective preferences despite the acknowledged fact that preferences are determined (at least in part) by sources beyond the individuals who avow them."<sup>21</sup> and that "At its base, as an approach to morality, utilitarianism is subjective-relative; it treats pleasure or desire satisfaction as the sole element in human good, and evaluates actions dependent on their consequences on human welfare determined by individual avowal (preference) alone."<sup>22</sup> The limited extent to which utilitarianism does prioritise needs is, for Hamilton, at the artificial

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<sup>20</sup> See Hamilton (2003) p.7 and p. 15 especially.

<sup>21</sup> *ibid.* p. 7.

<sup>22</sup> *ibid.* p. 15.

level of ensuring that the needs of rational agents to express their judgments about the good life are respected<sup>23</sup>. He adds that in general utilitarianism “excludes any systematic political process of evaluation or transformation of preferences...”

The interpretation of utilitarianism here by Hamilton is at variance with my account of ideal or interest-based utilitarianism. The latter does express conditions under which essential interests can be distinguished from standard preference-satisfaction where that is taken to mean the fulfilment of subjective wants. Utilitarians, in other words, are sensitive to prioritising preference satisfactions in favour of those more attuned to our essential needs and interests. What is more, I am not cynical about the efficacy of a pro-theoretical approach to the provision of needs within a political network. I believe that pro-theoretical strategies can play an effective role within the institutional structures of the state, especially on the part played by policy-making public officials and the values and standards we can expect them to profess. The universalism of essential human interests ought to have a straightforward appeal to any reflective agent operating within such an environment. I will develop this idea further in the next chapter, but it is enough to note here my points of difference with Hamilton.

Essential interests understood from an ideal utilitarian position can also be contrasted with work on human capabilities. Nussbaum holds that just distributions should be based on the Aristotelian ideals that promote human flourishing in the appropriate way, namely that humans flourish properly in relation to what makes them human. Specifically, this means that humans should be provided with the capabilities to act in such a way that the good life can be chosen and lived, and by ‘the good life’ is meant something in the order of living life intelligently. This would involve, above all possessing the capability to exercise effectively the skills of practical reason. One would have an adequate control of one’s intellect and judgement ability to be able to effectively choose and monitor a well-lived life; a life free from detrimental extremes for example. Associated with this is the degree of well-being or self-esteem that one would gain from knowing that one was in such control of one’s life. Feeling like an

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<sup>23</sup> *ibid.* p. 7.

autonomous chooser and not as a slave to the passions is an important component of living a flourishing life.

How does such a view relate to what I have said about utilitarianism and essential interests? The straightforward point is that utilitarianism can share the Aristotelian ideal set forward by Nussbaum. Ideal preference utilitarianism is concerned primarily with maintaining the conditions that enable individuals to be effective expressers of preferences, and not to be subject to conditions that disable them from doing so. As Singer informs us, people must not only be free from misery, but must also be able to partake in activities that make their lives uniquely human; namely that they must be effective preference holders. It is the capability of expressing preferences diligently or rationally that lies at the core of both Aristotelian and ideal preference utilitarianism. The theoretical distance between the utilitarianism and the capabilities approach should not be drawn as wide apart as it is in the literature. For example, Sen holds that utilitarians identify utilities such as pleasure, happiness or desire satisfaction as the only worthy objects of the what he calls the evaluative space which constitutes our moral sweep, as it were<sup>24</sup>. Nussbaum herself criticizes Sen's approach to capabilities when she indicates that he ought to counter the subjectivity of utilitarian accounts of the good life with a more "objective normative account of human functioning" and instead should put more emphasis on constructing a "procedure of objective evaluation by which functionings can be assessed for their contribution to the good human life."<sup>25</sup> For my purposes, it is not important to know whether Nussbaum is justified in this criticism of Sen. My point is to show how my theory shares with Nussbaum's an opposition to those who do not explicitly commit to an objective account of essential human needs and interests.

The account of essential interests I argue for here is needed in addition to the requirements of civil society set out in chapters two and three. As we saw earlier, republican civility according to Pettit is established by its relation to freedom as non-domination. The state is civil and we are civil to each other to the extent that we respect

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<sup>24</sup> See Sen (1993) pp. 33 and ft. nt. 9 on this page.

<sup>25</sup> See Nussbaum (1988) p. 176.

the rights of all to non-domination, where these rights involve the right not to have one's interests considered arbitrarily, the right to contest decisions, to have effective checks and balances in place that discourage concentrated power, to have an effective domain of undominated choices, etc. More importantly, for my purposes, Pettit holds that it is normatively plausible to think of non-domination as the only concern of the state. He holds that this is a congenial idea once we have a thorough understanding of non-domination itself<sup>26</sup>, even though he states in other places a less extreme or ambitious role for the language of non-domination in political theory<sup>27</sup>.

Firstly, I have a problem with Pettit's account of resource distribution based solely on promoting the extent of undominated choice. Take Pettit's example of a resource distribution that grants a disabled person the means to be more mobile. It seems odd to say that the justification for this resource distribution is based on increasing the quality of a choice-matrix that is increasing the undominated choices of disabled people. Mobility may make people more able to effectively contest decisions—being able to access transport and buildings more easily and may aid them enormously in contesting the world around them and in further tracking their own interests. But should a person with such disabilities have to track their own interests in a contestatory world against others. It would seem harsh to think that we would empower disabled people only on the basis that it makes them better able to contest decisions for themselves<sup>28</sup>. It is better for such people to live in a discerning democracy where members of the public and the public service are geared towards protecting the interests of the vulnerable. However, this is not a direct criticism of Pettit's notion of non-domination for under that theory alone needs in order to be free is that one is not subject to arbitrary interest

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<sup>26</sup> See Pettit (1997) p. 81.

<sup>27</sup> Ibid. p. 4, 7.

<sup>28</sup> We can ask, as an aside, whether such a contestatory environment is consistent with what Pettit and Skinner allude to as an assumption about human nature underlying republican theory, namely that 'the people' prefer to be left alone rather than to be politically engaged. I argue that Pettit's republic—one where normative knowledge is gained via dialogical process—is going to be more engaging for people and more demanding. It is an advantage of my account of essential interests that people will trust the state to protect their biological and rational integrity, and in so doing will more often than not act humanely on behalf of the citizenry thus making contestation less likely. It is not decent, under my account, for people in vulnerable positions—people who are lacking in effective biological functioning—to be empowered only to the extent that they can contest for themselves. A world of contestation for the vulnerable against the powerful state or powerful private interests may not be a very desirable world for the disadvantaged. Better to have, I argue, a state geared to be sensitive or discerning towards the needs of the vulnerable and to use public resources, via the public service, to lobby and organise on their behalf. On this basis, my account of a discerning democracy is more favourable than Pettit's account of civility as non-domination for all.

consideration, and this can be done via representation and not on the basis of one's efforts solely.

But my point of difference with the idea that resources should be distributed in the name of promoting the extent of undominated choice, in cases involving the vulnerable such as the disabled, is that resource distribution can be justified on a more discerning and edifying bases. Resources that increase the mobility of the disabled not only matter to the disabled because it increases their choice-matrix, it also matters to them in way that it increases their overall essential interests in many aspects of their lives. The reason why a disabled person would be granted resources would be due to their lack of biological functioning—mobility being an essential part of what it means to live a worthwhile life—one where social bonds can be formed and a sense of personal identity moulded. Such a person should live in a society where the state acknowledges the vulnerable position of disabled people and prioritises them above those better off in terms of biological functioning and personhood development. The disabled community gained more public status when they acquired resources in the wider community, when their membership in that community was enhanced due to their greater capacity to be a part of it. Appearing in public without strain or excess effort, without forever relying on the good favour of friends, seeking the assistance of strangers or have such well-intentioned assistance directed at them by others, all goes to contribute to the dignity of civic and social membership in a community.

Another problem with Pettit's account of civility is that the state is expected to maintain equal non-domination for all. This means that all are equally entitled to have a satisfactory level of the extent of undominated choice in order to track their interests. Undominated choice as a "right for all" and as the guiding principle of resource distribution does not necessarily privilege salient interests over less salient ones. The dialogical or deliberative process under Pettit's republican model is based on 'good faith'—that open contestation will produce best outcomes for all.

But what if I am a corporate magnate who can only effectively track my own interests—say being globally mobile—if I am granted more personal wealth by the

state. It could be argued that tax cuts by the state would be an effective way of increasing the extent of undominated choices for the wealthy. But tax cuts may lessen the extent of undominated choices for those in vulnerable positions where they rely on state services for the maintenance of their undominated choice. Pettit does not give an account of how the state should satisfy the extent of undominated choices among disparate individuals with varying degrees of need. We need to, in addition, ascribe to the state the power to favour certain ways of life over others in its relation to citizens.

Another way of expressing the distinction between my account of interest-based utilitarianism and Pettit's account of civility is to say that Pettit is committed to an equality of non-domination; whereas I am committed to the notion of equality of welfare—where all fare well in relation to an objective sense of what it means to fare well. Pettit's account of civility seeks the foundation of free choice, whereas my account seeks outcomes of equal welfare for all. The ranking of our interests according to *prima facie* moral appeal, as I argued earlier, needs to be added to the liberal and republican notions of civility. Not only, I argue should a political order be deliberative, it needs also to be morally discerning.

My account of a discerning democracy—a democracy that is designed with a requirement to ensure that the essential interests of all are prioritised—is also distinct from the other forms of republicanism covered earlier. It is distinct from Dagger's republicanism in that demands from the state that it not only promote the autonomy of citizens. Remember, that for Dagger a precondition of rational autonomy is a stable public that exemplifies public virtue. One cannot be effectively autonomous in a society laced with corruption, for example. But there is no account here in Dagger's republicanism of ensuring that the essential interests of all in a republic will be served by those who hold positions of constitutional authority. Daggars places faith in the ability of all to be autonomous within a community—the reliance is on exercising one's self-determination effectively within a domain of civil community practices. There is no acknowledgment by Dagger of the kinds of forces that operate surreptitiously within political communities that can undermine the ability of citizens to ensure that their essential interests are tracked. Such concerns were raised in chapter four. There is a



need, I argue, for republicans such as Dagger to look beyond their general commitment to autonomy—that which is fundamentally a commitment that owes its origins to liberal ideals—and think more of how a political society can operate so as to prioritise the essential interests of its citizens.

The notion of a discerning democracy based on the provision of essential interest for all differs also from Sandel's republicanism. Remember that for Sandel a republic needs to ensure the self-determination of all its members by empowering them to operate effectively within the community unique to their particular identity. This may require a political environment in which it is acknowledged that the social and cultural identity that all members of that unique political community needs to be enhanced so as to make each members capable of effectively functioning in that community. Sandel here implies that resource distribution in his republic will be largely influenced by the needs to enhance this unique social and cultural (or communitarian) identity within each members of that society. Again, the emphasis is not on a deep concern with ensuring that each citizen has their essential interests satisfied, rather the deep concern with Sandel's republicanism is that the contingently determined, and by contingent I mean the common understandings of collective identity established by history, tradition and the prevailing or dominant social values, communitarian identity of each member of that society is upheld and protected. Communitarian standards such as these are likely to include basic needs. However, there is a theoretical point of difference between the strategy adopted by Sandel and the one I set out here.

