

THE MORALITY OF STATE BORDERS

By

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For Grandpa Nine.

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## ABSTRACT

Traditional theories of domestic distributive justice take two claims for granted. (1) State territorial borders place legitimate limits on the scope of obligations of distributive justice, i.e., there is an obligation to distribute goods within our territory but not beyond our territory. (2) States have a need for and a legitimate claim to exclusive territorial jurisdiction. Given increasing globalization and the recent prominence of international theories of distributive justice, it is now obvious that these two claims cannot be taken for granted. Theories of distributive justice must explain how and why state borders affect distributive obligations.

In this dissertation I argue that state borders serve fundamental values in a liberal theory of justice. As such, state borders are morally relevant to a theory of justice. I argue for a Lockean theory of territory; state territory is justified because it serves four fundamental Lockean values of need, efficiency, the labor theory of desert, and self-determination. State borders mark the boundaries of a state's autonomous territory. State territory, and the borders that mark the boundaries of that territory, are valuable in a liberal theory of justice. This conclusion has implications for the answer to the question: what is owed to foreigners? The fundamental values served by the state's right to territory also support the state's right to control the natural resources within its territory and the state's right to control benefits that flow from the resources within the territory. This means that the state has a right to distribute the benefits from the resources within its territory and (to some degree) to exclude foreigners from these benefits.

## INTRODUCTION

What do we owe to foreigners?

In order to address this question we must answer a prior set of questions: what is the difference between compatriots and foreigners, and is this difference morally relevant to justice?

The simple difference between a compatriot and a foreigner is that the former is a co-member with me in a particular state, and the latter is not. But that's not the end of the story. State membership is dictated to a large extent by a natural and social contingency; state membership is due to one's geographic location. Where one is born or lives is the most important factor that determines her state membership. The particular feature of a geographical location that determines a person's state membership is the location's situation with respect to state borders. If you're born or live on one side of the border, you're a compatriot. If you're born or live on the other, you're not.

Of course, geography isn't the only contributing factor to state membership. German citizens live in America, and American citizens live in Germany. However, geography is by far the largest contributing factor to state citizenship. The majority of people are born within the territory of the state of which they are citizens, and the majority of them remain there.

In this dissertation I argue that state borders serve fundamental values in a liberal theory of justice. As such, state borders are morally relevant to a theory of justice. I argue for a Lockean theory of territory; state territory is justified because it serves four fundamental Lockean values of need, efficiency, the labor theory of desert, and self-

determination. State borders mark the boundaries of a state's autonomous territory. State territory, and the borders that mark the boundaries of that territory, are valuable in a liberal theory of justice.

This conclusion has implications for the answer to the question: what is owed to foreigners? The fundamental values served by the state's right to territory also support the state's right to control the natural resources within its territory and the state's right to control benefits that flow from the resources within the territory. This means that the state has a right to distribute the benefits from the resources within its territory and (to some degree) to exclude foreigners from these benefits.

## **1. Borders and Territory**

State borders traditionally have played an important role in theories of justice. They determine (to a large extent) who is a compatriot and who is a foreigner, and they mark the boundaries of a state's territory, a state's control over a geographical region.

The traditional understanding of the right to territory can be divided into three parts. (1) The central function of the right to territory is that it gives the state a right to establish justice—to establish a determinate jurisdiction—within a particular geographical region. A jurisdiction is a legal domain where a certain set of legal rules applies and a certain agency or agencies have authority to make, adjudicate, and enforce those rules. The state is an independent and autonomous power within its territory. The state has, for the most part, determinate legal and political jurisdiction within its state borders. The borders of the territory are a means to make the state's territory independent and autonomous. Borders clearly mark one state's independent rule over a particular geographical region.

The state has, for the most part, determinate legal and political jurisdiction within its state borders. There are exceptions to this rule. International treaties often limit what a state can do even within its own borders, and treaties concerning border issues may give neighboring countries limited jurisdiction within a bordering state. Cases of foreign embassies are also examples of foreign jurisdiction within a state territory. However, these counter-examples illustrate the ultimate jurisdictional claims that a state has over its geographical realm. The state has a territorial claim in the first place giving it the power to consent to the conditions that limited its jurisdiction. (For instance, it granted a foreign government jurisdiction over the land containing the embassy, and it will regain the geographical jurisdiction if, for instance, the foreign embassy closes or moves.) I use the term 'state borders' to indicate the boundaries of a state's geographical jurisdiction while acknowledging that in practice state borders do not always perfectly track this boundary.

(2) Traditionally, the state's right to territory has included the state's right to control the use of natural resources within the state's territory. (3) Territorial rights have traditionally been perceived as giving the state a right to control the benefits flowing from resources by giving the state the right to create systems of property rights, economic and social policies, and systems of taxation. Together these practices (a) keep the benefits from natural resources within the state, and (b) keep some of the benefits from natural resources under the direct control of the state.

In this dissertation I argue for the state's right to territory. The reason that I focus on state rights is not because I think that the state is the only institution that has these rights. Rather, I think that the state is one such institution, and perhaps the archetype of an institution deserving these rights.

Territorial rights in this dissertation are described in only one way; I don't bring up the possibility of these rights coming in degrees. In fact, there are many manifestations of territorial rights that I don't consider in this dissertation. There are as many, perhaps more, degrees of territorial rights as there are of rights to sovereignty or of self-determination. In the United States we see at least three versions of territorial rights: the right of the federal government to determinate jurisdiction over the entire United States, the right of individual states to jurisdictional powers within their territories, and the rights of Native American Nations to a degree of self-determination and control over the lands designated by their Reservations.

I hope for my arguments to serve as an evaluative tool for determining what other sorts of institutions have territorial rights, and what kinds of territorial rights these institutions have. For example, the value of efficiency may be served well by a system of territorial sovereignty where local governments within a state are given more autonomous control over the use of and benefits from the resources in their region.

State borders and territory are important to justice for two reasons. (1) State borders help to determine state citizenship and the rights, benefits, and burdens that are decided along the lines of state citizenship. (2) State borders help to determine who has control over the use of and benefits from certain resources. Since valuable resources are distributed unequally across the globe, some state borders surround valuable resources and other state borders do not. Borders not only separate compatriots from foreigners, they also create an initial inequality between different states because one state will have access to benefits from and control over resources that the other state will not.

## 2. Morally Arbitrary Borders vs. Homelands

Until recently, it was assumed that the effect of state territory and state borders had on theories of justice was justified. Nobody questioned the legitimacy of a state's right to determinate jurisdiction with a geographical region. The right to territory was taken as a backdrop to the theories of justice.<sup>1</sup> As theorists have begun to question this assumption, the general response has been to describe the moral status of state territory in one of two conflicting ways: (1) as *morally arbitrary*; territory shouldn't play a role in theories of justice, or (2) as *homelands*; territory is an essential element of justice because a state's right to rule over its homeland is a fundamental importance for the individual members of that state.

### *Morally Arbitrary Borders.*

Traditional liberal theories of justice assume that states have sovereignty over the natural resources within their territory. The problem with this assumption is that the placement of state borders and the distribution of natural resources between state borders are entirely arbitrary from a moral point of view; it is based on random or contingent facts about the placement of persons on the globe and the historical developments of different societies. Many theorists argue that rights cannot be established on the basis of such arbitrary facts.<sup>2</sup> The citizens of a state do not have an exclusive claim to the benefits flowing from the resources located within state boundaries because the distribution of natural resources between state borders is morally arbitrary. The same can be said of a state's exclusive right to control the use of its natural resources and of any special rights that we claim as citizens of a certain country (since citizenship is largely determined by geographical

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<sup>1</sup> See Rawls (1999a).

<sup>2</sup> See Pogge (1994), Beitz (1979), Barry (1991), Kuper (2000), Jones (2001), and O'Neill (2000).

contingency). Something as arbitrary as the placement of borders should not give rise to special rights or obligations.

The problem with the view that state borders and the distribution of natural resources among state territories are morally arbitrary is that state control over natural resources within its territory serves several fundamental liberal values. In Chapter Three, I argue against the general argument that descriptively arbitrary decisions, decisions based in luck or contingency, are also morally arbitrary decisions. In Chapter Four, I argue that state borders are morally relevant to determining which persons or organizations should have control over which natural resources. I establish a set of morally relevant criteria based on fundamental liberal values for determining the scope of obligations of justice. Then I argue that state borders are relevant to these criteria. When determining the scope of obligations of justice, it is permissible and sometimes even obligatory to take state borders into account.

#### *Homelands.*

In liberal theory, the argument for understanding territorial rights as rights to homelands has come from liberal nationalists. Liberal nationalism is the theory that liberal values (that individual autonomy and individual basic interests are fundamentally valuable) and national values (that national autonomy and national interests are fundamentally valuable) can accommodate and even support each other.<sup>3</sup> On this view, nations are valuable primarily because they are an essential aspect of individual autonomy and of basic individual interests.

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<sup>3</sup> Tamir (1993): 6.

According to liberal nationalist theories, a nation's right to territory is grounded in a nation's right to self-determination. If a nation requires territorial sovereignty in order to realize self-determination, then the nation has a right to territorial sovereignty.<sup>4</sup>

Usually a nation doesn't require a right to just *any* piece of land. What they require is a right to their *homeland*. Certain geographical regions have special meaning for certain nations. The islands of New Zealand have special meaning for the Maori. The island of Ireland has special meaning for the Irish. A homeland is a land to which a group of people has a deep, historical connection. Included in this historical connection are two ideas. (1) The homeland has had a formative effect on the culture of the group through the development of particular ways of organizing their society (the Sherpas practice polyandry, one woman marries several brothers of the same family, because the scarcity of usable land in the Sherpa's region of the Himalayas requires that land not be split between inheriting children). (2) The group, in turn, has had a formative effect on the homeland (cities are built, trees cut down or planted, genetically modified plants are introduced to ecological systems, etc.).

A nation's and its members' connection to its homeland is highly important to the individual members of the nation. The nation's connection with the land can sometimes be as important as the connection between individual members of the nation. Individuals are willing to kill and to die for their homeland.

State borders are important, according to liberal nationalism, because they designate the nation's homeland and the nation's right to rule their homeland autonomously. Borders,

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<sup>4</sup> Tamir (1993): 123-4.

on this theory, are fundamentally important because they essentially articulate the nation's sovereignty within a particular geographical region, their homeland.<sup>5</sup>

I agree that there is something important about a group's right to rule over its homeland. In Chapter One, I assert that a good theory of territory will include an account of a right to a homeland. However, I also argue that liberal nationalist arguments for the right to territory may be adopted by some religious groups or other organizations. This encourages the possibility that liberal nationalist arguments could be used to endorse racist or xenophobic policies. I argue that the liberal nationalist account of the right to a homeland should be (at the very least) supplemented with a non-nationalist account in order to avoid racist or xenophobic implementation of nationalist arguments.

### **3. A Lockean Theory of Territory**

In Chapter One I examine three arguments for a right to territory: the liberal nationalist argument, the argument from democracy, and the argument from a concern for basic human rights and interests. I argue that these arguments for the right to territory are flawed because they are missing a non-nationalist account of the right to a homeland and an account of the state's right to control the benefits from the natural resources within state territory.

A Lockean theory of territory is important to liberal theories of international justice because it explains how a group of people can have a right to a *homeland* without relying on nationalist or cultural accounts of that land's value. The Lockean theory of territory can also give an account of the state's right to control the benefits from natural resources within its

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<sup>5</sup> Not all territorial rights are going to be rights of autonomous rule. I discuss this point later.

territory; the right to control the benefits from natural resources can be explained in terms of the values of desert and of efficiency.

A Lockean theory of territory uses the Lockean principles of the just acquisition of property to explain how territory is justly acquired. In Chapter Two, I argue that the ultimate values that justify individual property rights within Lockean theory also serve to justify state territorial rights. I argue that states have rights to territory for parallel reasons as individuals have rights to personal property. Individuals have a right to own property because they have the world-altering ability to create valuable ownership rights in material objects. States have a right to control territory because they have the world-altering ability to create valuable rights to control certain lands.

The Lockean theory of territory can give a non-nationalist account of a right to a homeland, and it can give an account of the right to control the benefits that flow from natural resources within a territory. The Lockean theory of territory grants a state territorial rights to a land with which it has a deep, historical connection. The connection between the state and the land that gives rise to the territorial right is described in terms of the way that the state affects the land in an efficient way.

The Lockean theory of territory can give an account of the state's right to control the benefits that flow from the resources within its territory. The right can be justified in terms of the values of desert and efficiency that are served by the state's control of benefits from natural resources within the state.

I do not hold that the Lockean theory of territory is the only legitimate theory of territory. I think that there is a place for liberal nationalist reasons, democratic reasons, and reasons from basic human rights and interests for territorial rights. The Lockean theory

should be seen as one part of a larger theory of territory. The values that the Lockean theory endorses—the values of need, efficiency, desert, and self-determination—can be weighed against other values—of basic human rights, e.g.—if these values come into conflict. A robust theory of territory should acknowledge the part that all fundamental liberal values play in the justification of territory. These values can include liberal nationalist values, values for basic human rights, for democracy, and for the values endorsed by the Lockean theory.