My account of essential interests also offers important additions to the liberal commitment to civil society. I presented in the second chapter the emphasis that liberals place on certain rights of the individual. For our purposes, the most important of these was the right to life and the right to freedom from harm. However, both notions are act more as standard-setters in the normative sphere of public discussion and legal interpretation about what it means to have a right to life or to be free from harm. For instance, there will be disagreement about the extent to which people are entitled to a certain quality of life rather than the mere sustenance of life itself. There is also ambiguity under Mill's notion of harm as to what forms of harm can be universally

agreed upon as harms detrimental to one's well-being. My account of essential interests which sets out the universal requirement of the protection of bodily integrity and freedom from misery offers standards that can fill in the gaps within liberal theory concerning the use of public power over private citizens.

I have argued in this section that the state ought to exist not just to enforce the canons of reasoning to ensure transparency, accountability and the prevalence of relevant issues. For both sides will present their account of relevant issues: Fast food companies for the freedom of choice of children and the enjoyment that they derive from consuming their products, and lobby groups for the protection of child health and autonomy. A state that seeks to implement essential interests under my account of this term will hold that a life of obesity is contrary to essential human functioning, and will side with the interests of children against commercial interest on this issue. A decent and morally discerning state, in other words, will take a stand against the competing interests in society and legitimately discriminate against those interests that seek to harm the base natural functions of humans. A decent state will be entitled to take a stand and contribute to the decision making process about what counts as a relevant issue under consideration, and why one issue should be given more priority than others on the grounds of human dignity.

The state needs to be geared towards protecting the salient interests of all those involved here, and not just playing the role of facilitating the sharing of ideas between the participants in a contestatory process. It is legitimate, I argue, for state policy makers to endorse the arguments of child protection lobbyists on such issues on the grounds that they are protecting the vital interests of children as they proceed in their development to person. State policy makers can legitimately argue that excessive commercial targeting of children has very real dangers of bringing about poor diets that are damaging to concentration levels, obesity that leads to misery and long-term ill health and self-esteem problems which in turn affects the educational performance of such children, etc. Or it rules out post-hypnotic suggestion in advertising to all (or food stores releasing the smell of baking bread into the air to induce purchasing).

### 5.5 Essential Interests and Legitimacy.

It's worth noting that I hold that while the provision of essential interests is a moral claim on the official power holders in that society, it is not a claim about what makes a form of political authority legitimate. A political order can be legitimate without protecting the essential interest of those within it. Having legitimate political authority means possessing a recognized right to rule over others. To have legitimacy to exercise power over others requires that the authority holds the status of 'rightful ruler' over those others. What it means to have 'rightful rule over others' is a contested notion. Rightful rule, for example, in a patriarchal, tribal society will consist of meeting the criteria of 'conforming to traditional decision making procedures and giving power to those with the right hereditary status'. Rightful rule in a western democracy will be articulated very differently. It has been based on the idea that political authority is endorsed by divine command and, at another stage, via the consent of individuals where it is held that "persons are the basic units of value; all are worth of social recognition; personal worth is best protected by civic participation."<sup>29</sup> But the question of whether democratic legitimacy is "better than" tribal legitimacy is inexplicable. Both involve societies that have, for their respective members, legitimate or rightful rule. They both hold formal, publicly acknowledged forms of ruling that serve the political functions of those societies. The criteria for determining legitimacy are socially or rationally normative, not morally normative. The concept of legitimacy itself has been open to the constructivist forces of history. It is very hard to say what role philosophical reflection should play in our understanding of legitimacy, if such a role exists at all.

Lacking democratic rights or the enjoyment of rational abilities, for example, is not necessary for legitimacy. Nor are they essential for the enjoyment of some essential interests Children, for instance, can have their essential interests catered for without possessing either of these conditions. The fact that children do not have equal representation in a society is not going to be termed as a matter of indecency under my

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<sup>29</sup> Redford (1958) p. 98.

account. However, this is not to say that the lack of representation for children is of no concern normatively. Democratic principles and the rights of individuals to non-arbitrary interference could be argued for on a separate basis.; on say, the basis of what goes to make a society a decent society or the basis of who should have legally recognized political rights.

Having said that possessing essential interests is not necessarily connected with democracy, I want to add that open and democratic societies will be more likely to promote essential human interests than other political systems. The promotion of essential interests for all is highly unlikely to lead to, on a contingent basis, the totalitarian drive if it takes place within an open society with a sense of enlightened public service. Such a society will value and promote inclusiveness as well as essential interests. A decent state, according to my account, needs more however. It will be one that allows the public service, and the citizenry, to argue positively for a way of life that conforms to the tenets of their real interests for each individual qua their biological functions and qua their personhood functions. But by arguing for and privileging these tenets of human integrity, the state is obligated to provide good evidence for the policies they propose on this basis. The offering of such evidence and policies will be up for review and tested in a non-dominating society. It will be up to the non-state sectors of society to contest the accuracy of the information presented by the state in the name of promoting the universal tenets of decency.

By showing that there is a universal standard of human propriety I have offered a good reason for holding that an essential aspect of ‘rightful rule’ or the ‘rightful exercise of power’ could be such a standard. Essential interests would then act as external moral constraints on the rightful exercise of power. All political societies, and the legitimate holders of authority within them, in other words, would have good normative reason to be decent. The nature of political authority places individuals into a vulnerability relation<sup>30</sup>. Given that political authority has the power to significantly influence how people fare in their lives, it is important that this power is morally constrained—that

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<sup>30</sup> See Margalit (1996) for the idea that all authority is humiliating.

those who hold this power are made to think about their basic moral obligations to those who are vulnerable under this power.

We are now in a position to explore the ways in which the state could go about implementing the changes needed to produce a decent society as I have set it out here. Essential human interests have an important moral force in the political realm. I have argued that it is morally pressing on authority holders that they ensure that people get what they need; that there is an understanding of what is proper for each individual to have. Preferences based on wants that are not necessary for needs will not outweigh basic needs in a decent society, and any legitimate governance in a decent society will be geared towards ensuring that needs-based preference outweigh wants-based preferences when they clash in deliberative engagement. This is a necessary distributive principle in a decent society.

Before closing this chapter, however, I will briefly cover the issue of the extent to which my account of essential interest offers a guideline to how the relevant parties ought to respond to cases where essential interests conflict. In cases involving extreme comparisons the ranking of essential interests should be clear enough. Intuitively, for example, we should see that preventing such things as the misery of torture over a long period of time would outweigh the essential interests that children have in developing their audio faculties. If the choice is between either the former or the latter, then we intuitively ought to see the greater importance of preventing the former rather than creating the latter. A life of severe and prolonged pain is, intuitively speaking, worse than a life where one has no audio function.

So some essential interests will outrank others in extreme cases where they are mutually exclusive. But, of course, extreme cases will not dominate everyday decision-making about which essential interests should be realised over others. The harder cases are going to be those where two or more essential interests compete where it is not clear that one obviously outranks the other, as in the above case where excessive pain and misery outweighs audio function. How do we decide between competing essential interests in these more moderate cases? For instance, we might ask whether there is a

way of knowing whether the essential interest of a mother to have the opportunity to nurture her offspring outweighs the essential interests of, say, healthy children to develop their audio faculties. Does the essential interest in developing one's audio faculties from a young age outweigh, in any sense, the essential interest that a mother can be said to have in nurturing her offspring? Or, to take another example, is having good eyesight a more important essential interest than enjoying mobility?

How do we know when an essential interest outweighs another? In the extreme case mentioned above where the essential interest of avoiding a life of misery outweighs the essential interest of possessing audio function, we know that what makes the former of greater value than the latter (in this context) is due to experience (or appreciation) of the displeasure of excessive pain when compared with the perceived displeasure of a life without audio function. This is something that we can claim to know about essential interests and their comparison without much effort. But can we know, for instance, that eyesight is more important than mobility by turning to our 'common sense' perceptions? We cannot. The value of one of these essential interests over another is not as clear-cut as in the extreme example. In such cases where one essential interest does not obviously outweigh another, I argue that there exists an indeterminacy about how we ought to decide which one is of greater value. In the more moderate example, both eyesight and mobility are important interests to realize for human beings in their capacities as biological agents. It should be clear to us in this context that neither of these essential interests ought to be demoted. However, there may be occasions when a political decision needs to be made which will involve one interest being promoted to a greater extent than another. In such cases, we may need to know such things as the extent to which 'good eyesight' or 'mobility' is sufficiently realized.

Given that the weighing of competing essential interests can be clear-cut in some cases and indeterminate in others, we can derive the following position. When it comes to the issue of 'who decides' which essential interests should prevail when they compete, we should turn to a inclusive, principled and open decision-making process. Such a process will be inclusive in that public decision-making concerning essential interests

ought to include the combination of many groupings. In the most general sense, the public ought to be informed of such decisions and have an opportunity to comment. The people who are more directly affected by a decision concerning their essential interests ought to have a prominent position in the deliberation process. However, what is needed in addition to this is a principled framework under which such public deliberation should take place. This is especially so given that I indicated above that there will be clear-cut cases where some essential interests will outweigh others. Decision-making processes need to be suitably constructed so as to ensure that these common sense judgments about essential interests prevail.

But given that I also stated above that there will be cases where the assessment of competing essential interests will not be clear-cut and will involve some degree of indeterminacy, the conditions of inclusiveness and principled judgment will also have to recognize the roles played by the relevant experts. Deciding such issues as to the extent to which an essential interest is sufficiently satisfied will involve the expert advice from health professionals, educationalists, scientists, sociologists, etc. It is vital that these groupings play a large part in deliberations about essential interests so as to ensure that deliberations are made on an informed basis. In addition to this, deliberation over essential interests needs to be sufficiently guided in such a way so that the relevant issues are brought forth and debated, and that the salient interests are prioritised over others. In this sense, we need the state to be sufficiently geared to do this. For this reason, I include public service officials in this list of professionals who contribute to the principled structure of deliberations over essential interests. The next chapter will go into more detail about what this entails. What I wish to establish here is the eclectic nature of the decision-making process that ought to accompany public deliberations involving essential interests.

## SUMMARY

In this chapter I have set out a case for how our normative thinking about persons and their welfare should be conducted. This will serve as a foundation for a new way of thinking about the relationship between states and citizens. Specifically, I will argue that the state can take a new principled stance towards the latter on the basis of making provision for the protection of their essential interests. I have set out an account of such interests based on a utilitarian perspective. I have done this by distinguishing ideal utilitarianism from other forms of utilitarianism. This was done on the basis of making a distinction between welfare understood on a subjective basis, and welfare understood on the basis satisfying interests that are crucial for the biological well-being of persons. I have argued that the latter has a common sense appeal to all. I have shown how the epistemic appeal of these essential interests has important implications for our normative considerations, especially in the context of abductive reasoning about morality. This method of moral reasoning gives us clear guidelines about how to rank states of affairs in the world in order of normative importance.

This way of thinking about basic human needs or essential interests has been compared and contrasted with similar positions taken in the literature on normative political thinking. However, my main task has been to highlight points of difference between my account of essential interests and those who have incorporated human needs into their political theory. A utilitarian account is theoretically distinct from most others in this area on the grounds that it places emphasis on individuals as sentient beings, rather than individuals as citizens.



## 6. IMPLEMENTING ESSENTIAL INTERESTS: THE ROLE OF PUBLIC SERVICE INTEGRITY.

In this chapter I will show that essential interests can not only be formulated as an independent and coherent philosophical theory, but can also serve as feasible institutional goals for a democratic state to implement<sup>1</sup>. As we have seen, what makes a

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<sup>1</sup> Essential interests have been applied at a constitutional level. But this style of constitutional creation is the exception rather than the rule. Governance in a democracy is constitutionally bound. The legitimate institutions of authority are identified by the constitution and their jurisdiction and coercive powers are clearly defined and publicly known. For example, sovereignty and the nation-state will be identified, and the separations of the powers of the executive, legislature and judiciary will be established. Different levels of government may exist in the forms of federal, central and local denominations. Electoral systems will be codified. Rights to equality, non-discrimination, property, association, etc will be legally protected in statute. The legislative house(s) will be identified and the corresponding offices of the state (e.g. Presidents, Head of State,). Powers will be conferred upon these offices such as the power and authority to make, amend and annul law; identify and create citizens; exclusive authority to raise revenue, military power, and the like etc.

The prominent democratic constitutions that codify these formal relations in a polity vary in content. Each is a creature of history and convention unique to the particular society in which it originates. Some constitutions are formal and singularly identifiable documents others are less formal and spread throughout statute or are identifiable, in part, with relation to the common law. Take for example the constitutions of the United States and Australia. In these constitutions the powers and nature of the state are formally declared in a single document; the content of these constitutions is general in the sense that broadly defined powers of the different institutions of the state are identified rather than the specification of outcomes that those institutions ought to pursue. In these situations, constitutional provisions are vital for the maintenance of order and stability, as well as the protection of the democratic principles of individual freedom. Compare the nature of these constitutions with that of New Zealand where there is no single constitutional document.

Ireland's constitution is one where essential interests are codified-- where there are more details included in the constitution about the sort of society that the state's institutions ought to create. For example, in Ireland's constitution Article 45 sets out the "Directive Principles of Social Policy." Here it is stated that the state will "strive to promote the welfare of the whole people"; and "direct its policy towards securing:

"That the citizens...have the right to an adequate means of livelihood. ii. That the ownership and control of the natural resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good. iii. That...the operation of free competition shall not be allowed so as to develop as to result in the concentration of the ownership or control of essential commodities in a few individuals to the common detriment."

Not only are distributive principles detailed but also statements about the right to dignified treatment:

4. 1."The State pledges itself to safeguard with especial care the economic interest of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm,...and the aged.

2. The State shall endeavour to ensure the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter associations unsuited to their sex, age or strength."

While the constitutional provision for essential interests is possible and a worthy goal, such a codification is not my main concern. This is not to deny that human decency as a principle of constitutional purpose would be a suitable principle for a democratic state to use as its foundation<sup>1</sup>. But my concern is with implementing the tenets of decency in a democratic state that does not formally identify essential interests in this way. My task is to articulate how essential interests could be established in democratic societies that are founded on perfunctory constitutions. In such

society decent --one that systematically upholds the essential interests of its citizens-- is not going to be fully cashed out purely in terms of what makes a society democratic, for the two are distinct concepts. However, this chapter shows how essential interests and democracy can systematically cohere within the institutional structures of a political order. The question is how can governance that respects essential interests be entrenched within such a system? Before answering this question I will argue for why we ought to consider the protection of the essential interests of all as a primary concern and obligation of the state.

### 6.1 Responsibility and Essential Interests

In the previous chapter I set out the sense in which we can come to make knowledge claims about moral truth and falsity in terms of identifying plausible claims of moral concern. I showed how we can maintain a theory of utilitarian essential interests in the light of three major objections to naturalist morality. As we saw above, essential interests have a moral appeal to rational agents who deliberate in accordance with abductive reasoning. Such reasoning favours those natural facts that are conducive to our common sense understanding of what it means for individuals to preserve their biological integrity. Here I will argue that all forms of political authority have good normative reason, at the very least, to protect and promote the essential interests of those who are subject to that authority. The link between “having authority” and “having the obligation to uphold essential interests” is based on the normative importance of protecting basic human interests when the *ability* to do so exists. Political authority has the potential to seriously affect how people fare in terms of the preservation of these basic interests, hence its obligation to treat people decently. Take the issue of responsibility. There are two ways in which we can take responsibility for our actions. We can take responsibility by consenting to take responsibility. By accepting a job or freely choosing to have or adopt children, we take on responsibilities not only of a legal nature but also responsibilities of care. We are responsible for

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societies, the challenge is to show how the essential interests of all can be catered for within the institutional and dialogical processes of a democratic order rather than directly through constitutional reference.

ensuring that our actions within such roles are conducted with due attention to the responsibilities undertaken. An airline pilot, on taking the position, accepts not only the legal responsibilities that the job entails, but also the moral responsibility of paying due respect to his/her legal duties. We expect the pilot to act responsibly in ensuring that he/she takes the required amount of rest and sleep before flying and refraining from excessive alcohol consumption. The law acts as deterrent for the violation of such responsibilities, but we do not rely solely on this force for the effective implementation of such regulations. We rely, to a large degree, on the holders of the legal responsibilities to act reasonably.

There is however another way in which we can be said to be ascribed responsibility that does not involve consent. If one has the ability to act so as to prevent the detriment of essential interest to others, at no cost to their own essential interests, then one ought to accept some form of responsibility for protecting such interests. This is an expectation about moral responsibility on a par with the expectation that people will diligently obey and conform to their duties. I will call this type of responsibility 'original responsibility'.

The duty to assist others when their essential interests are under threat is not a duty that one explicitly consents to uphold. Rather, it is a duty that derives from a common sense expectation that needy people are entitled to the assistance of others where such assistance is viable. If someone is drowning, for example, it is understandable if one does not go directly to the rescue due to one's concerns about one's ability to preserve one's own life and well-being in the process. But it is not morally acceptable to do nothing. If it is within my ability to assist a drowning person, even if to merely raise the alarm, where there is no threat to my own essential interests then I have a moral duty to assist. Where the interests at stake are not essential then no such moral duty exists. It would be considerate of me to open the door for a tradesperson with her/his hands full, but there is no common sense notion of a moral duty of me to do so. Failing to open the door on this occasion would not violate the essential interests of the parent nor the child.

## 6.2 Public Service Integrity

This interplay between the two types of responsibility in the domain of public service is covered by J. Patrick Dobel and Debra Stewart. Dobel argues that responsibility is linked to real power and not just to formalized power<sup>2</sup>. Dobel argues that certain moral obligations can be derived from the nature of state office itself<sup>3</sup>. Specifically, Dobel points to Debra Stewart's point about the facts of state power to do with its capacity or ability to assist those in need which, in turn, implies its possessing the appropriate proximity and expertise to assist those in need<sup>4</sup>.

Public service integrity, for Dobel, is constituted by the following. He offers three desiderata for public integrity and notes that it is the responsibility of professional public officials to seek a balance between all three. The three desiderata of public service practice, according to Dobel, are paraphrased here as 1. The discretionary judgment of public officials must be consistent with liberal and democratic principles, 2. Public service discretion involves balancing official authority with the personal integrity of citizens, and 3. Public service discretion must be consistent with the standards of prudence without being dominated by political expediency<sup>5</sup>. To perform these practices Dobel argues that public officials need to possess professional integrity. This means, according to Dobel, that they must be disposed to act reflectively, with self-discipline, courage, and an awareness of the difference between private beliefs and public service obligations<sup>6</sup>.

The second desideratum above is the most relevant in terms of assisting those in need or in terms of protecting the essential interest of all, assuming that the personal integrity of citizens involves the notion of catering for their welfare. But Dobel does not go into great detail about the basis on which public officials can promote the needs of the citizenry. He indicates that an essential value of public service is to provide care for

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<sup>2</sup> Dobel (1999) p. 13.

<sup>3</sup> Ibid. See also Denhardt (1988) for a similar point.

<sup>4</sup> Ibid. p. 15. See also Stewart, D "An Ethical Framework for Human Resource decision Making" pp. 72-4 in Keller (1988).

<sup>5</sup> Dobel (1999) p. 2.

<sup>6</sup> Ibid. p. 3-4.

others<sup>7</sup> and to acknowledge that all citizens possess dignity<sup>8</sup>. However, this is just briefly mentioned and not elaborated on. More emphasis is placed by Dobel on the norms that ought to guide public service decision making in the sense of making such decisions respect truthfulness, accountability, fairness, competency and the like.<sup>9</sup> Dobel holds that public integrity, and with it the protection of and care for individuals, is desirable in the sense that it promotes democratic values. Public officials ought to be concerned for the welfare of citizens on the basis that such action promotes the liberal principle of respecting individuals<sup>10</sup>. One point to note is that Dobel does not explain public service integrity in any utilitarian sense.

Bovens makes a similar commitment without elaborating on the reasons for why the state should be concerned with the welfare of individuals. He states that "Conduct is often called 'responsible' if it shows some sign of an adequate perception of threatened dangers; if in the weighing up of the alternative forms of conduct, the possible disadvantageous consequences for others have received special attention." Yet Bovens does not say why the protection of individual welfare in this way is important, nor how public officials go about identifying what constitutes harm or what harms are more in need of avoidance than others.

An interesting aside to this is found in the work of J.P Burke. Burke argues that there are no objective and uncontroversial answers to the questions of what harms we ought to prioritise as worthy of avoidance over others. In general, he holds that the utilitarian mission of utility-based maximization of state of affairs cannot be achieved due to there being no objective standard of what counts as utility-maximization nor what method of maximizing utility should be adopted<sup>11</sup>. What would a utilitarian account of public service integrity look like, and in what way does it differ from the notion of public service integrity as it is articulated under a democratic guise? I turn now to a response to these questions.

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<sup>7</sup> Ibid p. 5.

<sup>8</sup> Ibid. p. 7.

<sup>9</sup> See Ibid. p. 21.

<sup>10</sup> Ibid. p. 7

<sup>11</sup> Burke (1986) p. 34, 36-7, 101,

### 6.3 Conscience Utilitarianism

In order to facilitate the public services protection of essential interests we can, I argue, articulate some normative guidelines based on utilitarian principles. Public servants who are instrumental in formulating public policy have the ability to influence proposals, agenda, outcomes and the like, but this ability must also be restrained by normative restraints that makes the exercise of this covert form of power consistent with the public interest. I will set out in this section how the norms of conscientiousness can provide such constraints and facilitate the professional performance of public service.

Let me say, firstly, something about conscientiousness. Conscientiousness is a trait of human personality whereby one is cognitively attuned to the proper or relevant considerations pertaining to one's responsibilities or to the issues before one's consideration. Conscientiousness describes a cognitive or rational excellence. Conscientiousness thus assumes self-control. A conscientious person is not someone who is only sporadically conscientious. Being randomly attuned to the relevant responsibilities expected under certain conditions is to say that a person is conscientious on occasion, but it does not mean that this is a conscientious person. Conscientiousness, then, can describe the nature of a persons cognitive abilities during the performance of an act and, or, the overall disposition of a person to hold this trait as a permanent feature of their being. Conscientiousness also means that one is diligent in learning from one's experiences. A conscientious approach is one where one is skilled in being able to compare and contrast current actions and issues with past one's, and seek to note the salient forms of knowledge gained from experience that can assist in the process of making future actions and politics effective. It is in the latter sense that I will refer to conscientiousness as a trait of professional life.