#### **4. Responsibility and Obligation**

In Chapter Four, part of my conclusion is that it is legitimate to limit some obligations of justice by state borders. I argue that it is permissible and sometimes even obligatory to take state borders into account when determining some obligations of justice. In particular, state borders are relevant to the distribution of the benefits flowing from state resources. I argue that the values of efficiency, desert, and self-determination are served if the distribution of benefits flowing from state resources are limited, at least in part, by state borders.

Does this mean that all obligations of justice should be limited by state borders? I don't think so. In fact, part of taking state borders and territorial rights into account is acknowledging the impacts that territorial rights can have on the global community. If one state steals the territory of another state, for instance, then justice demands reparation.<sup>6</sup>

In Chapter Five I argue that institutions (like the state) can be held responsible for certain global harms. In this chapter I hope to address another underlying obstacle to

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<sup>6</sup> What sort of reparation is required is debatable depending on circumstances. I argue that some historical injustices can be superseded in Chapter Two.

answering the question: what do we owe to foreigners. This obstacle is that the commonsense perception of normative responsibility has a hard time regulating global harms that are caused by large-scale social interactions. I argue that the commonsense conception of responsibility as restricted to individuals fails to regulate large-scale social interactions that are the cause of much global harm today. By considering institutions to be morally responsible agents, we broaden the commonsense conception of moral responsibility. As applied to institutions, this conception of responsibility is less restrictive because institutions have greater powers than individuals. Institutions can be held responsible for addressing problems for which, under the restricted, individualistic conception of commonsense responsibility, we cannot hold individuals responsible.

In this dissertation I argue that state territory and state borders are valuable for theories of justice. They are a valuable means for realizing several fundamental liberal values expressed in Lockean political theory. I argue that the value of state borders suggests that it is permissible and perhaps obligatory for the state to distribute the benefits from state resources primarily to state citizens only. To a certain extent, I leave the implications of my conclusion that state borders are valuable for a liberal theory of justice open to further interpretation. Exactly how borders should affect the scope of our obligations of justice is left largely un-answered. I hope that the evaluative tools described in this dissertation will be useful in further determining the effects that state borders should have on the scope of obligations to foreigners.

## CHAPTER 1: LIBERAL THEORIES OF TERRITORY

Traditionally, theories of justice have taken it for granted that territorial rights are justified. It has been assumed that states have the right to rule autonomously within a certain geographical region, and the state has the rights to control the use of and the benefits from the resources that are found within the state's territory. Because of the tremendous effect that territorial rights have on considerations that are important to liberal theories of justice (a person who happens to live in Guatemala is likely to have vastly different life prospects, including access to the objects of human rights, than a person who happens to live in the United States), the assumption that territorial rights are justified has recently come under attack.

Can territorial rights be justified? If so, how? I do four things in this chapter. First, I give an account of the right to territory, and I give a brief historical account of the development of the right to territory and borders. I explain the historical development of the territorial state and of territorial borders. When we understand the empirical purposes and effects of borders, we have a better understanding of what it will take to justify borders. Second, I argue that a theory of territory should be able to have an account of two features of territory. (1) It should be able to give an account of the right to a homeland, and (2) it should be able to take a stand on the state's right to control the benefits from resources within its territory.

Third, I present the most promising ways to justify territorial borders from a liberal perspective. I analyze these theories and highlight the failures and achievements of each. Finally, I conclude that, so far, liberal theories have very little to offer theories of territory.

In particular, liberal theory is missing a non-nationalist account of a right to a homeland—a right to a particular piece of land rather than merely a right to land. I argue that the liberal nationalist account of the right to a homeland should be (at the very least) supplemented with a non-nationalist account in order to avoid racist or xenophobic implementation of nationalist arguments. Additionally, liberal theories of territory have little to offer by way of accounting for the state’s rights to the benefits flowing from the resources within its territory. Because the state’s rights to the benefits flowing from the resources within its territory are a source of the inequality in life prospects between members of different states, I take it to be an important part of theories of territory that they can give an account of the right to a homeland and the right to the benefits flowing from territorial resources.

### **A. Introduction and History**

#### *Territorial Rights, the concept.*

The traditional understanding of the right to territory can be divided into three parts. (1) The central function of the right to territory is that it gives the state a right to establish justice—to establish a determinate jurisdiction—within a particular geographical region. A jurisdiction is a legal domain where a certain set of legal rules applies and a certain agency or agencies have authority to make, adjudicate, and enforce those rules. The state is an independent and autonomous power within its territory. The state has, for the most part, determinate legal and political jurisdiction within its state borders.<sup>7</sup> (2) Traditionally, the

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<sup>7</sup> There are exceptions to this rule. International treaties often limit what a state can do even within its own borders, and treaties concerning border issues may give neighboring countries limited jurisdiction within a bordering state. I use the term ‘state borders’ to indicate the boundaries of a state’s geographical jurisdiction while acknowledging that in practice state borders do not always perfectly track this boundary.

state's right to territory has included the state's right to control the use of natural resources within the state's territory. Control of the use of natural resources within a territory can be exercised directly, as when a state agency itself drills for oil and manages its production. The control can also be exercised indirectly through property law and regulation, as when the state regulates the drilling of oil by private companies in order to prevent air and water pollution.

(3) Territorial rights have traditionally been perceived as giving the state a right to control the benefits flowing from resources by giving the state the right to create systems of property rights, economic and social policies, and systems of taxation that (a) keep the benefits from natural resources within the state, and (b) keep some of the benefits from natural resources under the direct control of the state.

The state's control of the benefits flowing from resources can be quite passive. It can refer to, for instance, the patterns of wealth that are created when State A's system of property rights and economic and social policies make the population of State A wealthy compared to populations outside of State A. The wealth enjoyed by the population of state A is in part due to their use of the natural resources within the territory of State A. The wealth could be, to a large extent, contained within state A because of the incentives created by State A to reinvest the wealth inside of the state.<sup>8</sup>

State control of the benefits flowing from natural resources could also be quite active. The state could directly control the proceeds from state-owned facilities, and it can

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<sup>8</sup> A state's right to control the benefits flowing from natural resources does not (necessarily) conflict with the right of individuals to control the benefits flowing from their personal property.

tax individual property owners who are profiting from the use of natural resources. The proceeds from the taxes are controlled by the state.

An alternative to the state's control of the benefits from natural resources would be for the benefits to be controlled by a global institution that could distribute the benefits to all persons globally according to a global account of the principles of justice.

These three features of territorial rights are distinct features. It may be possible that the state could rule itself autonomously within a territory while not holding the right to control the benefits flowing from the resources within its territory, for instance. Each feature is included in the traditional concept of sovereign territory that has been used as a backdrop for theories of justice, but it is useful to distinguish between them while working towards a justification of territorial rights.

*Territorial Rights and Borders, a historical perspective.*

Anthropologically speaking, humans don't build and sustain things without reason. Our human-created structures, both material and social, have purpose. In this section I look at the historical development of state territory and borders in order to uncover the purpose of the right to territory within the context of the liberal political institution. I conclude that the right to territory has developed to serve the three purposes of territory outlined above, those of the independence and autonomy of the state, the right to control natural resources within the territory and the benefits that flow from them.

What we think of as a territorial state is a relatively new development in history. A territorial state has a jurisdiction over a defined geographical area. A territorial state rules, through law and administration, over each of its subjects, and a subject of the state is any person within its territory. Today it's difficult to imagine a non-territorial state. Prior to the

eighteenth century, however, the territorial state did not exist. An example of non-territorial rule is found in the historically-prior feudal system. Under the feudal system,

Rule was primarily personal in at least two senses: it was based on particular (voluntary or involuntary) relations between individuals, and governance was essentially promissory, laid the basis for the complex obligations between lords and vassals. Governance was also personal and not territorial... Allegiances were not territorially determined... Medieval allegiances could, and frequently did, overlap. Different lords, monarchs, and emperors could have some claim over some one, and bishops and popes as well. The potential complexity of multiple allegiances was illustrated by John of Toul, in the early thirteenth century, who had four lords, each of whom he intended to honor.<sup>9</sup>

The territoriality and the democratic rule of states gained prominence around the same time historically. As ‘the people’ gained political importance they demanded that rulers rule in their interest and in their name. The ruled became citizens and gained political powers and rights. Political allegiances became exclusive (one could be a citizen of only one state), and there became a need to clearly define citizenship. “Implicit in the emerging concept of ‘the people’ was an answer to the questions of boundaries: The state is the people’s, and they determine its boundaries.”<sup>10</sup> Where the people resided came to determine the territorial boundaries of the states to which they allied themselves.

*Independence and Autonomy.*

The right to territory has developed as a right to sovereign territory—it has been understood as the right to rule independently and autonomously within a specific region. Because of the need to establish the state’s independent rule, the placement and maintenance of state borders became important. Borders are what make sovereign territories sovereign; they clearly separate the realm of one state’s rule from another’s.

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<sup>9</sup> Morris (1998): 33-4.

<sup>10</sup> Morris (1998): 229.

The need for clearly defined territorial borders was reinforced by several factors, but the most important factor was the state's need to establish its independence from other states, usually by force. Lithuania is one of the most dramatic examples of borders established by war. Despite the fact that Lithuania was a European regional power throughout the middle and modern ages, in the 1920's, Lithuania had to establish its independence and claim to territory in three separate wars fought against three separate parties who opposed Lithuanian independence. Lithuanian forces fought the Bolsheviks to the east, the Bermontians (Russians taken prisoner by Germany in World War I) to the west, and the Poles in the Vilnius region (the south). The borders of the Lithuanian state were determined by military force. The regions that the military secured for Lithuania became part of Lithuanian territory. Without the strong fortification of territorial borders, Lithuania as an independent state would have been lost. The borders established by these wars became guidelines for future diplomatic agreements between Lithuania and Soviet Union when Lithuania established its independence from the Soviet Union in the early 1990's.

The placement of borders to establish state independence has been established by diplomatic means as well. The secession of Ireland from the United Kingdom established a territorial border between an independent Republic of Ireland to the south and Northern Ireland still ruled by the United Kingdom to the north. The border between Ireland and Northern Ireland was drawn along the existing borders of six of the nine counties of Ulster, a province of the historical Ireland. This was an attempt to reconcile the demands of the Irish who wanted to remain under UK rule with the demands of the majority of Irish who wanted independence. The size of Northern Ireland was seen as the maximum area within which Irish who wanted to remain under UK rule could expect to maintain a safe majority.

This diplomatic agreement was to establish a border so that two separate peoples (the Irish and the members of the UK) could rule themselves independently.<sup>11</sup>

Colonization presents an interesting twist on the ‘independence and autonomy’ reason for establishing borders. Instead of a native people using borders to establish their own independence and autonomy, a foreign people uses borders to establish their independent and autonomous rule within a foreign region. The motivation to establish borders in the case of colonization is usually to guard against other would-be colonizers claiming the same territory. Western European powers established borders in the American colonies to establish boundaries between French, Dutch, Spanish, and British ruled lands. Likewise, after World War I, Britain, France, Italy and Russia divided most the defeated Ottoman Empire between them. Each claimed a section of the Middle East as its own to control. Borders were established in the region to indicate the boundaries of their separate control over separate regions. For example, France was given control over most of what is known today as Syria and Lebanon, and Britain was given control over what is known today as Iraq and Palestine. The result was a Middle East divided by borders that indicated which foreign state had independent control over which region.<sup>12</sup>

*Control of Natural Resources and Their Benefits.* The importance of the early establishment of strong, clearly defined territorial borders in the new world (the U.S. and

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<sup>11</sup> I stress that this is what borders are *meant* to do. Whether or not they achieve their purpose is another historical matter.

<sup>12</sup> It’s interesting to note that colonizers were motivated by more than the desire to control more natural resources, including human resources. There was usually another reason—the desire to civilize or to convert the colonized populace. Britain often used this rhetoric when justifying its enforced rule of Ireland and the Americas. The British people thought that they had something good—their form of civilization, government, and religion—and they wished to impart this good to the rest of the world. Whether the rest of the world wanted it or not was not considered important. This reasoning was thought to give the colonizers a moral right to rule a ‘less civilized’ people.

Mexico, e.g.) is less obvious. With so few people populating such large areas of land, why would clearly defined territories be important? In the case of establishing territory in the western part of North America, the reason to control the territory wasn't primarily to establish the independence of the people from domination by other states.<sup>13</sup> That's not to say that the desire for independence wasn't a motivation at all. Colonizing Europeans were afraid of Native American attacks and attacks from other colonizing groups (although Native Americans weren't motivated by the desire to rule over the invading Europeans—usually the Native Americans were fighting to regain control of their lands.)

Another factor (besides the desire for independence) largely explains the Europeans motivation to establish strong territorial borders in the western parts of the new world. The states desired to secure control of valuable natural resources and lands in sparsely populated areas. Both the U.S. and Mexico had systems of land grants and homesteading laws that encouraged citizens to settle in unpopulated areas. One of the reasons behind these laws was to guarantee state control over unpopulated lands. If the state could establish settlements along the border or in unpopulated areas, then their chances of maintaining control of those lands and the resources within those lands would be higher. States were motivated to establish and maintain borders in order to maintain control over the resources within those borders.

These new world cases uncover an underlying motivation for the establishment of territory all over the world: the control of land and resources. It was assumed that land and resources contained within state territory were controlled by the state. Within its territory,

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<sup>13</sup> This isn't to say that establishing independence wasn't at all a factor. The U.S. and Mexico battled for control of certain territories, and the threat of attacks by Native Americans also fueled U.S. desire to settle the west.

the state controlled the use of resources and it had rights to the benefits that flowed from those resources. There are two reasons for a state to want jurisdictional control over land and resources. First, the state's control of resources is required for the state's economic and political stability and power. Each state needs a minimum amount of resources in order to operate. According to certain circles of thought, the more natural resources the state controlled, the more powerful the state became. The persons controlling the state desired to acquire jurisdiction over more land and natural resources in order to acquire more power. Second, individual members of a state are attached to their material possessions, including land. The people who make up a state want for the state to govern transactions regarding their properties. The state must have geographical jurisdiction over its members' lands in order for this to be possible. In order to do this, the state must have territorial jurisdiction over its members' lands.

Because borders are about defining a population as well as defining a geographical area, immigration restrictions and restrictions against border-crossings are part of a state strengthening its borders. A nineteenth century development prompting the enforcement and maintenance of borders in the U.S. and in many other states, occurred when booms in immigration combined with poor sanitation, poverty, racism and discrimination. Strong, clearly defined borders were enforced in order to limit immigration.

Americans encouraged relatively free and open immigration during the eighteenth and early nineteenth centuries, and did not question that policy until the late 1800s. After certain states passed immigration laws following the Civil War, the Supreme Court in 1875 declared that regulation of immigration is a Federal responsibility. Thus, as the number of immigrants rose in the 1880s and economic conditions in some areas worsened, Congress began to issue immigration legislation. The Chinese Exclusion Act of 1882 and Alien Contract Labor laws of 1885 and 1887 prohibited certain laborers from immigrating to the United States. The more general Immigration Act of 1882 levied a head tax of fifty cents on each immigrant and

blocked (or *excluded*) the entry of idiots, lunatics, convicts, and persons likely to become a public charge. These national immigration laws created the need for a Federal enforcement agency.

In the 1880s, state boards or commissions enforced immigration law with direction from U.S. Treasury Department officials. At the Federal level, U.S. Customs Collectors at each port of entry collected the head tax from immigrants while "Chinese Inspectors" enforced the Chinese Exclusion Act. Congress soon expanded the list of excludable classes, and in doing so made regulation of immigration more complex. As a result, when the Immigration Act of 1891 barred polygamists, persons convicted of crimes of moral turpitude, and those suffering loathsome or contagious diseases from immigrating, it also created the Office of the Superintendent of Immigration. Located within the Treasury Department, the Superintendent oversaw a new corps of U.S. Immigrant Inspectors stationed at the United States' principal ports of entry.<sup>14</sup>

With the rise of immigration, nationalist ideals, political independence, and poverty, states strengthen their borders in order to restrict immigration.

Although immigration is an important note in the history of the development of territorial borders, I believe that the move to restrict immigration is subordinate to the state's move to establish independence and exclusive control over land and resources. The state's restriction on immigration is seen as a crucial part of maintaining its independence and economic stability. The arguments given for restricting immigration are usually of two sorts. The state may argue that the people traditionally represented by the state are in danger of being outnumbered or 'overrun' by the influx of foreigners, and, therefore, to maintain the independence of the state from foreigners (even domestic foreigners), the state must limit immigration. The state may also argue that the economic health of the state cannot withstand the rise in population that would result from unrestricted immigration. Therefore the state must restrict immigration in order to secure the state's economic health. In both of these arguments, the state argues for restricted immigration because they believe (perhaps

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<sup>14</sup> Smith (2005).

falsely) that restricted immigration is necessary to establish either the independence or the economic stability of the state. The border's purpose with respect to restricting immigration has been derived from the border's purpose with regards to independence and economic health.

In this section, I have argued that historically there are two reasons that states have established borders: to establish the independence and autonomy of the state and to maintain control over natural resources and their benefits in order to secure economic and political power. In the rest of the chapter I consider whether or not territorial borders can be justified under a liberal theory of justice.

### **B. The Normative Question: Are Territory and Borders Justified?**

Territory and borders play the roles of upholding state independence and autonomy, maintaining exclusive control over resources, and giving the state the rights to the benefits that flow from those resources. But can these roles be justified under a liberal theory of justice?

There are many ways to phrase the normative question. In this essay I'm not (merely) concerned with what justifies changing this or that existing border; I'm concerned with *what justifies borders in the first place*.<sup>15</sup> I answer this question from a liberal perspective. A liberal justification of state territorial borders is determined by the borders' potential service to individual rights and to individuals' most basic interests.

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<sup>15</sup> This point is worth emphasizing. Many contemporary theories of territory are concerned with the right of secession (see Buchanan (1991.) or with remedial rights to territory (see Meisels (2003b); Waldron (1992a)). My arguments here are certainly related to this contemporary discussion, but they do not directly address that discussion. One aim of this essay is to do the theoretical groundwork required for a discussion regarding the justice of existing territorial claims to take place.

In this section I do three things. First, I argue for a particular conception of a theory of territory. I argue that a theory of territory should be able to give an account of the right to a homeland and to take a stand on the state's right to the benefits that flow from the resources within its territory. Second, I describe three separate ways to argue for territorial rights and borders within a liberal theory of justice: the democratic-rights account, the liberal nationalist account, and the basic-human-rights account. These arguments do not represent all of the arguments within liberal theory for territorial rights. I don't have space here to describe all of the arguments within liberal theory for territorial rights. I have chosen to focus on these three, because I find them to be the best at giving an account of the connection between a state and the land enclosed by the state's borders that would give rise to a territorial right. Finally, at the end of each separate account of the right to territory, I give an account of the ways that each account fails to provide an account of a good theory of territory.

I conclude that, based on these accounts alone, liberal theory is missing a good theory of territory because it cannot give a non-nationalist account of the right to a homeland, and it is missing an account of the state's right to the benefits flowing from the resources within its territory.

### **II.1. Homeland and Resources**

*Homeland.* A theory of territory is a more complete theory if it can take rights to homelands into account. A right to a homeland is a group's right to control a certain piece of land to which they have a deep, historical connection. A right to a homeland should directly connect the group to a certain region. Rights to homeland are not just territorial rights to *a* land, they are rights to a *particular* region that the group calls home.

I take the right to homeland to be a significant feature of the human condition. The connection between a people (or persons) and their historical lands is almost primal. Persons feel that their connection to their homeland is invaluable. They find the connection so important that they are willing to die for it. David Miller states that “We think of ethnic cleansing as one of the worst horrors of the modern age, not just because people are being discriminated against on ethnic grounds and subjected to the threat of violence, but because they are being cut off from places they have come to identify as ‘home’.”<sup>16</sup>

John Steinbeck writes of the human misery that accompanies the condition when a people lose control of their historically important lands. In *Grapes of Wrath*, the character Muley is a reminder—a metaphorical ghost—of the community’s deep and important connection with their land. Muley says

“...Somepin went an’ happened to me when they tol’ me I had to get off the place. Fust I was gonna go in an’ kill a whole flock a people. Then all my folks all went away out west. An’ I got wanerin’ aroun’. Jus’ walkin’ aroun’. Never went far.... I’m jus’ wanderin’ aroun’ like a damn ol’ graveyard ghos’... I been goin’ aroun’ the places where stuff happened. Like ... there’s the place down by the barn where pa got gored to death by a bull. An’ his blood is right in that groun’, right now. Mus’ be. Nobody never washed it out. An’ I put my han’ on that groun’ where my own pa’s blood is part of it.”<sup>17</sup>

The metaphor of a parent’s blood mixed with the land serves two purposes for understanding a people’s connection with their historical lands. First, it gives a sense of the fundamental nature of this connection—it’s as if our blood, our lives, is literally mixed with the land. Second, it conjures the sense of ownership and responsibility for lands for which a person’s parents, grandparents, or ancestors have fought (with or for) and lost their lives.

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<sup>16</sup> Miller (2003): 265.

<sup>17</sup> Steinbeck (1966): 43-44.

Without endorsing a particular analysis of the connection between a people and their lands or of this connection's importance, I take it for granted that a good theory of territory must give an account of a right to homeland. This connection is a ubiquitous and significant part of the human condition. The right to territory is invoked as the only means for a people to express their rights with respect to their connection to their homeland. A theory of territory should have something to say about the right to homeland. I'm not saying that a good theory of territory must hold a right to homeland as absolute or even as primary. A good theory of territory must only give some account of a right to homeland. In the Israeli/Palestinian conflict, a theory of territory must consider that these two separate groups have a special connection to the lands that are being disputed—not just to any land. A theory of territory doesn't have to find that the historical connection of a people to the land is the *only* consideration—and it may not find that this connection is an overriding consideration. Still, the theory of territory that couldn't take this connection into account would be missing a significant feature of the idea of territorial rights.

*Benefits from Resources.* Most theories of territory have assumed that the state's right to territory includes the right to the benefits that flow from the resources within that territory. The state's right to the benefits flowing from resources within its territory can be exercised directly, as when the state directly receives proceeds from the sale of natural resources or products derived from natural resources, and indirectly, as when the state receives tax money from the profits made from the private sale of these items or when the state's economy is prosperous because the benefits from the resources are reinvested into the state economy by individuals who enjoy the benefits from the resources.

The state's right to the benefits flowing from natural resources within its territory is controversial. Territorial rights have a tremendous effect on considerations that are important to liberal theories of justice. A person who happens to live in Guatemala is likely to have vastly different life prospects, including access to the objects of human rights, than a person who happens to live in the United States. The largest factor that affects the different life prospects of the Guatemalan versus the American is the state's right to control benefits flowing from the natural resources within the state's territory. This has prompted some theorists to reject idea that the state has a right to territory. A theory of territory must be able to take a stand on the state's right to the benefits flowing from the resources within its territory. By this I don't mean that a right to territory must include such a right. I assert merely that a good theory of territory must take a position on this right, it must say if the right to territory includes the right of a state to control the benefits flowing from its natural resources, and it must be able to explain why the state does or does not have this right.

## **II. 2. Liberal Nationalist Rights to Territory**

In this section: (1) I explain the liberal nationalist theory of territory. This theory is grounded in the position that the nation is a group that has the right of self-determination, and territorial rights are often required for the state to be self-determining. (2) I present several objections to the liberal nationalist theory of territory. I argue that the nationalist theory of territory encourages undue discrimination because the nationalist arguments for territory may extend to other sorts of groups, like religions. I also point out that the liberal nationalist theory of territory does not give an account of the right of a state to control the benefits flowing from the resources within the state's territory.

*Liberal Nationalism.*

Political theory makes the distinction between a state, a government, and a nation. A state is a set of political institutions, a body that successfully claims a monopoly in a particular territory.<sup>18</sup> A government is the agent that carries out the directives of the state. A nation is not a set of institutions. Instead, it is a group of individuals who share common characteristics and self-identify as a nation. The population of a state may be one nation (as is the case with Japan) or it may be more than one nation (as is arguably the case with the United States because it includes many Native American nations,) or it may straddle two or more nations (as is (was?) the case with North and South Korea.) A nation as a mutually self-identifying group of people that share certain characteristics. It is notoriously difficult to define exactly what a nation is. Christopher Morris comments that “There are ... difficulties in characterizing the notion of a nation. It is a term that has undergone many evolutions and that is used in a variety of ways, not all of them obviously consistent.”<sup>19</sup> I agree with Morris when he states that “We should not fret too much, as students of the subject so often do, about ‘defining’ nationhood. The concept is imprecise, complex, and problematic. And it is widely contested, as many believe that so much rests on it.”<sup>20</sup>

It is still important to have an understanding of what a nation is, even if this understanding is imprecise. The characteristics of a nation include but are not limited to a shared public culture, a shared history, and a desire to be or to remain politically self-determining to some extent.<sup>21</sup> Different authors may add other characteristics,<sup>22</sup> but this

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<sup>18</sup> Miller (1995): 19.

<sup>19</sup> Morris (1998): 234

<sup>20</sup> Morris (1998): 235-6.

<sup>21</sup> Self-determination, I believe, admits of degrees. A nation can enjoy a certain amount of self-determination even if it does not have its own state.

definition provides a useful and working understanding of the concept for the purposes of this paper. The term ‘nationalism’, in turn, is the belief that the flourishing of one’s nation is a fundamental good. This belief also usually includes the desire that the nation has some degree of self-determination. The term ‘nation-state’ refers to those territorial political units whose citizenry comprises one and only one nation.

Liberal nationalism is comprised of a group of theories that claim that nationalism is consistent with or founded in liberal principles.<sup>23</sup> There are two strategies for justifying the right to territory from a liberal nationalist point of view. First, it is argued that the right to territory is required for national self-determination. Second, it is argued that the right to territory is required in order to protect fundamental individual interests.