Being in control or disciplining one's professional cognitive functions not only means that one gives priority to the salient or proper features of one's responsibilities, but also that one acts so as to uphold such features. It is one thing to know how one is expected to deliberate and function as a professional, and another to act in such a way. This

means there has to be a certain robustness of character to uphold the professional duties of conscientiousness even in an environment in which one might be pressured to act otherwise. Being conscientious means that one is motivated to stand up for what it is in one's duty to do. A professional environment is going to be one where the costs of fulfilling the duties of conscientiousness are negligible. Professionals need to be free to profess; they need to work in an open and productive environment in which their professional duties are not compromised by outside factors.

Professional conscience needs also to be distinguished from personal conscience. A personal conscience is one that is formulated, primarily, in private. A professional conscience or consciousness is where publicly endorsed standards and values are promulgated and served. The professional conscience is related inexplicably with reference to the interests and welfare of others, whereas personal conscience can be performed in private, say in relation between one's God and oneself. Professional and private consciences can contingently overlap, where say one's personal, religious belief that one should be a good Samaritan and assist those in need may be contingently consistent with a lawyer's professional duty to provide legal assistance where it is sought, or a doctor's professional duty to preserve life. But the link here is only contingent. It is not permissible for personal conscience to impinge on professional conscience. For example, believing that suffering is the will of God and should go unaided is not consistent with the professional duty of a doctor to preserve life and reduce suffering when necessary. Nor could a public servant professional argue that anti-abortion policy should be implemented on the basis that it violates the sanctity of human life, divinely created. Private conscience can never legitimate the public conscientiousness of public service professionalism.

Having made these general points about conscientiousness and professionalism, what is the best form of conscientiousness for public servants to adopt in their professional role? I present utilitarian conscientiousness, or what I will term as 'conscience utilitarianism', as the best mode of professional thinking for public servants<sup>12</sup>. The tenets of conscience utilitarianism should not be foreign to us by now. Conscience

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<sup>12</sup> For the origins of this idea see Brandt, R (1996) pp. 146-7; 149-50; 153-55.

utilitarianism stipulates a responsible way of thinking for professionals, namely that we ensure that every policy considered or undertaken, is one that best avoids the disutilities that are detrimental to human well-being. The entitlement to avoid such disutilities is an impersonal good held in equal regard by all sentient creatures alike. It does not matter who is vulnerable to disutility—all are equally entitled to avoid subjection to it. Sentient creatures count as sentient creatures and not as entities as they might be perceived according to personal conscientiousness (eg. as servants of God, female, male, children, etc).

Conscientiousness, of any kind, is an elevated ideal of thought. This not only means that being conscientious means disciplining oneself to give paramount attention to the salient features before oneself and filter out those that are irrelevant, it also means that one can be expected to feel a sense of shame or guilt when one fails to perform one's responsibilities conscientiously. Not only is one expected to have a response to the failure in one's actions, the community to which the responsibilities apply are expected to view others with shame when they fail to act conscientiously. There are two important implications of this for the way we ought to create a professional environment in which public servants should act. Firstly, public servants should act in an environment in which conscientious acts, acts consistent with the tenets of conscience utilitarianism, are institutionally rewarded by increasing the good name or status of those who so act. Secondly, public servants should act in an environment in which peers and colleagues are free to express disapprobation when other professionals fail to act conscientiously.

Acts of approbation towards others in a professional environment may take the form of honour. Honourable action can be taken as actions done for the sake of avoiding the intrinsically bad property of misery, and having a concern to maintain dignity and value human flourishing. Honour, or good favour, should be bestowed upon those who exemplify such standards within the public service, and such a trait will be expected to have benefits for those who exemplify it. However, there is also an important sense in which an honourable person is not solely motivated by such benefits. An honourable



person is one who acts not for the sake of their own gratification but for the sake of bringing about states of affairs in the world that are intrinsically good for persons.

It's important here to note how my interest-based account of honour differs from Pettit's account. With Pettit, identifying the presence of honour involves identifying the character traits that promote the value of non-domination via the practice of civility<sup>13</sup>. Pettit holds that "people can be assured of their non-domination only so far as others recognize normative reasons for respecting them". Also, "Widespread civility is likely to be supported by the intangible hand of regard-based sanctioning, since the honourable are destined in most circumstances to be the honoured,"<sup>14</sup> and "If we assume that people care about the regard of others, seeking their high regard and fleeing their low regard, then it is natural to think that the intangible hand can be an important way of establishing and securing certain patterns of behaviour."<sup>15</sup> Civil people under Pettit's account of civility are ego-centred; they take umbrage at someone gaining benefit from the efforts of a collective for which they have failed to contribute. Those violated feel cheated that the rewards of their efforts are accessed by free-riders. Specifically, for Pettit, civil people who seek to act honourably will be those who act so as to enhance their own sense of honour, and uphold the bonds and supporting characteristics of non-domination and the institutional fairness that it constitutes.

I argue that while the ego-centred account of honour is plausible and possibly effective under certain conditions, it should not overshadow an equally plausible account of honour based on conscientiousness about essential interests. My point is that Pettit's account of honour is narrowly construed, and does not acknowledge the breadth which an account of honour can take. A decent or discerning society, I argue, will encourage the recognition of those whose internalisation process is governed by conscience utilitarianism. Public officials acting in the name of decency will not seek honour from their fellow because they are honour seeking. Such officials will be first and foremost conscientious—they will see their role as treating people properly and they will not seek

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<sup>13</sup> See also Davies (1969) p.103.

<sup>14</sup> Pettit sees civility as sprouting also from a spontaneous basis (habitual respect for others). But when people stray from this they need to be sanctioned by dishonour.

<sup>15</sup> Pettit, P (1997) p. 254.

honour in itself nor esteem in the eyes of others as the motivation to honour, but instead a concern for doing what is fitting or appropriate to human beings. Honouring will involve endorsing the motivation to decency, not the motivation to seek self-esteem. Decent people, I hold, who seek to act honourably will have a concern for making others better off in terms of promoting their essential welfare.

If public officials act for the sake of acquiring esteem from their peers when that esteem is not directed towards an optimal moral code—the code of avoiding the detriment of basic interest for all—then they will not be worthy of honour<sup>16</sup>. The motivation for civility, according to Pettit, is the payback one gets in terms of esteem from one's peers and in terms of the non-domination that is reaffirmed and hence secured. The motivation for protecting essential interests is quite different. People will be decent due to conscience not due to personal paybacks<sup>17</sup>.

Consider the case of those who we might expect to report domestic violence of a friend, as Pettit addresses. We might say that they are so motivated to get paybacks of non-domination. But it is equally as plausible to say that people do this for conscientious reasons—for the sake of avoiding misery and treating people decently. Or think of the segments of the white population in South Africa and the US that fought for the civil rights of blacks. It sounds odd to say that they were fighting for the sake of paybacks for themselves—that their non-domination was threatened by the domination that blacks were experiencing. The non-domination of the white population in the former scenario was secure in a police state dominated by the minority white population. Instead, it is more plausible to say that the white advocates acted in these cases from a motivation of conscientiousness—out of a concern for human decency<sup>18</sup>.

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<sup>16</sup> Benevolence: doing good for the sake of others and showing sympathy, empathy with victims. See Thompson, V (1975)

<sup>17</sup>Denhardt writes: "Honor denotes a quality of character in which the individual exhibits a high sense of public duty, pursuing good deeds as ends in themselves, not because of any benefit or recognition that might be accrued because of the deeds." (Denhardt, K 1991 p. 103).

<sup>18</sup> Taking civic responsibility for the dispossessed, unable and unorganised. See Gortner, H (1991) p. 117; Van Wart (1998) p. 292 for multi-faceted approach to implementing institutional values (control by law, norms, public opinion, etc).

I argue that while the ego-centred account of honour is plausible, it should not overshadow an equally plausible account of honour based on conscientiousness about essential interests in the domain of the public service. Individual public servants may seek the esteem of their peers for reasons of self-interest, seeking promotion and financial advancement the status that goes with being in held in high esteem by their peers. But they may also be motivated to behave honourably not for overtly self-interested reasons, but for the sake of their acceptance of their moral duty to do so. Both approaches, the self-interest and responsibility strategies, may both result in outcomes where the essential interests of all those affected by the actions of government and the public service are realised.

In this sense the public service can tolerate motivational diversity behind the acts of professionalism performed within it. However, let me conclude by saying why we have better reason to promote honour as it is understood as an act of responsibility rather than honour as it is understood as an act of self-interest. I argue that the former, acts of honour performed for the sake of one's responsibility to uphold human dignity, is more likely to produce positive effects for a professional environment than negative ones. In other words, honourable acts performed in the name of human dignity, and which are publicly recognised as being performed as such, will have a resonance that will play an important part in the sustenance of a professional environment.

Honour performed for reasons of self-interest, I hold, will have a greater likelihood of producing negative affects. Respecting human dignity due to self-interest is more susceptible to malleability than the morally grounded motivation of responsibility. For example, self-interested people may under certain environments be motivated to seek the esteem of their fellows when such esteem is distributed on the basis of effectively realising the essential interests of all. But the motivation of self-interest can just as easily be swayed to seek the esteem from other sources even if this is at the cost of producing optimal levels of welfare for those in need of it. Think of the career obsessed public servant enticed by financial incentives to cut costs or overlap service delivery. Or think of the public servant who wishes to gain the esteem of those employed in the private sector for the sake of their future employment, and who seeks to outsource to

these areas for reasons of career advancement. Here the drive for self-interest threatens the professional status of public servants more than the motivation to act for reasons of moral responsibility. The expectation need not be that all public servants are motivated by a deep sense of conscientiousness or responsibility, we can imagine a public service functioning effectively without this. But the idea is that we can plausibly conceive of professionals acting on the basis of such reasons.

Public service professionalism in this sense, however, will involve a form of discretionary power that needs to be checked. Policy proposal initiated by the public service should only proceed on the condition that it acquires a positive response from the relevant sectors of society. We have seen that being honourable and acting honourably involves privileging the welfare of all as the basis for an optimal moral code<sup>19</sup>. But the extent to which public servants can be assured to adequately meet these standards can only in effect be measured by the degree to which they are endorsed by the community over which the state has jurisdiction. But not only will it be the level of community support that will determine whether the use of discretionary power by public servants is justifiable. If a public servant advocates essential interests and receives substantial support from his/her peers in the public service for doing so, this will count in favour of the justifiability of the action.

## 6.4 Implementing Essential Interests

### 6.4.1 Role-based function of the Public Service.

Public service integrity can be understood in two sense. Firstly, public servants are expected to perform their formally defined institutional *roles* with integrity. I will briefly cover in this section what I take these roles to be. I will then move on to the second sense in which public servants can be expected to exemplify integrity, namely in the capacity they hold to perform *influence-based functions* within public institutions.

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<sup>19</sup> See Brandt (1996) p. 145.

Under the role-based notion of public service governance the state exists as a “constitutionally endorsed authority that is given to it by the head of state and informed by the legislator.”<sup>20</sup> . The public service, in this sense, plays a reactive role to the policies chosen by the government of the day. It is reactive in the sense that it will take its policy guidance from the legislator and will serve the legislator when the latter seeks knowledge and information about how best to achieve the policy objectives set by those who control the legislator<sup>21</sup>.