*National Self-Determination.* It is valuable to the members of a national culture that the culture exists. A national culture plays a constitutive part in a person’s individual identity. Fellow nationals share common attributes, and we recognize ourselves in them.<sup>24</sup> A national community gives a person a sense of historical identity and a background identity against which individual choices can be made. If a person were to lose their national culture, she would be either stuck in a cultural vacuum or forced to undergo a painful assimilation into a new national culture.<sup>25</sup>

National cultures need to be self-determining to exist. National cultures often have essentially public dimensions that, if not under state control, can be easily undermined by

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<sup>22</sup> For example, see Miller (1995): 22-25. A nation for Miller is a group of people that has the following five characteristics: (1) the members mutually recognize that they are a part of the group, (2) the group is historically continuous, (3) it is an active community, (4) it is connected to a particular territory, and (5) the members of a nation share a common public culture.

<sup>23</sup> See Tamir (1993): 6.

<sup>24</sup> Morris (1998): 238.

<sup>25</sup> Miller (1995): 85-86.

market forces or other external influences. Architecture, performing arts, and television programming can all be expressions and constitutive elements of a national culture. Without political incentives to engage in building houses that conform to community standards, a builder may have monetary incentives to build houses out of prefabricated materials without character. The best way to preserve your national culture, states Miller, is for your nation to have its own territorial state, democratically run.

Another way to argue for this position is to posit that the state functions effectively only when its citizens share a common national identity. For instance, to avoid collective action problems, individuals must make sacrifices. To avoid creating a polluted environment, for example, persons must sacrifice the convenience of dumping their waste products into their backyard ditch. People are more likely to accept these sacrifices for the greater good of a clean environment if they trust that everybody else is also sacrificing. (If everybody else is doing it, then I can also do it.) This characteristic of human behavior suggests that in order for a state to be successful at autonomously ruling itself (at being self-determining) its citizens should share a national identity. Territorial claims are justified in so far as they further the cause of national self-determination. Borders are necessary to control immigration and to preserve a people's controlling interest in their land.

These arguments, however, only serve to establish a national right to some territory. Control of any region with sufficient size, conditions, and supply of natural resources would serve to provide an exclusive space within which a nation could exercise its right to self-determination. The nationalist, however, wants to ground a nationalist right to a homeland, a territorial right to a particular region with which the nation has a deep, historical

connection. To ground the right to a homeland, the liberal nationalist turns to accounts of the importance of a particular region, a homeland, for individual interests.

*Individual Interests and the Nation-shapes-land Defense.* According to the liberal nationalist, territory is not merely changed by the labor of a nation, but it is also changed in a particular way to reflect the cultural tradition of the nation itself. The members of a nation use the land to meet their needs in accordance with their collective values. Whether the community farms, herds, raises livestock, hunts, gathers, buries of the dead, builds factories, light-rails or freeways depends (at least partially) on the communal cultural, religious, political, and moral values. The land is physically shaped by national values. The importance of territory to the nation is reflected in one's individual identity. Because the individual is important from a liberal perspective, the importance of a homeland to an individual provides a liberal reason for nation's to have a claim to their historical territory.

Places of settlement come to reflect the national culture of the individuals who established and who reside in them, a culture that they share with their fellow nationals. In keeping with the liberal-nationalist assertion that national cultures form significant components of their individual members identity, I suggest that national settlements (imbued with this culture) come to constitute components of the cultural identity of the individual members of the settling nation wherever they may live. Since individuals and their identities are important from a liberal perspective, liberals have good reason to favour the prolonged holding of national settlements by the nation state whose members established and inhabit them. This indicates that 'settlement' should be adopted as a significant liberal criterion for determining the destiny of contested territories.<sup>26</sup>

*Individual Interests and the Land-shapes-nation Defense.* A similar liberal-nationalist argument for the historical right to a territory relies on the fact that a territory shapes the national culture (in contrast to the above argument that relies on the fact that the national

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<sup>26</sup> Meisels (2003a): 36.

culture shapes the territory). The territory in which a people settles plays a central role in how that nation develops and the identity that the nation comes to have. The context of the land has a profound influence on the economic and social structure of the people. The formative effective of the land on the nation has, by extension, a significant role in the formation of individual national identity. This fact provides a strong liberal reason to preserve the connection between the nation and its territory by giving the nation territorial rights.<sup>27</sup>

Territorial borders are justified by the amount of value that they create for the community. It is because of the historical, social and political ways that the nation forms that claims to territorial borders are valuable for national communities. The nation's connection to its particular geographical region is integral to the nation's identity. I take this to be a contingent fact. If the nation could develop in a different way, without geographical connections, then a connection with a particular geographical region would not be integral to the nation's identity.

Liberal nationalist arguments have a strong appeal.<sup>28</sup> The contribution of these arguments is two-fold. It explains how self-determination—even if not exclusively national self-determination—is linked to territory. And it explains our intuition that individuals are importantly tied to a territory and need to have a controlling interest in the way that the land is used. In short, it explains how a group can have a right to a homeland.

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<sup>27</sup> Meisels (2003a): 36-37.

<sup>28</sup> I do not argue here the virtues and vices of the theory of liberal nationalism itself. For arguments against nationalism, see Beitz (1983), Buchanan (1993), Gans (1998), Jones (2001). For arguments in favor of nationalism, see Miller (1995), Tamir (1993), Haller (1997).

However, I maintain that there are serious objections to a liberal nationalist defense of territorial claims. First, nationalist agendas, even liberal ones, often effectively violate liberal values by discriminating against minorities within the state. There are numerous historical and current examples of discrimination based on nationalism. One of these examples is seen in early U.S. immigration policy, mentioned earlier in this chapter. The U.S. saw itself as a ‘white’ nation (even though it clearly wasn’t one), and members of the nation should be limited to whites. This racist national identity prompted the Chinese Exclusion Act of 1882. Champions of liberal nationalism maintain that nationalist arguments shouldn’t be rejected merely because these arguments have been previously misused in the name of racism or bigotry. Instead, the work of the nationalist should include attempts to clarify the ideals of nationalism so that in practice undue discrimination is avoided. This strategy to separate nationalist ideals from racist or xenophobic agendas may be seriously thwarted by the second objection to liberal nationalist theories of territory.

The second objection to liberal nationalist theories of territory is that it is not clear what sets nations apart from other groups such that nations and only nations have a special relationship to the land that generates a territorial right.<sup>29</sup> If nationalist arguments effectively grant religious groups (for example) territorial rights, then the nationalist strategy to avoid encouraging undue discrimination is seriously undermined. Religious groups are often characterized by exclusive and discriminatory doctrines. In fact, it’s thought to be a right of religious groups to hold such doctrines. A territorial right is the right to establish justice within a particular geographical region. This includes the rights to make and enforce law and to establish a system of distribution of benefits and burdens within the territory. With

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<sup>29</sup> Allen Buchanan and David Miller debate this issue in Buchanan (2003) and Miller (2003).

territorial rights, religious groups would gain the right to enforce their discriminatory doctrines through legal systems and distribution schemes.

David Miller responds to the worry that other sorts of groups, like regions, could have territorial rights by arguing that nations (and not other sorts of groups) cannot exist without geographical ties (“to think of oneself as belonging to a nation just *is* to think of oneself as belonging to a community that has the right to occupy its homeland”),<sup>30</sup> and therefore nations (and not other sorts of groups) have territorial rights. This description of nations just isn’t accurate. Nations can exist without co-existing geographically. The Jewish nation is an example; it existed without a territorial claim for over a thousand years. Furthermore, other sorts of groups including religions have deep historical connections to certain regions that, if we adopt the nationalist reasoning, grant them a right to territory.

The liberal nationalist argues that the normative value of a national claim to territory is found in its importance to individuals’ rights and interests. Let’s evaluate this claim by separating the importance of a nation from the importance of a national claim to territory. A nation serves individual rights by creating a stable, liberal state. A nation serves individual interests by helping to comprise the individual’s sense of self-identity. I argue that a non-territorial nation could serve these interests as well as a territorial nation. This helps to establish the claim that nations can exist without territorial ties. Miller’s claim that what separates a nation from other sorts of groups is the territorial nature of the nation is unfounded. Miller made this claim as a response to the challenge that nationalist arguments for territorial rights could apply to other sorts of groups as well (religious groups, for

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<sup>30</sup> Miller (2003): 269.

example). The consequence of the failure of Miller's claim regarding the territorial nature of a nation is that the national arguments for territorial rights do apply to other sorts of groups.

Nations could exist without geographically connections. To imagine a nation completely without geographical connections, I offer the possibility of an internet nation.<sup>31</sup> Large groups of persons connecting over the internet self-identify themselves as members of the same group, and this sense of identity and community is sometimes more important in their lives than their identifications with their neighbors and compatriots. Communities of like-minded people coalesce into political organizations over the internet. These communities form strong bonds of camaraderie and feelings of kinship. It is likely that, over the course of generations, these feelings of mutual kinship could evolve into communal and cultural identities. The internet group could find that they have certain shared values and beliefs that shape their lives—the way that they raise their children, their customs and etiquette, and their preferred ways of interacting economically with each other. They could build economic, political and social institutions connecting each member over the internet. Their way of interacting with each other could result in a new language. Already the internet has spurred a different on-line dialect; it is not difficult to imagine these other changes taking places within one internet group over a long period of time.

Suppose that the internet group's values and customs become more and more unlike the values and customs of their geographical neighbors, and the members of the internet group do not identify with their neighbors as co-nationals in the relevant sense. They recognize that they hold the same passport as their neighbors, but they do not self-identify

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<sup>31</sup> I don't use the Jewish nation as an example because even though it existed without territorial claims, has strong geographical ties to the area that is today Israel. The same can be said for many other sorts of territory-less nations, even traditionally nomadic nations.

with their neighbors as members of the same relevant national group. Instead, they identify with the other members of their group as co-nationals in every relevant sense of the term except that they do not share a geographical territory. As a group they desire to be self-determining, and they become politically active to achieve their freedom to settle their own disputes internally and to establish their own laws regarding marriage, education, etc. The members of the internet group begin to resent their existing political membership because it does not recognize the political independence of the internet group.

The internet group is like a nation in all ways except that the internet group is not tied to a geographical territory. The internet group serves to protect its members' rights and interests. Because of the members' self-identification with each other and shared public values, the social, political and economic institutions that they construct are stable. Further, a member's self-identification with the internet group and the group's values and beliefs comprise a large part of the individual's self-identity. The group is important to the members' sense of self-identity and to their interests. Given the arguments for national self-determination, we can conclude that the internet group has rights to self-determination, but it does not have rights to territory. The internet group does not have any ties with a particular geographical region, and it doesn't need territory to be self-determining.

To grant the internet group the right to self-determination would be complicated, but not implausible. The arrangement between the members of the internet group and the territorial states within which they reside could be worked out by agreement between the internet group and the states. For instance, the internet group could have authority to make, adjudicate and enforce laws for its members that do not involve issues regarding common lands. The territorial states within which members of the internet group reside would have

authority regarding common land issues, and the members of the internet group would pay the state minimal taxes for land-related concerns such as protection, building roads, beautification projects, etc. Disputes regarding personal property between members of different nations could be settled by agreements between different nations.

The internet group example establishes that a group can have nationalist rights to self-determination, including jurisdictional rights, without the right to territory. The right to territory, then, is only conditionally granted to a nation. Not all nations (the internet group is an example) would retain a territorial right. It's important to note that if the internet group were geographically co-existing and developed strong historical ties to the land, then they would have a claim to a territorial right to that land, a right to a homeland (assuming that a territorial right was required for their self-determination).

I've established that a nation's territorial right is conditional. A nation has a territorial right if certain conditions hold. Importantly, the right to a homeland requires that the nation have deep historical connections with the land such as are outlined by the nation-shapes-land and land-shapes-nation arguments above. The important question now is, given the arguments for a nation's right to a homeland, why don't religions and other similar groups have the right to a homeland? In particular, many religions have all of the relevant characteristics of the internet group (a shared sense of identity, established public values, a shared history, economic institutions, and a desire to be self-determining) **plus** the historically relevant connections with certain geographic regions. Muslims, for instance, have the relevant historical connections to Mecca. The same arguments that ground a nation's territorial right to a homeland also ground a religion's territorial right to a holy land.

What's wrong with a religion's right to territory? As I indicated earlier, the most significant challenge to granting non-political groups, like religions, the right to territory is that this legitimizes severe discrimination against some persons. The right to territory is the right to establish a determinate jurisdiction within a particular geographical region. Religious groups in particular are understood to have the right to hold discriminatory and unfair doctrines. There is no liberal principle that can bind a religious group to incorporate principles of tolerance or fairness as part of the religious doctrine. Religious groups with the right to territory would seem to have the right to create determinate jurisdictions based on their discriminatory and unfair doctrines. There seems to be little barrier between nationalist theories and using those theories to endorse discriminatory and unfair policies if the right to territory can be given to religious groups.

The final objection to a nationalist theory of territory is that it doesn't give an account of the state's right to the benefits flowing from the resources within the territory. Nationalist arguments can give an account of the state's right to occupy a certain land and to establish an independent and autonomous state within that region—this is required for the nation to be self-determining. There is not account of the connection between the benefits flowing from the resources within the territory and the arguments for territory. The focus of the nationalist theory of territory is the right to self-determination. That is, a nation has the right to be self-determining, and territorial rights are justified in as much as they are required for *that* nation to be self-determining (not all nations will require territorial rights in order to be self-determining). Within nationalist arguments, there isn't an account of the connection between self-determination and the state's control of benefits flowing from the state's resources. It may be consistent with national self-determination that the nation-state does

not control the benefits flowing from state resources. This may simply be a missing part of the nationalist theory of territory. It doesn't seem to be inconsistent with liberal nationalist theory to suppose that such an account can be given.

I conclude that the liberal nationalist theory of territory should be, at the very least, supplemented with other theories of territory in order to minimize the legitimizing effect that nationalist theory could have for racist or xenophobic policies. Because nationalist arguments provide an account for a right to a homeland, a separate, non-nationalist account of the right to a homeland should be provided by a liberal theory.

### **II.3. Democratic Rights.**

In this section I do two things. (1) I describe how democratic rights can ground territorial rights. (2) I argue that this account of territorial rights has two flaws. First, this account does not provide an alternative, non-nationalist account of the right to a homeland. Second, this account does not, and perhaps cannot, give an account of the state's right to the benefits flowing from the resources within state territory.

A democratic government is the most reliable custodian of individual rights and interests. A commitment to the equal respect of persons requires a democratic politic. Each member of the political group has equal say in political decisions. A commitment to democracy, though, does not by itself require a commitment to territorial rights. What connects democratic rights to territorial rights?

Avery Kolers argues that the territorial state is a necessary precondition for democracy. This is because exclusion is often required for democracy. Democracy requires both adequate *inclusion* and adequate *exclusion*. "Decision procedures are ... undemocratic

if competent adults' decisions can be overridden or vetoed by those without a legitimate stake, or if decision makers' accountability is diluted by accountability to non-stakeholders."<sup>32</sup> We can see this in modern examples,

Impoverished countries have little or no say over transnational institutions such as the IMF and World Bank, let alone U.S. policy, while these institutions have coercive power over the most important decisions of poor countries. To be sure, then, these countries' citizens ought to be included. But that would not solve the problem; the IMF, World Bank, and U.S. simply should not have so much influence over the decisions of impoverished countries in the first place.<sup>33</sup>

A group or agency with territorial rights maintains sole control over the decisions that govern the patterns of land use within that territory. Territorial borders provide a means to exclude outsiders from participating in democratic institutions. The establishment of territorial borders is one of the only ways to exclude those who ought not to have a say in a state's democratic decisions regarding patterns of land use.

In democracy, the accountability of decision-makers is often diluted. An increase in the population of a democratic state dilutes the individual accountability of the decision-makers within the state. However, the dilution of accountability can be objectionable if the dilution is because of an accountability to persons or organizations that should not have a say in the democratic processes of the state.

Kolers argues that the persons who are legitimate participators in democratic decisions are significant stakeholders in the outcomes of those decisions. It is a familiar argument that decisions should be made only by stakeholders in the decisions outcome. In this context, stakeholders should be limited to those who:

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<sup>32</sup> Kolers (2002): 33.

<sup>33</sup> Kolers (2002): 33.

... risk bearing *long-term* costs to their most important interests ought to have the loudest voice in such decisions. Decisions about land use have especially grave implications for those who live on the land in question. The way a community uses its land significantly shapes how its members eat, work, commute, use leisure time, and participate in public life; land-use decisions affect the public health, life expectancy, and democratic character of communities.<sup>34</sup>

Kolers' overall argument takes for granted that peoples are already placed geographically and have formed deep connections with and expectations for the use of their territory. The argument divides the world into separate geographic communities and argues that these individual communities should have territorial rights. This isn't a defense of existing territorial boundaries, although it could be imported for that use. For Kolers, the boundaries are set by the conditions of collective properties of a society. The territorial boundaries should enclose the land that meets the conditions of a collective property of that particular society. The definition of collective properties is taken from Thomas Christiano's development of this concept.<sup>35</sup> According to Christiano, a feature of a society is a collective property if and only if "in order to change one person's welfare with regard to this property one must change all or almost all of the other members' welfare with regard to it."<sup>36</sup> Kolers comments, that, based on this definition,

The precise size of each parcel of land would depend on topography, geography, population density, and historical patterns of land use. On this issue it is particularly useful, though perhaps not essential, to be guided by a conception of culture. For not only indigenous communities but every population with a share culture—organizing its members' diet, kinship, education trajectory, and work, for instance—is deeply shaped by the land it inhabits, and deeply shapes that land, in turn.<sup>37</sup>

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<sup>34</sup> Kolers (2002): 35.

<sup>35</sup> Kolers, Avery (2002): 35.

<sup>36</sup> Christiano (1996): 60.

<sup>37</sup> Kolers (2002): 36.

Kolers' argument, if sound, proves that territorial borders are a precondition for democracy. Liberal theorists must at least in theory embrace the existence of territorial borders. A virtue of this theory is that it clarifies the purpose of territorial borders as a means to establishing state independence. Kolers' theory explains which persons are included in the claim for territorial independence, and it provides a justification for this claim—that the claim is necessary for democracy.

Kolers' justification for territorial borders has many limitations. First, Kolers' theory cannot ground a right to a homeland without relying on a nationalist or cultural argument. Kolers' theory proves that territory is necessary for democracy because territory is a good way to exclude people—people who should be excluded—from participating in the democratic process. The state could claim *any* territory and still reap the benefits of exclusion that come with having a territory. Any territory will exclude some and include others. For Kolers' theory to generate a people's right to a homeland—the right to control a land with which they have a deep historical connection, not just *any* land—Kolers' theory relies on cultural or nationalist arguments regarding the people's connection with the land. Kolers states that “every population with a shared culture—organizing its members' diet, kinship, education trajectory, and work, for instance—is deeply shaped by the land it inhabits, and deeply shapes that land, in turn.” He establishes the connection between a people and their homeland by means of the people's cultural connection with that land. This way of formulating the right to a homeland encounters the same problems as the liberal nationalist argument discussed in the previous section. Cultural and nationalists arguments for territory encourage unjustified discrimination, because they don't give us any way of valuing national claims to territory over religious or other relevant groups' claim to territory.

In chapter 2, I argue for a Lockean theory of territory that explains the connection between a people and their homeland without using nationalist arguments. The Lockean theory of territory can be used instead of the nationalist arguments as a compliment to Kolers' theory—establishing a liberal right to territory and to homeland that avoids the vices of nationalist arguments.

Second, Kolers' argument does not, and perhaps cannot, give an account of the state's right to control the benefits from the resources flowing from its resources although it does give an account of the right to control the use of those resources. Kolers argues that democratic rights include the rights to determine patterns of land use and use of natural resources within the state territory. The benefit of this control is that the members of the democratic community can maintain their desired cultural or individual connection with the land. If the community is traditionally an agricultural community, then, by controlling the decisions that determine the patterns of land use within their territory, they can remain an agricultural society if they choose to do so. The right to control the benefits flowing from their agricultural labor is not required in order to maintain their cultural use of the land for farming, and Kolers is silent about an account of this right.

There is some tension between who gets to decide how a land should be used and who gets control of the benefits from the land under the stakeholder analysis of legitimate participating members in a democracy. With respect to decisions regarding the control of land use, stakeholders can arguably be understood as members of the state—those who are living on the land. With respect to the distribution of benefits flowing from resources, the stakeholders could be understood as everybody. If the life prospects of persons in different countries are severely effected by the way that the distribution of benefits from natural

resources are contained within state borders, then the stakeholders in the decision to keep the benefits within state borders appear to be both those people who are outside the borders and the people who are inside the borders. Then, on the stakeholder analysis of who should be counted as participating members, it seems like *everybody* should be counted in the democratic decision making process. However, under the stakeholder analysis, the decision regarding land use and property rights is limited to those within state borders. There is some reason for disagreement, then, regarding who should be counted as a participating member in the democracy on Kolers' stakeholder analysis. This disagreement suggests that the democratic account of territorial rights will have trouble giving an account of the state's right to the benefits flowing from the resources within its territory.

#### **II. 4. Basic Human Rights/Important Human Interests**

In this section I, (1) describe the right to territory as grounded in a concern for basic human rights and important human interests. (2) I argue that this account of territorial rights is useful and important, but it cannot give a full account of a right to a homeland or a robust account of the rights to the benefits flowing from natural resources.

Territorial borders may be justified because they are necessary—for empirical reasons—to protect basic human rights. For example, Italy was granted the area of South Tyrol, once a part of Austria, as part of the Versailles Treaty in 1919. The assumption was that Italy must control the South Tyrol area in order to defend its citizens against attacks by Austria.<sup>38</sup> Another case can be made by acknowledging benefits of bringing just liberal rule to a region. Rwanda, Bosnia, and Kosovo are modern examples where an outside agency created a mild version of foreign rule aimed at averting humanitarian disasters and creating

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<sup>38</sup> Buchanan (2003): 243.

viable political institutions of self-government. This change in territorial jurisdiction could be justified because of its liberal benefits for the region.<sup>39</sup> In these cases, dividing up the region into separate territories is meant to alleviate political tension by giving separate groups complete political independence which includes territorial independence.

However, any change in territorial jurisdiction to protect individual basic liberties should be wary of the basic liberties that will be violated by the action that changes the territorial jurisdiction. An argument to justify a particular territory because of its liberal benefits must be weighed against the rights and liberties that are violated by the establishment of that particular territory. For example, the Austrians in the South Tyrol area were deprived of their citizenship and/or their personal property rights in land when Italy was granted territorial rights to the region.

This argument for territorial rights is limited to the extent that it doesn't ground a territorial claim unless gross human rights violations are being committed. If Austria didn't have a history of attacking Italy, then Italy wouldn't have been granted a territorial claim to the South Tyrol region.

We can broaden the argument and say that states are justified in claiming territories, in theory at least, because a world divided into separate state territories is likely to protect individual rights than a world that is not. There is a historical basis for this claim in that, in many cases, territorial sovereignty has secured independence from foreign rule and allowed peoples to establish their own state. Freedom from foreign rule and democratic home rule has tended to protect individual human rights, although with many exceptions. Notable

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<sup>39</sup> Miller (2003): 266.

exceptions are found in many countries with histories of corrupt government. In these cases the system of territorial sovereignty has become part of the problem.

The notable exceptions to the value of a system of state territorial sovereignty for protecting human rights suggests that a concern for the protection of human rights cannot alone create a theory of territory. Instead, theories of territory should pay close attention to how territorial divisions affect human rights. Basic human rights should be considered a trump in territorial theory. As in the South Tyrol case, if certain territorial claims are necessary for the protection of basic human rights, then these claims are justified.

A concern for basic human rights and interests cannot ground a right to homeland. Again, I draw on the distinction between an exclusive claim to *any* territory and an exclusive claim to a homeland. Territory is required to protect individual rights and interests because it guarantees the state's independence. State independence does not require a homeland—it merely requires any territory of sufficient size to allow the state to conduct its affairs and protect its citizens. A concern for basic human rights would only ground a right to a homeland if we assumed that the right to a homeland was a basic human right, and then we would be arguing in a circle.

This account of the right to territory (grounded in a concern to protect basic human rights and interests) could give an initial account of the right to the benefits flowing from natural resources. That is, if we think that the protection of basic human rights is an overriding fundamental concern—a moral trump—then any right to the benefits flowing from natural resources will be tempered by a concern for the protection of basic human rights and interests. Rights to the benefits from natural resources around the world should be distributed so that these rights secure the protection of basic human rights and interests,

to the extent that a distribution of natural resources can affect the security of these rights and interests.

The argument from human rights and interests affects the right to control the benefits from resources is only conditionally applicable to the state's right to control the benefits from natural resources. It is conditional based on the fact that there are human rights violations or severe deprivation of basic human needs, and the distribution of the benefits from resources will alleviate these problems. If it were the case that this condition did not hold, that all persons had secure access to the objects of basic human rights and needs, e.g., then it looks like this argument is no longer applicable. This argument is silent about a many central features of the right to control the benefits from natural resources. For example, it does not tell us who (states? global institutions?) should initially have rights to the benefits flowing from the resources (even if these benefits will be eventually redistributed globally to secure access to the objects of basic human rights), or why.

### **C. Conclusion**

I have given a brief overview of the historical development of territorial borders over the past three hundred years. In this time territorial borders have played the roles of establishing state independence and securing state control of natural resources and the benefits that flow from those resources. In the second section of the chapter, I outlined the virtues and vices of three prominent liberal arguments for territorial borders. I've argued that these three arguments have two important failings. First, they are unable to give a non-nationalist account of the right to a homeland. I reject the nationalist account of a homeland because it can be used to promote racist and xenophobic behavior. The remaining theories

of territory, the argument from democracy and the argument from basic human rights and interests cannot give an account of the right to a homeland. Second, these theories are missing an account of the state's right to control the benefits from the resources within its territory. The argument for territory from basic human rights and interests provides an indication of how some of the benefits from natural resources should be spent—to secure the basic human rights and interests of all persons—but it is silent about a great deal of the content of this right.

However, this is not the last word in liberal theories of territory. In the next chapter I provide a defense of a Lockean theory of territory that provides a liberal argument for the right to territory. The Lockean theory of territory is a promising part of a good theory of territory because it provides an account that avoids nationalist account of a land's value while grounding a right to a homeland in basic liberal values, and it provides an account of the state's right to control the benefits from state resources.