What is more, underpinning the role-based notion of public service governance is the notion of neutrality (i.e. giving fair and impartial advice to the government of the day without leaning towards any political views). Technical decisions fall on the side of public servants—political on the side of ministers<sup>22</sup>. Policy-making by public officials may be sensitive to what is politically feasible, but again their role is only one of reaction to the political realities prevailing at the time. There is no position taken by public officials as to the desirability of policy direction.

Linked with the expectation of neutrality is the ethical duty of accountability. Public servants are held to account for the information they provide and the advice they give to government representatives, and for the actions they take with relation to the day-to-day running of government departments. Parliamentary representatives hold public servants to account through the committee system, and citizens can hold state departments to account through the law and various grievance procedures provided by the state. Internally, public servants are held to account by the hierarchical structure of the institution of the public service itself. Superiors will hold those under their responsibility to account for the actions they take and the outcomes they seek; and this task is monitored by the publicly declared institutional goals of the public service institution. For example, there will be institutional checks to ensure that no public servant or official occupies a position that poses a conflict of interest.

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<sup>20</sup> Moore (1995) p. 17

<sup>21</sup> See Flathman, R (1966) for ‘discourse/procedural model. Also Shipman, (1959)

<sup>22</sup> Moore (1995) p. 148.

Public servants are expected to exercise professional conduct in line with the public service role they fulfil. Conduct within the service is expected to be undertaken with good faith, courteous respect for process and for citizens and the dignity of public office, conformity to the duty to respect the confidentiality not only of private information pertaining to citizens but also to information crucial to the public interest, and to be open, responsible and fair. Such conduct is vital for establishing strong bonds of trust between the citizenry and the state, the government and the public service, and to foster the principles of a functioning democracy. The nature of this trust is not of the kind where all participants expect optimal virtue or compliance to the values of neutrality, fairness, and responsibility. Although, it is fair to say that each may hold to the ideal that this would be the case. Rather the trust that is to be found in such a network of ethical relationships is that each will be orientated towards respecting this ideal, and that those who transgress these important public values are at risk of being caught and dealt with in such a way as to uphold such values.

One of the basic roles of the state is to facilitate the delivery of public services<sup>23</sup>. The most straightforward way the public service performs its role-based function in this sense is via the provision of technical expertise. Such requirements as organizational efficiency will call for public service expertise on the technology available for accurate and effective public service delivery. Computer and office systems designed to fulfil the public service of benefit assessments, data processing, surveillance, etc. will be a paramount concern for those charged with the responsibility of achieving a ministry's goals. Also underpinning the notion of role-based governance are certain ethical standards. Honesty, loyalty, confidentiality, respect for procedures, accountability and the like will go hand in hand with providing the most cost-effective services.

Established institutional roles are a vital part of the continuity of public service. The public service needs to act consistently, regularly, predictably and coherently in relation to parliamentary, business and social cycles that act as the core to the fabric of a society. Each compartment of the state must be able to cohere effectively with the workings of other areas of the state and with the institutions outside of the state. Established roles

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<sup>23</sup> <sup>23</sup> See Finer (1941)

that constitute the foundation of the institutional identity of the state make the state a unified whole that can exist as the same entity over time. Official state positions, in other words, have an identity separate from that of the people who fill them, and the demarcation of state power into roles of power and responsibility make the state a metaphysical entity. greater than its parts.

#### 6.4.2 Influence-based function of the Public Service.

But there is another dimension of public service policy making. By initiating policy advice to the government themselves, public servants can make substantial contributions to the formation of policy goals and outcomes. In this sense the role of the public servant is proactive rather than reactive in relation to the body of elected government. “Most public servants, especially at the most senior level, see themselves as involved in making policy and not just advising and implementing.”<sup>24</sup> This is due to, in part, the limitations of parliamentary representation. Members of parliament have neither the time nor the expertise to be the masters of the information required for policy formation. It is also of great benefit for new governments that the public service is not a political arm of the previous administration. If the public service was not neutral but instead a political arm of governments then much time and cost would be expended during the transition of power.

There is another argument for why the public service should not be totally subservient to, nor solely an administrator to, the parliamentary executive. It is that, as Dvorin and Simmons write, “The elected executive more often than not has a weak mandate. Large numbers of the populace are ineligible to vote and do not vote (eg. children, prisoners, the disabled, poorer citizens, etc). Most elections are decided by small percentages rather than overwhelming majorities. Many pressing issues are not debated, much less resolved, in the heat and bombast of modern electioneering.”<sup>25</sup>

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<sup>24</sup> Mulgan (1997) p. 147-48

<sup>25</sup> Dvorin (1972 ) p. 38.

Public service as an independent source of policy initiation and influence is needed, I argue, to ensure that the essential interests of the citizenry are protected and not subject to arbitrary influence. Public service is independent of government in the sense that it ought not to be subject to the pressures of political or electorate opinion<sup>26</sup>. Each citizen in a decent society should not only have their vital interests considered via their place within a political environment, but also within an environment that is professionally geared to track such interests (eg. to good health or biological functioning, to freedom from despair, to dehumanising treatment, etc). Serving the public will involve a commitment to protecting the essential interests of all.

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<sup>26</sup> The idea of essential interests utilitarianism I argue for is not intended as a guide for political action on the part of the elected representatives of parliament. Why do I hold this view? Parliamentary authority is constitutionally entrenched. The practice of legislative authority derives from what is permitted by the constitution. Legislative governance in a democracy is an open exercise of power. All citizens—irrespective of whom they voted for, have reason to respect the legitimacy of the government if their representation is determined by democratic vote and their programmes subject to institutional checks and balances. For example, democratic governments must declare proposed legislation and subject it to public consultation, parliaments must meet regularly and publicly to address policy issues, and parliamentary privilege is granted to the peoples' representatives so that they can speak freely. All are equal under the law. Despite these checks and balances, legislative power-holders or the parliamentary representatives derive their policies from various sources. There is the source of their engagement with the electorate at a party level. One dimension of the policy making process undertaken by politicians will be to produce policies that will further their own electoral interests. The nature of the party system is to group interests together for the sake of acquiring political clout. The support that funds and finances parties can expect to have a privileged voice for those parties that find themselves in government. Legislative governance is also greatly influenced by executive governance. Executive rule will use its own discretionary power in the day to day running of government. This will involve the formation of law that by-passes the legislative process. Executive orders are an example of this. But such orders are checked by expectation, namely that the law implemented will be in the spirit of laws legislatively processed. The government cabinet tends to lead policy direction to a far greater degree than in any other area of the party structure. The executive component of a government has ties and obligations to the international community both commercially and strategically in terms of international trade, defence and national security. Political parties dominate parliament—not individual members—and the hierarchical structure of such parties needs to be taken into account with any analysis of the nature of democratic governance. Traditionally, parties provide an indication of their policy programme prior to an election, and the voters can decide which programme to endorse. However, this practice has its limitations.

Some of the limitations of legislative governance were covered in the third chapter. Due to what I take to be the realities of power in modern democracies I do not hold that my account of essential interests, as a normative ideal to be institutionally or systematically entrenched, should be implemented within parliamentary parties as they undertake their legislative roles. It is an important substantive and symbolic feature of a democracy that the people are free to articulate their ideas and concerns as they see fit. The freedom to associate and formulate parties and policies of their own choosing is an important feature of a democratic order. An important role of the legislative is to represent the interests in the community. Members of Parliament must be effective in voicing the concerns of the people they represent. This representative role is best not morally constrained by formal networks, and should be performed largely along the lines of political strategy. Formally or systematically placing the moral constraint of human decency over all political actors and institutions at this level of organization would violate this important democratic principle. This is not to say that we shouldn't hope that a concern for the essential interests of all will be expressed as a value from the grassroots level of political activity. It is also not to deny that my account of essential interests is not universal, for the affirmation of universality is a crucial aspect of that theory. Utilitarians will hold that all rational agents, irrespective of their subjective associations have reason to recognise their utilitarian moral obligations. Welfare interests, as we saw in the previous chapter, are of universal moral concern. But at the level of institutional design on which this chapter is based, I do not see any feasible role for the instantiation of utilitarian decency at the level of legislative governance as that role is undertaken by political representatives. This is not to deny that we ought to seek to put moral restraints on elected representatives, but this is not the focus of my work.



For the public service to be independent it has to be able to provide ‘impartial advice in the public interest.’<sup>27</sup> This means the public service should have some degree of autonomy in undertaking research, and its time and research emphasis is not to be limited to serving the political interests of parties. I hold that essential interests are a legitimate source of knowledge that public service officials can draw upon in exercising these roles. The previous chapters suggested ways in which the state could protect the salient interest of persons and sentient beings. But, at the same time, it is important to note that the discerning role played by the public service here will not constitute arbitrary rule if such a role is constrained, firstly, by a robust public service ethos. Here, the practitioners of the public service themselves can be expected to keep each other in check, ensuring that essential interests are served and not private interests. But, in more official terms, a public service permitted to undertake public action in the name of serving essential interests will be kept in check and prevented from arbitrary incursions on others by the checks and balances of law and institutional review. Performance in the public service is closely monitored and assessed in order to ensure that the use of public power is held to account, and the pursuance of essential interests on the part of public service activists will be subject to the same processes.

The autonomy of the public service as a decision-influencing organization will also be found in the degree to which certain public officials will be able to identify and seek information pertaining to essential interests. In order to identify what essential interests are public service officials will be expected to gather information from, and seek the advice of, the professional communities that are concerned with the basic needs of people. The ability of public officials to liaise effectively with these professional groups will be a crucial part of responsible decision making by the state. Given that policy-influencing public officials are required to be well educated and trained in the areas relevant to their responsibilities, the ability to engage effectively with outside professional groups should be well established. It is important to note that public service officials are not expected to provide a definitive judgment about essential interests

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<sup>27</sup> Gerald Caiden (1996 p. 25) also points out that policy making bureaucrats will have conflicting loyalties. They will have loyalties to profession, ministers, the constitution, class, personal ideology, and nation. I acknowledge that bureaucrats will have their conflicting loyalties, but I set out here the nature of their duty to humanity—their duty to promote decency. See Dolan, J and Rosenbloom, D.H (2003) for the theme of public service and the influence of personal experience.

themselves. Rather, their role is to be aware of their responsibility to prioritise such interests and gather thorough evidence and support from the professional community as to what they are. Public officials need to be conscious of the importance of highlighting the importance of such interests in the public policy processes it undertakes with governments. These officials will be called upon to consult on a wide basis with the relevant sectors of society and engage with civic institutions such as universities and libraries so as to present detailed information of the extent to which essential interests need to be satisfied or the extent to which they are falling short of being satisfied.

Of course, public service officials will have other responsibilities when it comes to prioritising issues for institutional deliberation by the state. As we have seen, they have a responsibility to be sensitive to the policy programmes of the government. They will also have a general responsibility to respect the autonomy rights of the people affected by state action. An autonomy right is not necessarily an essential interest. I may have a right to make choices for myself without undue interference from others, but it is not clear that the denial of this right would lead to the detriment of my basic biological functioning. Under western democratic ideals the denial of such a right may well lead to the biological detriment of agents, but it is not as clear cut as say the effects that the denial of food and clean water has on such functioning. However, autonomy rights are highly valued in western democracies and the state is compelled (sometimes legally) to treat such rights with respect.

The issue I want to raise briefly is the nature of the relationship between autonomy rights and essential interests? For instance, can we know how to assess autonomy rights and essential interests if they were to compete against each other in a particular decision scenario? For example, parents possess the right to choose what disciplinary action they may take towards their children consistent with the law. But, it is arguable that a child's development may be better enhanced by non-violent forms of discipline. Here we have a case where the autonomy of parents may conflict with the essential interests of children. Which one ought to prevail? The answer I present is that the relationship between autonomy rights and essential interests is not a zero-sum game in this context. Neither is it so in a case where the essential interests of a hospital patient could be

satisfied if the autonomy of another citizen was violated by their being forced to give blood to that patient. It is vital that the autonomy of citizens is respected. People have a prima facie right to their own dignity as self-determining agents. Equally, it is important that the essential interests of all are sufficiently catered for. I argue that in western democracies there is good reason to hold that both autonomy and essential interests should be protected. The state here through its public officials can, as I will mention in the next section, educate parents as to alternative/non-violent ways of disciplining their children. Likewise, they can inform citizens of the need to supply blood to those in need of transfusions. The autonomy of citizens and essential interests of all can be respected by the state carrying out an advisory role in such a manner.

### 6.5 Examples of Public Service Discernment

In what areas of life would we expect a discerning state to take on the responsibility of protecting essential interests? What areas of social life will be feasible one's for state action in this sense? Here are some examples. Take the case of the state in New Zealand providing post-natal clinics for women prisoners. The rationale here is that the first eighteen months of a child's life are crucial for the child's long-term physiological development. Breast-feeding, for example, from the natural mother is essential for the transference of nutrients that will assist the development of the child's immune system. What is more, there is a sense in which the natural birth mother deserves to nurture her child after giving birth. Child bearing is obviously not a necessary function of being a woman; but it is an essential capacity of a woman's body and once realised it is vital for well-being.

The policy making process in place to determine how women prisoners should be treated by the state ought to privilege the natural welfare of the women and children in its care and under its responsibility. It should not be the case that the debate is thrust open for all to contest the allocation of state funds to corrections systems. Those who hold the view that post-natal clinics would be considered a luxury to prisoners and the

money spent instead on harsh work schemes should have their input relegated in a deliberative process. State policy officials should feel no restriction in promulgating that they are doing what is morally permitted of them in these circumstances—doing what is accordance with the essential interests of those subject to their authority.

Other examples of creating a decent society by protecting natural functioning can be found. There will be physiological limits on how much driving hours a truck driver can fit into a day. Such limits must be ensured to prevail by a decent state when it reviews the negotiations between unions and transport corporations. Likewise, there will be natural or physiological facts about the digestive needs of workers that will rule out arguments in a contestatory process that seek to regulate toilet breaks to fixed times. The examples go on to include the protection of conditions that protect the vital human functioning of individuals. One method of disciplining children is by smacking. It is in the interests of children to be disciplined by their parents to avoid behaviour that may be detrimental to their overall welfare (e.g. children have to learn not to run out onto the road or not to display rude behaviour). Yet under my account, although smacking may be effective in producing a proper behaving child it may not produce a child with self-esteem. Smacking, it can be argued, is an act of violence that is inimical to the overall welfare of children and is harmful to their interests. The state here need not take steps to legislate against smacking, but could instead educate parents about alternative and more effective forms of punishment.

Enlightened public servants would be able to draw on anthropological data to support their case for providing alternatives to violence as a means of discipline. For example, the Inuit of the Canadian Northwest territories have enshrined in their culture non-violent conflict resolution. Their attitudes to volatility, fear, anxiety and their use of positive emotions act as the ultimate ends of their social being. Incorporated into this are different conceptions of masculinity and maternalism that are vital to the parent child relationship. By drawing on such material, public officials can offer valuable alternatives within a policy debate about the nature discipline. Of course, not only can they point to alternative anthropological cases, but they can also point to knowledge within child psychology.

Take the basic requirements of nutrition, sanitation and clean water needed for effective biological functioning. Or take the view that good health—good biological functioning that is conducive to better long term prospects in terms of health and well-being—is owed to individuals by the state promulgating the benefits of regular and frequent exercise. Or the issue of noise levels that are detrimental to children’s hearing (as well as adult hearing). The state can be expected to work on the assumption that ‘the hearing life’ is better than ‘a deaf life’. A decent state would be expected to favour the view when facing the possibilities of putting restrictions on the production of children’s toys, that good hearing is an essential precondition of an enjoyable life, and market interests will be subservient to such vital interests in any deliberative processes.

Let me give another example of a state arrangement that is potentially harmful to the vital interests of children. In New Zealand, the Advertising Standards Authority is the first port of call for those who wish to complain about the content of adverts on television, radio, newspapers or magazines. The Authority is constituted by the following representatives: two members of the public, ministerial appointment, five market representatives from television, magazines, radio, etc. Is such a board well equipped to protect the vital interests of children? Is the representation on the board likely to favour deliberation that includes an informed insight into the psychological needs of children and the effects that advertising has on these? It seems very doubtful that it does. A civil service geared towards protecting such vital interest—a civil service that is substantively civil—is one that would include the appointment of an expert in the field of child psychology to such an authority. The dominance of commercial interests in the make up of this board is insufficient to ensure a decent society.

These issues will have implications for the state when it comes to deciding which arguments to favour over the issue of advertising for children. Fast food companies target children in their advertising and the subsequent affects on child health and education can be of concern. That is, influences to the extent of pressuring children to consume in the areas of fast food. Lobby groups point out the dangers of excessive advertising along these lines during prime time viewing for children. Both parties will

come together in contestation under the umbrella of the state: the lobby groups seeking to regulate the actions of the commercial market in targeting children. Commercial interests will seek to inculcate in children traits conducive to profit-maximization.

Here are some examples of public policies *initiated* by the public service. Gifford Pinchot was the chief bureaucrat in the US Department of Agriculture in 1905<sup>28</sup>. Pinchot initiated a campaign to shift the forest reserves from the jurisdiction of the Department of Interior to his department. He argued that the Agriculture Department was better equipped to protect the forests in the public interests; namely to protect them from the misuse of the resource by loggers miners and ranch owners. Pinchot proposed putting fees on the latter to discourage over use of the resources. Pinchot sold this policy proposal to the scientific community and the media, and gradually gained support for it in the House of Representatives.

Or take the case of Harvey Wiley<sup>29</sup>. He was the chief of the United States Drug Authority's chemistry Bureau in 1905. Wiley initiated and proposed a drug Bill that sought to regulate the safety of food and drug products. Wiley gained support for his initiatives from various non-government associations and convinced members of the House of Representatives to turn the bill into law. Wiley also campaigned against the use of caffeine in Coca-Cola, and his public mission resulted in the company reducing the quantity of the drug used in its product. In both the cases just stated, and in the case involving Pinchot, we can see how a leading bureaucratic official was able to propose and influence policy formation. Decency will have pedagogical impact-- public officials will be called on to promulgate their role of maintaining and protecting decency as non-misery in society.

Actions such as these are what Paul Dugdale refers to as insider activism, as opposed to the influence placed on governments and the public service by external organizations such as lobby and interest groups, community organizations and private citizens<sup>30</sup>. He argues that public service activism takes many forms and can be identified by an

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<sup>28</sup> See Carpenter (2001) p.1 for this example.

<sup>29</sup> *ibid.* p. 2.

<sup>30</sup> See Dugdale in Yeatman (1998).

affiliation between an autonomous professional ethic to pursue 'the good' for people under their jurisdiction, and a duty to respect the administrative functions that the constitution binds them to<sup>31</sup>. The forms that this type of activism can take can be less overt than the direct policy initiatives stated in the cases above. It can, for example, take the form of a public servant making contact with and feeding policy information to a specific interest group, or increasing the capability of such a group participating in the policy process. This would involve using professional discretion as it would target and promote one sector of interests. But such discretion would be justified if the actions can be explained in terms of promoting essential interests. This may involve making the processes of government deliberation more culturally sensitive to indigenous groups, or more open to different sectors of the socio-economic community such as gangs, prostitutes or other groups alienated from normal government procedures<sup>32</sup>.

Insider activism can take other forms as well. It may not necessarily take the form of direct policy initiation but might include performing a critical response to proposed legislation. Autonomous professionalism implies, I argue, the capacity to promote universally reasonable ideals concerning human needs. If a proposed policy threatens to disadvantage the vulnerable then public servants are justified in speaking out against the viability of the policy proposal on the basis of its potential harm. For example, a government proposal to make funding for child health care centres more favourable to working parents rather than to non-working one's who value such a service for the provision of needs rather than the facilitation of work<sup>33</sup>, could legitimately be argued against, by public servants, on the basis of its indecency.

Another aspect of the critical approach involved with public service activism can take the form of whistleblowing. In serving the public interest an official must be able to whistleblow without fear. But officials can only whistleblow if certain conditions are in place: 1. You can only whistleblow if, the public is not being fully informed. Once the information that would have been suppressed prior to the whistleblowing is out and transferred to the relevant parties, then it is up to the democratic process to settle the

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<sup>31</sup> Ibid. p 107.

<sup>32</sup> See Yeatman (1998) p. 7.

<sup>33</sup> See Brennan (1998) p. 96.

issue<sup>34</sup> “..the public servant, even qua trustee, must bow to the popular will, suitably informed and emphatically expressed.”<sup>35</sup> People’s interests are at their core “settled, reflectively-endorsed preferences.”<sup>36</sup> The need to balance these considerations is a crucial skill for all relevant practitioners.

In the case of legal breach, the assessment of whether the corresponding whistleblowing is justified is clear cut. We can assess whether the whistleblower had good reason for believing that a law was being broken. In the case of whistleblowing on the basis of full information the issue may not be so clear cut. How does a whistleblower know which information being kept from public disclosure should be publicly exposed? On what basis is a whistleblower in a justified position to make such an assessment. The ambiguity here would need to be assessed on a case by case basis, but I hold that at least one form of justification for the public disclosure of private information can be performed on the basis of protecting the essential interests of others. A psychiatric nurse, for example, may have expressed his/her concerns about the release of a patient within the formal structures of a public department. However, if the department still permits a patient to be released from the institution’s care and the nurse believes, on his/her professional assessment, that the patient will still pose a threat to public safety, then whistleblowing will be justified.

Essential human interests can be applied at many levels. It ought to be a common moral concern between individuals, between communities and between the ways the state relates to and treats its citizenry. This thesis is concerned only with the last application—the way in which the state is obligated to protect and enhance essential interests and the way it might go about doing so through its institutional practices.

Examples of where the promotion of essential interests is required may apply in more opaque situations. Take the case of where the government proposes to stop subsidizing public housing and instead pass over the leasing of state houses to private ownership at market rates. What sort of advice from the civil service is legitimate advice? I argue that

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<sup>34</sup> see Goodin. (1998) p 328

<sup>35</sup> *ibid.* p. 329.

<sup>36</sup> *Ibid.*



it is legitimate for civil service policy makers to argue against such a scheme on the basis that it would cause serious *stress* to people in disadvantaged circumstances. Or what if the government proposed to rapidly cut welfare payments? It is legitimate (and obligatory) for civil service policy makers to show the serious effects this will have for these people and future generations. The implications for the creation of an impoverished sector of society would negatively affect the society in which this happens.

A public service geared to protect essential interests could also promote anti-smoking. Partialism will not be committed and neutrality will not be violated if public servants favour the overwhelming scientific evidence that points to a relations between smoking and lung and heart disease. Favouring such information in its dialogical engagement with citizens and interests groups would see the state promoting the health interest of the vulnerable, which would include children exposed to passive smoke. The damaging effects of smoking go further to inhibit the psychological development of children who smoke themselves and experience the state of addiction; a psychological state that is highly likely to impair educational development.