## CHAPTER 2: A LOCKEAN THEORY OF TERRITORY

A Lockean theory of territory uses the Lockean principles of the just acquisition of property to explain how territory is justly acquired. The Lockean theory of territory is not new, but the theory has recently come under attack. Allen Buchanan and others have argued that the Lockean theory cannot justify a state's territorial claims because a Lockean theory of *property* is irrelevant to a theory of *territory*.<sup>40</sup> Property rights are individual rights to control other people's use of and benefit from a thing. Territorial rights, by contrast, are jurisdictional rights to determine what is just and unjust among persons within a jurisdiction. Property rights and territory rights are not analogous, and justifications for the former have little to offer by way of justifying the latter. In this chapter I defend the analogy between property rights and territory rights. I argue that the ultimate values that justify individual property rights within Lockean theory also serve to justify state territorial rights. I conclude that a Lockean theory of territory is a theoretically sound and an important part of liberal political theory.

There are two versions of the Lockean theory of territory: the individualistic theory and the collectivist theory. The individualistic theory holds that individual persons have property rights, and individuals create state territory by contracting with each other to create a state that maintains jurisdictional rights over their properties. The collectivist theory holds that a collective, like a state, can gain territorial rights on its own without contracting with individual for territorial rights over their property. I defend a collectivist version of the

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<sup>40</sup> See Buchanan (2003): 231-261; Miller (2003): 264; Morris (1998): 261-265; Kolers (2000); Tully (1994).

Lockean argument. I argue that states have rights to territory for parallel reasons as individuals have rights to personal property. Individuals have a right to own property because they have the world-altering ability to create valuable ownership rights in material objects. States have a right to control territory because they have the world-altering ability to create valuable rights to control certain lands.

I defend my position in five parts. In the first section of this paper I describe and give reasons to prefer an alternative to the individualist version of the Lockean theory of territory. In the second section I defend my own positive argument for a collectivist version of the Lockean theory of territory. In the third section I explain how a Lockean theory of territory is a part of a good theory of territory. It can give a non-nationalist account of a right to a homeland, and it can give an account of the right to control the benefits that flow from natural resources within a territory. The final section of the paper deals with the problem of explaining the role of initial acquisition in a Lockean theory of territory.

### **A. Individual Property Rights**

In this section I, (1) give an account of the difference and similarities between the right to property and the right to territory, and (2) I explain the individualist arguments for a Lockean theory of territory. I give reasons to prefer an alternative account to the individualist theory. The acceptance of an individualistic Lockean theory of territory forces us to accept a particularly narrow account of state authority. I argue that we should look for an account of the Lockean theory of territory that is consistent with a broader spectrum of theories of state authority. (This account is found in the collectivist version of the Lockean theory of territory.)

*Property Rights and Territorial Rights.*

John Locke argued that mixing labor with land constituted a right to that land.<sup>41</sup>

There are two general ways to spell out a Lockean theory of *territory*. One can say that the Lockean right is an individual right to property, and individuals who own land contract together to form a state that has territorial jurisdiction over their individual properties.<sup>42</sup>

This is an individualistic version of the Lockean theory. Alternatively, one can break with the historical Locke and say that a group of persons such as a state can gain rights to certain lands through their collective labor, and this collective right is a right to territory.<sup>43</sup> This is a collectivist version of the Lockean theory.

The Lockean argument for property acquisition explains how *individuals* can come to acquire exclusive rights to common *land*. It is a stretch, then, to apply this argument to *state* claims to *territory*. Property rights in land are different from territorial rights. This is not an obvious distinction, because a person's property rights in land give the owner powers similar to the powers that a state has in virtue of a right to territory.

We should be clear about what I mean by property rights on the one hand and territorial rights on the other. In Lockean theory, a property right in land gives the owner of the land the right to control access to that land and to use that land in any way that does not violate the Law of Nature or civil laws. Property rights are individual rights to control other people's use of and benefit from a thing.

A state territorial right describes a relationship between the state and a geographic region. It is a jurisdictional right—the state has the right to make, adjudicate, and enforce

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<sup>41</sup> Locke (2003 [1690]): Chapter V, On Property.

<sup>42</sup> See Rothbard (1978): 26-37; Nozick (1974).

<sup>43</sup> Meisels (2003): 35.

law within a certain area. A territorial right is the right to determine what is just and unjust among persons within a jurisdiction. A territorial right also gives the right-holder the right to control access to that land and to the benefits that flow from the land's resources.

I suggest that the primary difference between a property right and a territorial right is that the central functions of the rights are different. The central function of a property right is to give the holder control over other people's access to the use and benefits from a thing. The central function of a territorial right is to give the right holder the power to establish justice within a particular region.

This is not to say that territorial rights do not have the potential to include the rights to control others' access to the lands within state territory, or that property rights cannot be used to establish jurisdictional rights. A person may use their property rights to establish a jurisdiction within their property. Suppose that Allison owns a piece of land, and Bob and Carl really want access to that land. Allison, Bob and Carl voluntarily enter into a contract. Allison will allow Bob and Carl access to her land if Bob and Carl submit to Allison's authority. Allison demands the right to make, adjudicate, and enforce laws for Bob and Carl while they are on her land. From this case we see that property rights can play a role in jurisdictional rights. The desire to access Allison's land compels Bob and Carl to consent to Allison's rule. A similar statement can be made of state territory. The desire to access resources (lands, jobs, schools, etc.) within state territory compels person to consent to state rule. Furthermore, Allison's jurisdiction over Carl and Bob is limited to her property. If Carl and Bob wander off of Allison's land, then they are no longer under Allison's jurisdiction. Again, this is similar to state territorial jurisdiction; when a person crosses territorial borders, they pass from one state's jurisdiction to another's. However, a person

need not prove that she has the right to rule within her land in order to prove that she has a property right to that land. Additionally, the establishment of a jurisdiction is not the central function of a property right. The central function of a property right is to establish control over the access to a certain thing.

Even though territorial rights and property rights may grant similar powers to the right-holders, a territorial right and a property right can be distinguished in the following way: the central function of a territorial right is to establish justice within a particular region by creating, adjudicating, and enforcing laws within that region. The central function of a property right is to have power over the access to and control of a certain thing.<sup>44</sup>

*Individualistic Theory of Territory.*

As we explore the relationship between property rights and territorial rights in this section, it is important to keep the following distinctions in mind. As Buchanan notes, there are three concepts concerning control of territory or land that should be distinguished. These are “(1) **jurisdictional authority** (the right to make, adjudicate, and enforce legal rules within a domain), (2) **meta-jurisdictional authority** (the right to create or alter jurisdictions, including geographical jurisdictions), and (3) the **property rights of individuals** and groups within jurisdictions.”<sup>45</sup> We are concerned with justifying meta-jurisdictional authority—the right to claim a certain territory in the first place. Individualistic Lockeans claim that meta-jurisdictional authority is grounded in individual property rights. Individual property rights give persons the right to create or alter geographical jurisdictions.

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<sup>44</sup> Thanks to Tom Christiano for this clarification.

<sup>45</sup> Buchanan (2003): 233. emphasis added.

In this sub-section I clarify the individualistic Lockean theory of territory, and I raise several problems for this theory. In order for property rights to be a foundation for meta-jurisdictional rights, individuals must have a right to exit a state with their property. There must be individual rights to unilaterally change the shape of the state territory. This account of the individual's right to exit with her landed property is consistent with only a few theories of the authority of the state. The conclusion to this section is not that the individualist theory is implausible, but instead that it is undesirable as a theory of territory. I argue that the individualist theory has limited appeal as a liberal theory of territory. My aim is to provide a liberal theory of territory that can be adopted broadly by liberal theorists.

In order to prove a right to territory, a state has to prove that it has the right to establish justice in that region. On the individualistic Lockean theory of territory, state claims to territory are justified because individuals have consented (in one way or another) to the state's authority over their personal property. The argument assumes that property rights give individual property owners meta-jurisdictional authority, the right to create and alter jurisdictions. On this argument, an individual who owns property may contract with other property owners for the purpose of forming protection agencies to police the property owners' lands and interests collectively, thus creating a state. In this case, the state has a right to territorial jurisdiction by virtue of the individual's right of property ownership and her right of contract.

Territory is not reducible to merely a property right in land. For instance, if Mexico buys real estate in the U.S., that land is still under U.S. jurisdiction. It is not annexed to Mexico. As a property owner in land, I cannot unilaterally secede my bit of land from the U.S. in order to avoid paying property taxes. Furthermore, there is the problem of

accounting for an individual's relationship to public lands and an individual's relationship to the state's territory as a whole.

An explanation that grounds the right to territory in individual property rights isn't going to be simple. A defender of the individualistic Lockean theory is going to have several other obstacles to overcome. First, there is the problem of unanimous consent. It is assumed that states need geographically co-existent and united territory in order for that territory to be effective. This rule admits of some exceptions. Foreign embassies are not part of domestic territories, for example. These exceptions demonstrate territorial political flexibility—the ability for territories to be somewhat discontinuous and still be politically effective—but they do not undermine the general point that, for the most part, a territory should be geographical co-existent and united. If every block in a city were part of a different state territory, the point of having a territory at all would be moot. The important features of defense, coordination of public goods (like roads), and securing political independence could not be achieved with such a fragmented geographical territory.

According to Lockean theory, in order for a state to have a whole, united territory, persons residing within the territory must arrive at a unanimous decision to assent to the same political authority.

[W]e run into problems whenever territorially intermingled individuals prefer to contract with different political authorities. Either we say that jurisdiction should be personal, rather than territorial, and abandon the idea of political authority residing in a state in Weber's sense of an institution that successfully claims a monopoly of the legitimate use of force in a give territorial area, or else we have to abandon the idea of individual consent, and say, for example, the majority consent in any given territory is sufficient to establish legitimate authority. But this creates problems of its own, and in any case is inconsistent with the original belief, of individualistic liberals,

that political authority should be constituted on the model of free association, with everyone having a choice about who he is engaged with politically.<sup>46</sup>

The problem of unanimous consent is difficult to overcome. However, a proponent of the individualistic Lockean theory has recourse to many well-developed theories of tacit and implicit consent to state rule. I won't sort out all of the arguments regarding consent theory here. Instead, I will assume that the individualistic Lockean view can overcome this obstacle. There are two things to note regarding a theory of consent within a theory of territory. (1) The consent theory will have to include considerations regarding rights to land. Traditionally, most consent theories only take into consideration decisions regarding the rule of persons. To ground a theory of territory, an individual must consent not only to the state's rule of her person, but also to the state's rule of her property. All consent theory includes the terms of exit for a person from society. In this case, the consent theory must also include the terms of exit for a person's landed property from society. I will discuss this consideration more below. (2) An important thing to keep in mind is that the obstacle presented by the problem of unanimous consent does not have to be solved before one can accept the collectivist Lockean theory of territory that I give in section 2. The collectivist theory of territory is not predicated on a Lockean theory of state authority. For that matter, neither is the individualist theory of property to which my collectivist theory of territory is analogous. Consequently one can accept the collectivist Lockean theory of territory but reject the Lockean theory of state authority. I will demonstrate this virtue of the collectivist theory in section 2.

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<sup>46</sup> Miller (2003): 264.

Second, it looks like current property holders don't have meta-jurisdictional rights. Regardless of whether *current* property holders consent to territorial jurisdiction, it doesn't look like they have any power to change territorial jurisdiction. From this perspective, the consent of current property holders to grant the state authority over their land is rendered meaningless because individuals do not have the authority to withdraw their land from the state's authority.

Locke maintained that the original members of the social contract had *no* right to remove themselves or their property from the social contract once it had been made. And although children may decide to exit the society once they come of age, they may not take any land with them when they leave.

A man is naturally free from subjection to any government, though he be born in a place under its jurisdiction. But if he disclaim the lawful government of the country he was born in, he must also quit the right that belonged to him, by the laws of it, and the possessions there descending to him from his ancestors, if it were a government made by their consent. (II, 191)

Even if we *wanted* to say that individuals have a right to secede their land, there is little to say in support of that right. This is because there is a difference between legal property rights and natural property rights. Legal property rights are established by convention and enforced by the state. Most current individuals have legal property rights to land and not natural property rights. A natural property right in land is acquired in the state of nature, the absence of a civil society, or in civil society, through the mixture of one's labor with previously un-owned land. It is thought that natural property rights are vague, and because of their vagueness, they depend on legal property rights for any practical application of that right. For example,

The labor-mixing principle on its own is difficult to specify and difficult to justify. Most importantly, the amount of resources that one comes to own upon mixing one's labour is completely unspecified. As a way of illustrating the problem, suppose the *size* of an object is the sum of the raw resources from which it was made *plus* the labour that was put into it. The question of specification can then be put this way: what portion of the size of an object must the added labour constitute, for the laborer to own the whole object? If we could settle nonarbitrarily on a number, then we would at least be able to answer questions like those that Robert Nozick raises: if I build a fence around some land, do I own the enclosed land, merely the land directly under the fence, or what?...

Since property rights require conventional settlement, people who claim those rights, and whose claims conflict, must have access to some unbiased account of which conventions exist, and how various matters have been settled. Equally important, because conventions may differ from population to population, claimants must have some predictable way to know whom, or what, each convention covers. These are necessary conditions of any stable property system.<sup>47</sup>

David Miller summarizes this point well.