The environment will also fall under the category under discussion. Humans need fresh air and reliable eco-systems; they need to perform basic biological or physiological functions such as digesting, nurturing their young and being nurtured as youth<sup>37</sup>. While it is a fact that environmental awareness has come about due to the protest and lobbying of people outside of state (or loosely associated with the state through universities), it seems unreasonable to say that environmental protection is not a core concern of the state itself if it is to be obligated to protect basic human functioning. If we need anything we need fresh air, clean, water and good food. A state concerned with decency is going to be one geared towards promoting these facts against the competing interests of those with short-term goals that are inimical to sound environmental principles. Pettit sees this point but of course, as I argue in this thesis, he does not see that this should be a requirement of a decent state; rather he sees it as a way of increasing non-domination. Yet, I reiterate, it sounds odd to say that we protect the environment on the basis that its

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<sup>37</sup> See Watkin (1963 )

protection enables me to have more undominated choice. It sounds more suitable, I argue, to explain the value of protecting the environment in terms of protecting basic human functioning—states of being that are intrinsically good for humans-- and not in terms of the value it may give to the quality of a choice-matrix.

### 6.6 Essential Interests and Judicial Governance.

The judiciary is also an area in which the utilitarian understanding of essential interests and the notion of conscientiousness can play a role in the service of the public good. An important dimension of democratic governance is found with the judiciary. At work here is the notion of the separation of powers. Power or authority is decentralised and spread by the constitutional provision for the judiciary to make law itself. Judicial authority holds its place within a democratic system so as to combat the centralization of power in the legislature.

Decisions of legal consequence are made at different levels within the institutions of the state<sup>38</sup>, but here I wish to focus exclusively on the legal decisions made by the judiciary. The function of the judiciary is to “interpret and apply the law laid down in parliamentary statutes and in the precedents of the common law.”<sup>39</sup>. The judiciary is an institution that ensures that all governance—whether legislative, judicial or public service orientated—is carried out in accordance with the law. The ‘rule of law’ rather than ‘the arbitrary rule of persons’ is, as we have seen, a strong liberal and republican tenet, and it ensures the protection of individual rights against state power via constitutional rights, and in some cases a bill of rights. The notion of judicial independence is a strong democratic principle linked with this ideal of protection. For instance, elected representatives must not interfere with judicial decision-making. The judiciary is expected to rule on matters of law without fear or favour. Judges also have to be free from suspicion in terms of ruling on the basis of vested interests.

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<sup>38</sup> See Kagan (1984) p. 816.

<sup>39</sup> Mulgan (1997) p. 155.

The main decision making role of judges is that of adjudication in civil, criminal and statutory contexts. In fulfilling this adjudicatory function, and in acting independently, judicial decisions must be based on legal reasons. This has different dimensions. One is that all legal adjudication must follow legal procedures as established by the constitutional jurisdiction set. Another is that the justification of judicial rulings can only be expressed with reference to the law, and that such rulings are expected to be consistent with previous rulings in similar cases pertaining to the one under consideration. In the latter sense, judges not only adjudicate according to law but also make law in the form of common law rulings in civil and criminal cases.

However, judicial decision will also involve a certain amount of discretion and this is the area upon which I will focus. Discretion arises for judges in their rulings where there is no clear legal standards guiding their decisions. It is up for debate about whether this is an unintended feature of the law itself or whether discretion is an integral part of any legal function<sup>40</sup>. However, uncertainty about how judges ought to rule in certain contexts is a common feature of their adjudicatory function.

There are established guidelines for how judges can respond to such uncertainty. The common law guide is one example. Judges can turn to precedent to justify their application of a 'created law' when there is no existing law pertaining to the specifics of the case under consideration. This precedence-guide kicks in when such imprecision applies and judges are bound to follow decisions made by other courts on similar matters where the jurisdiction is the same or higher. Judges, in other words, must adjudicate consistently with established law and can only make new law 'with reference' to existing law.

Another established guide for judicial decision-making in the presence of uncertainty is that of doctrine of referral. Here there is a standard guide for judges when they are in doubt about the how to proceed with a ruling. In the presence of such doubt, judges have the power to, and are expected to, refer the decision to its parliamentary source.

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<sup>40</sup> See Arthur, J (1995)

The following case illustrates the restraint of legislative referral. The example has to do with the provision of benefit eligibility for pregnant women. The Social Security Act made no reference to benefit entitlements for pregnant women. Again, the legislation was interpreted to include “the unborn in the act’s definition of dependent children”<sup>41</sup>. The spirit of the act was interpreted in such a way as to cater for the needs of the vulnerable. Proper prenatal care is vital to the physical and mental well-being of children, and that the needs of the mother and child are greater before the time of birth than any other time<sup>42</sup>.

Sometimes uncertainty about how to adjudicate can be overcome by a contemporary assessment of modern, community standards, or what we might call the ‘communitarian guide’. An example of this restraint is the following. In the case of *Riggs versus Palmer* there existed no statute guidance, precedence or referral option for a judicial ruling. In this case, a grandson who was convicted of killing his grandfather claimed the inheritance legally due to him as a result of his grandfather’s death. The judge considered the morality of legally granting an inheritance to the person convicted of the death of the possessor of the will. The standard justification to this case is that public standards would not allow the inheritance to take place. But there is also a sense in which the judge could have been said to act with the guidance of the rule of unconscionability. Outcomes, according to this rule, cannot prevail where they produce conditions that violate our sense of reasonableness and decency. This rule is central to one aspect of the operation of equity law, and the account I give here of utilitarian essential interests is intended as a contribution to the task of determining conditions and outcomes that are unconscionable from the judicial viewpoint.

The guidelines stated above for judicial decision-making in the face of uncertainty enable judges to use the law to produce fair outcomes. But there is another realm of uncertainty that faces judges in their adjudicatory role. This is where there is no clear guide for referral to any of the above avenues, and where the judge is empowered to make a judgment on the basis of possessing discretionary power. Having discretionary

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<sup>41</sup> Melnick (1994) p. 101.

<sup>42</sup> See the following cases: *Carver vs Hooker* (1974); *Parks v. Hardin* (1974); *Wilson v. Weaver* (1974).

power is inextricably linked with the possession of autonomy that enables a decision maker to make a free, or formally unrestricted, choice between options. The possession of discretionary power by judges is what some opponents of judicial activism fear most. The fear is that if judges have such discretionary power then they will make legal rulings based on personal interests, and not on matters to do with what are just for all those concerned.

I want to refer here to a distinction made by Kenneth Davies between the 'possession of the power to decide according to discretion' and 'exercising discretion'<sup>43</sup>. The two may sound similar if not the same, but there is, according to Davies, an important difference between the two. Possessing discretionary power is committed, as I stated above, with the idea of unfettered choice, whereas the capacity to 'exercise discretion' is not necessarily linked with this ideal of autonomy. Exercising discretion can be performed under certain constraints, for example 'prudence constraints', which in themselves do not leave the decision maker to decide as she/he wishes. Rather, the exercise of discretion is a feature of decision-making where the norms of prudence are expected to apply. Flexibility is granted to the decision maker but it is not unfettered flexibility. The flexibility of decision making needs to be used diligently by the decision maker with respect for certain norms.

Why do the likes of judges need such flexibility in their decision-making capacity. The provision of flexibility is granted to judges on the basis that such an allowance enables a judge to produce just outcomes according to the nature of the circumstances in each case, or to effectively produce equity for all parties involved. Examples of the use of such discretion are found in the flexibility granted to judges in making decisions involving sentencing. The discretion whether to impose maximum sentences or a sentence less than this due to mitigating circumstances is the best of ensuring that just and equitable outcomes are reached. Discretion about the extent to which penalties or standards are imposed are spread throughout the judicial rule (eg. whether to suspend or

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<sup>43</sup> See Davies (1969) p. 4.

revoke licences, adjudicating in favour of ‘minimum procedural protection’ in official proceeding or maximal one’s, etc.<sup>44</sup>

From this we can see that the use of discretion on the part of judges is limited or regulated by a ‘justice constraint’. Flexibility in decision making is justified within judicial adjudication on the basis of enabling those decisions to meet the requirements of equitable outcomes for all. We can think of other justice constraints on the exercise of discretion such as the constraint of the right of parties to appeal decisions, that the judge must state reasons for why she/he used her/his discretionary power in the way she/he did, that the judge must make the decision within a particular time period, constitutionally created supervision of those who are making discretionary judgments, and so on.

The exercise of discretion on the part of judges performing their adjudicatory role can be guided by essential interests given that they are expected to lead the application of the law to just outcomes. In other words, I hold that the exercise of discretion can be justified on the basis that it serves the utilitarian essential interests that I covered in the previous chapter. The tenets of these essential interests can serve as another constraint on the exercise of discretionary, judicial decisions.

I hold that we can get an indication of the use of essential interests guidelines from the following cases. Take the case of *V.C v M.B* (2000) where the New Jersey Supreme Court initiated the term ‘psychological parent’ so as to allow a lesbian to apply for visitation rights and custody of the biological children of her former partner. The court here invents a new term so as to allow a non-biological, lesbian parent to have the same status of an adoptive parent due to the psychological attachment that it is reasonable to expect such a woman to have towards her children. It can be plausibly argued that the court sought to empower this woman legally so as to avoid the suffering that she could reasonably be said to experience if she were to have no such legal statutes with relation to her children, and the potential suffering that the child may undergo is denied access to continued contact with its psychological parent.

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<sup>44</sup> *Ibid.* p. 23.

The following case reflects the eclectic nature of some forms of judicial decision making. Here is an example that shows the eclectic sources of judicial decision-making. In *Brown v. Board of Education* (1954) the United States Supreme Court acted so as to make education policy consistent with the 14<sup>th</sup> Amendment that requires 'equal protection' under the law for all. The education system in Topeka, Kansas in the 1950's was legally entitled to enforce the segregation of black and white students. This was based on a ruling in a 1896 case (*Plussy v. Ferguson*) where the court ruled that segregated rail travel did not violate a citizen's constitutional right to freedom from slavery, nor from equal protection under the law to enjoy "life, liberty or property." or the right to enjoy the privileges of citizens. Segregated functioning in the community still meant that each could pursue their own lives, but it meant that blacks and whites had to do it separately from each other.

Linda Brown was a young black student living in Topeka, Kansas in 1954. Due to the segregated education system in that state, she had to bus five miles to school each day even though a public school was located only a few blocks from her place of residence. A suit was filed entitled *Brown v Board of Education*. The suit argued that racial segregation within the education system deprived "the plaintiffs of the equal protection of the laws under the Fourteenth Amendment."

The United States Supreme Court based a part of its ruling on a legal-historical interpretation of the Fourteenth Amendment. It ruled that the "history of the Fourteenth Amendment is inconclusive as to its intended effect on public education." It also ruled partly on a communitarian consideration. It ruled that "The question presented in these cases must be determined not on the basis of conditions existing when the Fourteenth Amendment was adopted, but in the light of the full development of public education and *its present place* in American life throughout the Nation." (My emphasis).

However, there is another interesting dimension to the court's ruling in this case. The court ruled that segregation based on race created a sense of inferiority for black children. This sense of inferiority, the court went on to rule, is contrary to the

educational development of children. To quote the ruling, “A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.” “To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.’