[T]he idea that state S has rightful jurisdiction over piece of territory T because T's owner O has consented to its authority depends upon first establishing that O has a (property) right to T. But if the only way in which we can demonstrate that O has a right to T is by referring to the law of S, then clearly our account becomes circular. So unless it can be shown that O has a pre-political, natural right to T, then S's jurisdiction over T cannot be established by referring to O's consent.<sup>48</sup>

This argument, although introducing valuable terminological distinctions, proves too much. One mistake that Kolers and Miller make is that they think that because the right to property needs a legal system to clarify, adjudicate, and enforce these rights, the property right does not exist independent of a legal system. Natural rights including property rights can be said to exist independent of a legal system. Natural rights—rights thought to exist independent of social conventions—do not need to be exactly specified in order to tell us something important about the way that social institutions (like laws and boundaries) should be formed. The tenet of Lockean property rights is that the right to property is a natural

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<sup>47</sup> Kolers (2000): 36.

<sup>48</sup> Miller (2003): 264.

right, not a legal right. Natural rights exist independent of society and legal rights. In fact, natural rights provide one of the only means by which we can criticize governmental laws and decrees. It may be true that we cannot adjudicate property rights without an established legal system, but this does not prove that property rights are not grounded independent of that legal system. It should be noted that the same thing can be said for any natural or human right. The right to bodily integrity requires the existence of a legal system to clarify, adjudicate, and enforce the right. But this does not mean that the right to bodily integrity does not exist independent of the legal system. Moreover, the acknowledgement that such a right exists, even if only in the abstract, is from the start a central consideration in the construction of a legitimate legal system.

Locke considers the problem that natural rights are under-defined. Consideration for this problem is central to Locke's theory of legitimate political authority. Because natural rights are under-defined and because defects in human nature lead to misunderstandings and disputes, we are compelled to leave the state of nature and form civil societies. Within civil societies there is a common judge who resolves disputes. Without a common judge

... there will be the problem that persons are judges in their own cases. Where there is no common judge with authority, persons may be partial or vengeful in exercising their natural executive rights, possibly leading to feuds, conflicts, and war (II, 13). This kind of social problem plagues all forms of the state of nature, and the insecurity it causes is the primary reason for seeking the protection of a (properly limited) civil government (II, 13, 21).<sup>49</sup>

Imagine a simplified case beginning in the Lockean state of nature (a state where Allison and Bob do not belong to a civil society, and where land is still part of the

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<sup>49</sup> Simmons (1993): 27. Inset page numbers refer to book, chapter, and section numbers of Locke's *Second Treatise on Government*.

commons). Allison has a natural right to a certain bit of land. Bob has a natural right to a certain bit of land adjacent to Allison's bit of land. Allison and Bob dispute the boundary marking the division between their respective bits of land. Allison and Bob enter into civil society S in order to appeal to a common, impartial judge to adjudicate their border dispute. By entering into civil society S, Allison and Bob give S territorial jurisdiction over their bits of land. Allison's land and Bob's land become part of S's territory. The boundaries of Allison's and Bob's lands are defined by S's laws, and the laws (if legitimate) *are informed and constrained by S's interpretation of natural law, including that natural right to property*. The story becomes more complicated when a foreign person, Franz, owns land that borders the lands of Allison and Bob. A border dispute between Franz, Allison, and Bob, would require a dispute between S and Franz's civil society, FS. Disputes of this sort could be settled by an agreement, a *modus vivendi*, between S and FS.

As I have just shown, it is at least theoretically feasible for natural property rights to ground territorial rights. Disputes regarding the specific nature of natural property rights would be settled ultimately via *modus vivendi*. This understanding of property rights is limited. It explains how individuals with a natural right to originally appropriated land can by consent create a society. But once the land becomes part of state territory, the state has the power to define property rights, and property rights are subject to state jurisdiction. In this case, Miller's argument still applies. Founding territorial rights on current legal rights to property in land is circular. Territorial rights could be justified in virtue of the natural property rights of the original members of the social contract, but they could not be founded on the legal property rights of society's current members.

One may maintain that legal property rights should always be rooted in natural property rights. The state, in clarifying the right, does not diminish the right's power. But this is so only if the right retains the right of secession—to exit the society and take your land with you. Individual property rights are only capable of grounding territorial rights if they are truly meta-jurisdictional rights. This includes the right to withdraw from territory as well as the right to submit to a territory.

...precisely because a nation's territory is legitimately composed of the real estate of its members, the decision of any of them to resign that membership and, as it were, to take their real estate with them is a decision that must be respected...Jurisdiction over land, like jurisdiction over persons, is a purely voluntary affair for consistent liberals and it is thus predicated on the agreement of all the parties concerned.<sup>50</sup>

This leaves the individualistic Lockean theory with two options: either only the original contractors have property rights that carry meta-jurisdictional authority and ground territorial rights, or all current property owners in land have these rights including the right to unilaterally secede one's land from state territory. I consider both possibilities in turn.

If we say that territory is grounded in natural property rights, and that current individuals do not possess these sorts of rights (with the right of secession), then we are committed to the view that current individuals are bound to jurisdictions that they have no control over. This is antithetical to the Lockean position that state jurisdiction is justified only by individual consent; no state has the right to rule over a person who did not consent to be ruled by that state. It is true that an individual could exit the state, but no individual or collection of individuals would have the right to change the state geographical jurisdiction. Geographical jurisdiction is a central component in determining *how* a state will rule its citizens because it determines *who* is a part of the democratic decision-making process. In

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<sup>50</sup> Steiner (1996): 144.

democracy, who votes determines how the state is run. The loss of any right of control over state territorial jurisdiction is an important loss of control over how the state will rule. From this perspective, there is little incentive for the neo-Lockean to accept the position that only the original members of the social contract have meta-jurisdictional authority.

Now let's turn to the second alternative that all property holders possess meta-jurisdictional authority to unilaterally secede their land from state territory. What would this view of the state be like? Chandran Kukathas provides a way for us to articulate this theoretical possibility. In *The Liberal Archipelago*, Kukathas argues for a particular view of a good society. This society is a liberal archipelago,

not a stable social unity created or upheld by a shared doctrine. It is, rather, a collection of communities (and, so, authorities) associated under laws which recognize the freedom of individuals to associate as, and with whom, they wish. This model of a free society is one in which there may be many associations, but also in which none is 'privileged' or regarded as having especial moral significance. Thus, there may, in such a society, be many authorities, all authority resting in the end on the acquiescence of subject rather than on justice.<sup>51</sup>

According to Kukathas, of primary importance to a liberal society is the protection of freedom of conscience. No person should be forced to adhere to principles in which she does not believe, and no person should be stopped from attempting to pursue a life lived in accordance to principles in which she does believe. As a direct result of the respect for the liberty of conscience, society must respect the freedom of association and the freedom to exit any association. These communities have all and only the authority that the members revocably acquiesce to the community and its leaders. The only external limitations placed on the authority of a community is that the community must respect the right of all persons

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<sup>51</sup> Kukathas (2003): 19.

to a freedom of conscience, which includes the right of members to exit the community and the requirement to tolerate the existence of other associations.

Kukathas' conception of the liberal archipelago is consistent with the conception of territorial borders as theoretically divorced from political borders. On this account, we can understand the primary units of ownership as individual and that, ideally, individuals can contract into different political associations regardless of the individual's location.<sup>52</sup>

Territorial jurisdiction is not regarded as necessary for a political association to exist, although Kukathas grants that political associations (of the relevant sort, like nations and states) are usually geographically distinct from other political associations.<sup>53</sup> A non-political association (such as a collaborative or corporation) may claim this jurisdiction, or several associations could contract to jointly administer over a given territory. Alternatively, political associations could have no territorial claims. Instead individuals could contract privately the administrative tasks of their territory. Claims to territory are settled by a *modus vivendi*, a practical agreement achieved between competing associations.

Contrary to the conclusions of some theorists, I do not find that theories such as Kukathas' cannot give a consistent account of territory.<sup>54</sup> Individual property rights can theoretically ground state rights to territory, if individuals consent to include their lands under the state's jurisdiction, and given the conditions argued above.

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<sup>52</sup> Kukathas doesn't seem to have worked out a theory of territory. His theory may be consistent with the traditional territorial sovereignty, but it may not. I think Kukathas would like for the associations contained in his liberal archipelago to determine the nature of their territorial rights themselves. Whether or not robust freedom of association can be achieved without the right to exit one's property from a state territory is a question that Kukathas' theory still needs to answer. I maintain that Kukathas' conception of the liberal archipelago is consistent with the view of territorial rights such that one can exit a state with one's landed property. In fact, a view like Kukathas' robust conception of the freedom of association is arguably the only kind of theory of state authority that is consistent with the right to exit one's landed property from state territory.

<sup>53</sup> Kukathas (2003): 173.

<sup>54</sup> See, for example, Buchanan (2003), Kolers (2000), and Miller (2003).

Rather than debate the virtues and vices of a theory like Kukathas', I point out how limiting it is. My aim is to provide an account of a theory of territory that can be widely adopted by liberal theorists. The individualistic account of a Lockean theory of territory cannot be widely adopted by liberal theorist. If one wants to use an individualistic Lockean account of state territory, then she must also accept a neo-Lockean account of state authority such as Kukathas' view. But many liberal theories do not endorse a view of state authority grounded in such a robust conception of the freedom of association. I opt for a more inclusive, collectivist account of territory that is compatible with a wide range of liberal theories. I provide my account of a collectivist Lockean theory of territory in the next section.

## **B. The Lockean Collective Right to Territory**

In addition to holding, as John Locke's original argument held, that individuals gain property rights, the collectivist-territory adaptation of the Lockean argument holds that groups of individuals also gain territorial rights to certain lands because their collective labor improves the land. There are different ways to characterize the Lockean collective right to territory: as a group right to property or as a state right to territory. I set aside the first version of the collectivist argument in favor of an argument that the state can acquire a right to territory without first acquiring a right to property. This theory avoids the additional and potentially troublesome steps in a theory that are required to connect the right to property with the right to territory.

### **B.1. Group Property Rights**

John Douglas Bishop argues that a right to property in land can be held by groups as well as by individuals.

Locke's arguments for property are based on consumption (II, 28) and labor (II, 27). The consumption argument is that the bounty that was given to humanity in common does no person any good until someone appropriates a specific portion and makes it theirs by using it to the exclusion of others... Land is not consumed by use, nor does it become part of the user in any physical sense. An apple (or at least a specific bit of it) cannot be profitably used by more than one person, but bounty from the land can be made usable by a group of people and, in fact, generally is. The argument for property from consumption, if it can be applied to land at all, would work as well or better if groups of people are recognized as owner.

The labor theory of property appropriation equally does not require the unit of ownership to be the individual. Labor can be a spousal, family, or community activity... Locke's entire argument about the natural right of people to ensure their own preservation, and the natural right to won the product of their labor which he derives from it, actually works better with the family as the unit of ownership rather than the individual, at least for the ownership of agricultural land. Farming is usually a joint effort.<sup>55</sup>

Groups of individuals such as families or clans can acquire property rights to lands.

However, this argument does not establish that the group has any territorial rights to lands.

Remember that a property right is a right to exclusive control of a land and its bounty.

Territorial rights, by contrast, are jurisdictional rights. Territorial rights demarcate a geographical area of jurisdiction within which a government has the right to make, adjudicate, and enforce laws that govern not only the land but also the individuals inside the territory. As noted in the previous section, territorial rights are not reducible to property rights. The argument for a group right to property will be subject to the same objections as the individual right to property in so far as these arguments are used to justify a state's right to territory.

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<sup>55</sup> Bishop (1997):324. Inset page numbers refer to book and chapter of Locke's *Second Treatise on Government*.

The challenge for this version of the group right to territory is that it asserts that a group has a property right—not a territorial right. A property right in land is the right to control the use of and the benefits from that land. A territorial right is primarily a jurisdictional right—the right to establish justice between people within a region. All groups with property rights do not have territorial rights. The Church of Jesus Christ of Latter Day Saints owns vast tracks of land in Utah, but that doesn't give them jurisdictional rights. The group that claims territorial rights over a region must be politically organized in such a way that they have the moral authority to establish jurisdiction within the region. Suppose that such a group, a political institution with the moral authority to establish justice, collectively had property rights in large amount of land. Would this mean that the group would also have territorial rights to this land? Maybe. But it doesn't seem like this has to be the case. Some states own property that is within the territory of another state. If the United States owns property in Mexico, the property remains under Mexican jurisdiction. There is an additional criterion for the state to have territorial rights to a land that is not met when the state merely has a property right to that land. Because of this difficulty, I prefer to bypass property rights altogether and argue that the state can directly acquire a territorial right to the land without first acquiring a property right to that land. I argue for this position in the next section.