The court justified this position with reference to the findings of the ‘modern authority’ of psychological knowledge. But in turning to these findings—in turning to what the academic community’s findings about children and their educational development—the court was assigning a privileged status to certain facts about persons that outweighed other facts. For example, it was implicitly implied in the ruling that other facts such as the psychological sense of security that members of the dominant white community would receive from the maintenance of a segregated education system, were of less relevance than the salient facts pointing to the likely of inferiority felt by black children. Here, the judiciary used its discretion to favour the essential interests of children over the welfare of the pro-segregationists.

The Supreme Court in this case ruled according to the dictates of the legal and communitarian restrictions of judicial activism. But it also ruled on the basis of a concern for decency—for a concern to give people what they deserve qua their interests in fulfilling their biological functioning and to respect their dignity as persons. The court chose these areas over those of others, and in the sense of ruling in terms of ‘giving people what they deserve qua their biology’ I argue that the court is ruling under the influence of a moral constraint. In particular, as it should now be clear, it is a moral constraint based on the utilitarian concern to give individuals the best chance of developing ideal pleasures (to enable their personal autonomy to flourish) and avoiding unnecessary suffering in their lives. The Court sided with and favoured the conscientious position with regard to this matter.



### 6.7 Essential Interests and Judicial Independence

I have argued that the judiciary can legitimately favour a utilitarian approach to the use of its discretionary power. The exercise of such power is justified on the basis of producing outcomes that realise not necessarily general welfare, as this would express an exclusively broad and majoritarian notion of utilitarianism concerned with total welfare<sup>45</sup>, but salient forms of welfare for all those whose essential interests are most at risk in a particular context. A consequence of a utilitarian understanding of law, based on the notion of pro-welfare outcomes, also has implications for how we should think about the idea of judicial independence. I will set out a way in which judicial independence has been conceived in the past where unconscionable outcomes were permitted by state action. I will show how the principled stand of protecting essential interests could have been adopted by the judiciary in this case so as to avoid reaching this interpretation of independence. Judicial independence has been interpreted in various ways, but one of the most interesting ways in which it has been interpreted is in the way the South African judiciary saw itself during the apartheid years. My account of utilitarian essential interests can give the judiciary a way to think of its own independence in contrast to the contingent powers granted from the source of parliamentary sovereignty. The following scenario illustrates this point.

The South African Supreme Court after the formation of the Republic in 1961 had a unique view of its own independence. Their ethos of judicial independence was based on the view, directed by the constitutional relationship that the judiciary had with the legislative branch, that their rulings were to be made in line with their legal duty to respect the supremacy of parliament as the law making body in the Republic. An implication of this was that the judiciary recognized that statute law outweighed common law principles when the two came into conflict. The latter would have committed the judiciary to a different source of legal guidance, a source that was imbedded in the history of the legal traditions behind the Republic, and not the parliament per se. For example, it has been argued that the South African judiciary the 1961 constitution still

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<sup>45</sup> It is on this point that I distinguish my account of ideal preference utilitarianism from the total utilitarian notion of law defended by Arthur (1995) p. 108.

retained the power to turn to common law principles, deriving from the Dutch-Roman legal traditions, that would have included “the presumption that statute should be interpreted so as to give maximum effect to individual liberty and the presumption that statute should be interpreted so as to give maximum effect to a principle of equality of all individuals before the law.”<sup>46</sup>

Dyzenhaus argues that the South African judiciary did not side with this normative approach to statute interpretation, when statute interpretation was ambiguous, because the judiciary thought that to do so would violate their constitutional duty to respect the supremacy of parliament as the law making body in the Republic, and that such a normative interpretation in favour of the independence of the common law principles of equity would involve committing a moral decision, a decision that judges are not permitted to make given their independence<sup>47</sup>. In short, the judges were reluctant to favour moral norms over legal and constitutional one's.

Before showing how my account of essential interests could have justified the discretionary favour of a moral norm over a legal one and, in doing so, maintained the independence of the judiciary, I want to deal with the view that what the judges committed in holding to the above view was a failure of legal and not moral reasoning. The argument could be put that the judges in the apartheid Republic failed to recognize that judicial independence empowered them to use common law principles as a guideline to statute interpretation. While it is plausible to say that the South African judiciary was mistaken to define judicial independence so narrowly in this case, it should not be forgotten that judicial independence itself is a contested notion. The fact that the South African judiciary did legitimately interpret their independence in this way and adopted the style of statute interpretation that they did, even though such a strategy allowed the oppressive apartheid regime to flourish, shows that the use of legal reasoning can be used to justify different accounts of judicial independence.

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<sup>46</sup> See Dyzenhaus (1998) p. 15.

<sup>47</sup> Ibid. p. 16.

In what sense, then, could the South African judiciary have made a moral decision to favour the principle of equity above parliamentary intent when it was confronted with ambiguity when interpreting statute? I argue that the judiciary could have made such a moral decision based on the impersonal consideration of essential interests that I have set out, and the adoption of such tenets would not violate the judiciary's status as an independent and neutral branch of government. The maxim that the judges could have adopted was that the move from statute law to common law is justified when the 'plain fact' approach to statute law would involve detrimental levels of human suffering.

There are examples from the rulings of South African judges that show that they were doubtful whether the 'good' intended by the parliament in creating housing and movement zones in apartheid South Africa would result in effect goods for the people to whom it would apply<sup>48</sup>. The judges in these cases sided with parliamentary intent even though they held these doubts, but the existence of the doubts themselves shows that the judiciary can reason critically independently from the functions of parliament. The reasons why the South African judiciary did not challenge the supremacy of parliament are varied, and are not restricted to moral considerations only. The political and social feasibility of the judiciary overriding parliamentary intent may have thrown South African society into turmoil. Maybe such turmoil would have been edifying for society in this context, the foundations of apartheid themselves would have been severely shaken. Such political and sociological issues do not directly concern me here. My task is to show that the judiciary did and could have, if it had so wished, implemented the concerns about human decency whilst retaining its status of judicial independence. I have shown how the judiciary did make evaluative speculations about the consequences of apartheid law even if they eventually sided with parliamentary intent by facilitating the effective functioning of such law. The fact that the judges could have articulated such concerns shows that they could have promulgated in their rulings, concerns for the well-being of the coerced even when such concerns may not have been adequately considered by the parliament. In this sense, the judiciary can contribute to public discussions about decency and the rights of the coerced. The promulgation of the standards of decency is often used by judges in the Western legal tradition when they

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<sup>48</sup> See Dymally (1998) pp. 17-18 where he refers to the case of *Minister of Interior v. Lockhat* (1961).

make reference in their rulings to the conditions that maintain the fabric of a society. Judicial officers can be decent by exercising enlightened, practical reasoning.

### SUMMARY

In this chapter I have shown how essential interests can be applied within the public service. I have given reasons for why the public service ought to take on the moral responsibility of overtly protecting essential interests in conjunction with its constitutional obligations. To facilitate this process, I have set out the basic tenets of conscience utilitarianism. Here public officials ought to develop for themselves a professional framework of moral consideration that prioritises the protection of essential interests for all. Likewise, public institutions should create workplace environments conducive to enlightened deliberation towards this goal. Public officials have many roles and duties and are called upon to use their professional insight to find a balance between each. However, the balancing of such roles and duties can take different forms under the watch of professional standards. Some may, for example, order conflicting roles and duties in favour of efficiency, economic growth or political prudence. But, I have argued, public service professionals have a moral obligation to balance here in favour of the overall outcome of protecting essential interests. Such a commitment, however, is not held in isolation from the other responsibilities that public servants have, nor is the implementation of the protection of essential interests to be undertaken in a covert manner. The major actions of public servants ought to be subject to the checking mechanisms that are integral to the operations of a fair and open society. I have argued, however, that public officials can adopt a morally discerning approach to their work in a way that does not violate these standards of fairness and openness. The examples I have presented in this chapter illustrate how public officials have promoted essential interests in this way. This thesis provides a theoretical framework for such actions and seeks to make the protection of such interests a tangible goal for public authority.

## CONCLUSION

In this thesis I have presented a case for why a concern for the essential interests of all should be incorporated into our normative thinking about politics. I have argued that this way of thinking about citizens needs a greater presence in this area of thinking, especially as much of the contemporary literature on political theory is dominated by the themes of political civility and civil proceduralism. I have set out a basic characterization of this concern for civility (chapter one) and focused on its prevalence in two major political idioms (chapters two and three). I have responded to these positions by challenging some of the assumptions made about the operation of such processes in a pluralistic environment (chapter four).

As a response to the analysis undertaken in chapter four, I presented an account of utilitarian essential interests (chapter five). Here I highlighted the need to think of individuals not only in their capacity as citizens bound by legal and institutional ties, but also as persons with essential biological and social needs. The status of citizenship is crucial for the protection of individuals in a political context, and this thesis does not challenge this ideal and its functions. However, citizenship can't be the whole story. The formal relations between individuals and states based on the rights of citizenship do not, I have argued, sufficiently track the essential interests of persons. The reasons for why such a minimalist approach has been taken are various. One of the main reasons being the belief by liberals that the state should not concern itself with the substantive concerns of the citizenry, and instead limit itself to providing basic protections and the performance of neutral governance. This position has been tempered by the contributions of welfare liberals, however the overall emphasis has leaned in favour of individuals and groups enjoying structural and legal equality first and foremost. Liberal theory, in general, has limited itself to protecting rights and implementing outcomes that result from procedural origins.

Pettit's republican thinking, I have shown, is presented in a similar fashion. Legitimate outcomes are generated as a result of deliberative processes where each participant

enjoys a sufficient level of non-domination. Interests are tracked in Pettit's republic by each having equal access to the mechanisms of contestatory democracy. But, I have argued, Pettit's republicanism does not address the impact that power imbalances could have on such processes. A great deal of faith is placed by Pettit on the operation of 'fair and inclusive' deliberation between competing parties. I have argued, in response, that state institutions need to be better equipped to identify and protect the essential interests of all in the presence of such imbalances. The lack of a philosophical contribution in this area, I have also shown, is a concern with Sunstein's account of republicanism.

The other forms of republicanism I have addressed in this thesis have acknowledged the importance of the state taking on the responsibility of pursuing more substantive outcomes for the citizenry in the name of the 'common good'. Dagger and Sandel have argued that the state needs to show a greater awareness of the conditions that protect and enhance autonomy and self-government respectively. This move within republicanism is more in line with the pro-active strategy I endorse. However, my account of utilitarian essential interests presents a way of thinking about the relationship between individuals and the state that is not always bound by the relation of citizenship, and in this sense it differs from the approaches taken by Dagger and Sandel.

In the last chapter I covered ways in which essential interests could be applied within the public service. I showed that public service professionals, and the institution of the public service in general, ought to recognise a moral obligation to uphold and protect the essential interests of all that come under their jurisdiction. Actions consistent with such an obligation exist already in many areas of the public service, albeit covertly. The last chapter (chapter six) is presented in the spirit of bringing this moral obligation to the surface as an integral part of the public service ethos. The public service has many obligations, functions and roles and is influenced by differing social and political forces. In this sense the public service is a multifaceted institution. However, this thesis has argued that the institutions of the public service must be united by professional standards, one of which is to recognise and act on the moral obligation to protect and enhance essential interests.

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