## **B.2. State's rights to territory**

Up to this point I have argued against Lockean understandings of a right to territory. Rights to property are not rights to territory. However, they are similar, and understanding the former leads to an understanding of the latter. In this section I give a positive argument for a Lockean understanding of territorial rights. I assert that the Lockean theory of

property is a useful tool for understanding territorial rights. For very similar reasons that persons (and sometimes groups) have rights to property, political institutions also have rights to territory. To see how this is so, I divide this section into two subsections. In the first subsection I detail the Lockean reasons to believe that individual persons have a right to personal property. In the second subsection I explain how these same reasons can be applied to political institutions. But instead of having the result that legitimate political institutions have the right to property, the proper understanding of the argument leads to the conclusion that legitimate political institutions have the right to territory.

### **B.3.1. Individual Property Rights**

According to Lockean theory, individual property rights are given by the laws of nature. The laws of nature are universal; they apply to all persons equally. The laws of nature impose on us rights and duties. As John Simmons explains, “the general form of these duties is clear—that is, they are duties to preserve oneself and others (by, for instance, not harming persons in their lives, liberty, health, limb or goods [II, 6])... Persons enjoy in the state of nature their full complement of natural rights (which correlate with the natural duties of others to respect those rights.)”<sup>56</sup>

The natural right to property is an extension of the general right to self-preservation and the duty to preserve others (the human race) (II, 26). Originally all lands were owned by the commons. Leaving all lands in their natural state is not, according to Locke, a state that efficiently preserves humankind. Therefore we must be able to appropriate lands out of the commons for personal use (II, 26). The Lockean argument for natural property rights has two parts. First, it explains how an individual comes to have a property relationship with a

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<sup>56</sup> Simmons (1993): 24.

particular material good. Second, it explains the moral value of that relationship such that the relationship warrants the strong designation of a natural right.

There are two ways that an individual may come to have a property relationship with an external object: by consumption or by labor.<sup>57</sup> The consumption argument is quite literal. When a thing, such as an acorn or an apple, is eaten, it becomes literally part of the person. The person then owns the acorn or the apple as she owns her own body (II, 28). The consumption argument cannot (not really) establish a claim to lands. I will focus, then, on the labor argument. A person owns her body and her labor. When a person works on the land, she mixes it with her labor and thereby gains property rights to the land. The land has essentially become part of herself such that her rights to her own body and labor now extend to the land. Locke did not mean for any act upon the land to generate property rights to that land. If I throw a can of tomato juice into the ocean I do not thereby gain property rights to the ocean. By looking at the second part of Locke's argument, the moral value of the property relationship, we better understand the particulars of how the property relationship is established. I turn to the moral value of the property relationship in the rest of this subsection.

For our purposes there are four arguments for the moral value of the right to property. These are the arguments from need, efficiency, labor-based desert, and self-ownership.

There is a *need* for a right to property based on labor, because without this right, property rights would have to be established by consent. Because prior to original appropriation all things are owned in common, without a property right based on labor, we

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<sup>57</sup> Bishop (1997): 324.

would have to gain the consent of all existing persons to establish any individual property right. In waiting for such consent to come about, people would die without the benefit of the efficient production that personal property creates.<sup>58</sup>

Was it robbery thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him. We see in commons, which remain so by compact, that it is the taking any part of what is common, and removing it out of the state of nature leaves it in, which begins the property; without which the common is of no use. And the taking of this or that part does not depend on the express consent of all the commoners. (II, 28).

Property rights are also valuable because they are *efficient*. I have noted that property rights are an extension of the law of nature. The law of nature imposes on us a duty to

...undertake actions which tend to preserve the human species. Because certain forms of labor increase the likelihood of preservation, we have a duty to perform those kinds of labor. Since original appropriation of property encourages and makes possible those kinds of labor, original appropriation of private property becomes a right. This is related to efficiency in that more efficient use of land also tends towards human preservation.<sup>59</sup>

The argument from efficiency should not be understood as a maximizing argument, or as an argument for appropriating the personal property of others. One does not have to establish that they are using land in a maximally efficient manner in order to appropriate land from the commons. But one does have to be using the land in a manner that tends to preserve the human species and in a manner that more efficiently promotes that end than if the land remained in the commons.<sup>60</sup> Additionally, once land has been acquired, it cannot be acquired by a different party merely because they are using it more efficiently.

However, Locke nowhere argues that efficiency overrides private property once ownership is established; his theory is obviously not a utilitarian theory in which land

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<sup>58</sup> Schrader-Frechette (1993): 204.

<sup>59</sup> Bishop (1997):316.

<sup>60</sup> For arguments that a system of private property is more efficient than the state of nature, see Schmitz (1994).

must always be reassigned to the most efficient use. Thus efficiency is only relevant at the time of original appropriation and only in so far as it helps Locke derive property rights from natural law.<sup>61</sup>

Locke also justifies the right to property with an appeal to *labor-based desert*. Of goods that are useful to us, Locke attributes most (99/100) of their value to labor. When a person invests her labor in the land, the land produces valuable products. The value of those products and of the land is attributed mostly to the labor. The owner of the labor, then, deserves the product of her labor, because it is her labor that made the product valuable (II, 40-44).<sup>62</sup>

Eric Mack assigns an additional value to personal property. Mack finds that personal property is an important aspect of *self-ownership*. Locke (as well as all liberal theorists) understands the right to self-ownership to be a fundamental natural right. Self-ownership is a set of exclusive rights to one's own body, talents, and energies. One's talents and energies are world-interactive powers, "capacities to affect [one's] extra-personal environment in accord with [one's] purposes."<sup>63</sup> Mack explains that "such world-interactive powers are essentially relational. The presence of an extra-personal environment open to being affected by those powers is an essential element of their existence."<sup>64</sup> To respect others' rights to self-ownership essentially involves allowing them to have a relationship with an external environment such that their talents and energies can interact with the world in a meaningful way. "To be a self-owner is to have moral rights over oneself as a purposive being whose

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<sup>61</sup> Bishop (1997):316-17.

<sup>62</sup> Schrader-Frechette (1993): 205.

<sup>63</sup> Mack. (1995):186.

<sup>64</sup> Mack. (1995):186.

faculties, talents, and energies can be brought to bear on the world in the pursuit of one's values."<sup>65</sup>

With the exception of ownership in one's own body, the argument from self-ownership does not establish a right to personal property *per se*. (Mack makes this argument in the context of providing an interpretation of the Lockean proviso.) One does not need to own property in order to have meaningful world-interactions. There are other ways to interact with the world—by borrowing other people's stuff, e.g. However, this does not stop us from using the argument as a characterization of the value of personal property (although not a value unique to personal property). It is also possible that having personal property is the best way to realize this value. When a person privately owns an object, that object is at her exclusive disposal. She can bring her energies and talents to bear on that object whenever and however she wants.<sup>66</sup> If she does not have a property right to the object, then her interaction with that object is limited by the constraints that others who have a claim to the object place on her. These limitations could appear if the object is owned by another person or if the object is owned in common.

### **B.3.2. The state's right to territory**

In the previous sub-section I described the justifications for a Lockean theory of personal property rights. In this section I explain how the same justifications, applied to the state, give reasons to attribute territorial rights to states.

A state is a set of political institutions with a governing body that serves to make, adjudicate, and enforce rules within its political realm. The geographical realm of the state is

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<sup>65</sup> Mack (1995): 201.

<sup>66</sup> Within limits. One's property rights and what one does with her property are constrained by a respect for the rights of others.

its territory. The personal realm of the state is its members. It may be the case that other sorts of political institutions besides the state can claim Lockean rights to territory. In this chapter, I only argue for the state's right to territory.

There are two necessary conditions for the Lockean right of property. These conditions, as I described them earlier, are (1) that persons are capable of creating a property-relation with material objects—established by consumption or by labor, and (2) that this property-relation is morally valuable—established by need, efficiency, the labor theory of desert, and the value of self-ownership. In what follows I argue that these three conditions apply to political institutions with the right of self-determination. But instead of establishing a right to property, these conditions establish a right to territory.

*States have world-altering abilities that create value in land.*

States are capable of altering land. More importantly, these institutions are capable of creating value in land. Laws and customs governing land use create stable systems of agriculture and other forms of production that create value in land (and air and water) at any particular time and over long periods of time. They do this in several ways: (1) Market systems established and maintained by political institutions determine and create value in land (air and water) and all of its products. (2) Individuals organized by political institutions are more productive. (3) States (and their governing bodies) are responsible for interpreting and enforcing personal property rights, and property rights are an important source that creates value in land (as Locke argued.) Just as individuals create value in land, so do states. States have world-altering abilities that can be the source of rights claims.

*The relationship between states and land is morally valuable.*

*Need.* Locke said that without a way to acquire property from the commons, man would starve. There is a need based on a concern for human well-being for a property rights. There is also a need based on a concern for human well-being for territorial rights. States need a way to acquire territorial rights. Without a means to acquire territorial rights, states ‘would starve’. Territorial rights have played an essential role in the creation of the independent and autonomous state. Territorial rights are generally required in order for a state to establish justice.<sup>67</sup> While states do not *necessarily* need territories in order to exist (There is, after all, Kukathas’ theory that political institutions can be effective without territory and the possibility of an internet state presented in Chapter One.), territories have played an important empirical role in securing state independence. I elaborate on the important role that territories play in securing state independence in Chapter One.

State independence is important for human well-being because it is a component of state self-determination. The right of self-determination is the right of self-government. A people is self-governing if it has the independent and supreme political control over some important aspects of the members’ common life. Self-determination requires both autonomy and independence. The self-determining people is autonomous—it has the ability to govern itself by adjudicating, legislating, and enforcing laws on its own, and it is independent—it has a domain of political control independent of higher or foreign political units to which the people’s self-made laws are subject to being overridden or revoked.<sup>68</sup>

This characterization of self-determination, however, is not uncomplicated.

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<sup>67</sup> I argued for the possibility of a territory-less state in Chapter One. However, I believe that this is the exception to the rule. Given the general human condition—the need to coordinate property rights law, e.g., with our neighbors—territorial rights are generally required in order for a state to establish justice.

<sup>68</sup> Buchanan (2004): 333.

...self-determination (or autonomy) implies an independent domain of political control. But this characterization leaves open (1) the nature of the domain of independent control (what sorts of activities and institutions the group exerts control over in its own right), (2) the extent of its control over items in the domain (which may vary from item to item), and (3) the particular political institutions by which the group exercises political control over its domain of control. Given the indefinitely large set of self-government arrangements made possible by various combinations of different ways of specifying these three variables, it is extraordinarily unhelpful to talk about “the” right of self-determination (or autonomy).<sup>69</sup>

There are great variations in the ways that a state or other political institutions may be self-determining, and in the territorial rights that those political institutions might have. A right to territory does not have to be exclusive, for example. Both the United States and Arizona have territorial rights to the Arizona region. I assume determinate juridical rights to territory in the following argument for explanatory purposes only. I do not dwell on the variations of self-determination and territorial rights here. Instead, for explanatory purposes, I assume that some political institutions have rights to self-determination as this right is (roughly) attributed to states currently, and this right sometimes includes the right to exclusive juridical claims to a territory.

Since territorial rights play an important role in the state’s ability to be self-governing, there is a need for state’s to have a means to acquire territory.

*Efficiency.*

In the case of property rights, one gains a property right to land only if the land is used in a manner that tends to preserve the human species and in a manner that more efficiently promotes that end than if the land remained in the commons. In other words, the person must make the land more efficient. The same argument can be said to justify a system of private property rights. A system of private property rights ends up using the land

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<sup>69</sup> Buchanan (2004): 333.

more efficiently than a system where the land is left in common, even if in some cases individual are not using their property efficiently.

A system of state territorial rights is more efficient at getting value from land than leaving the land to individual land owners devoid of territorial jurisdictions. Locke held this position. Efficiency is the primary reason that the original members of the social contract are motivated to enter political society. Political society provides a common judge to which citizens can appeal for jurisprudence. The presence of a common judge and of the judge's authority and power to enforce law is what stabilizes a system of property rights. The value of efficiency that is given to individual property rights is, then, dependent on the existence of a political society that reinforces those rights. If a system of individual property rights is valuable because it is efficient, then a system of political institutions that reinforce those property rights is valuable because it makes it possible for the individual property rights to have value.

*Labor theory of desert.*

In the case of individual property rights, the owner of the labor deserves the product of her labor, because it is (to a great extent) her labor that made the product valuable. Likewise, a percentage of the value of a land is attributable to the state that governs that land. This is demonstrated in my points above regarding a state's world-altering abilities. The state's governance of land use creates stable systems of agriculture and other forms of production that create value in land (and air and water) at any particular time and over long periods of time. Additionally, the state can be seen as (at least in part) the manifestation of the coordinated efforts of individual members of the state. Much of the value of the lands occupied by the members of a state is due to the coordinated efforts of those members.

Examples are technological advances built upon group and cross-generational research and conservation efforts coordinated by communities and enforced by political institutions. By the same reasoning that grants individuals property rights in land because their labor adds value to the land, states gain rights to land because the efforts of the institution also add value to the land.

*Self-ownership/self-determination.*

To respect individuals' rights to self-ownership essentially involves allowing them to have a relationship with an external environment such that their talents and energies can interact with the world in a meaningful way. We respect a state's right to self-determination in much the same way as we must respect a person's right to self-ownership. Like self-ownership, self-determination requires a physical space where the people's values can be brought to bear. Assemblies need places to gather, values in land use need plots for application, and civil rights, like the right of privacy, need protected spaces in order to be realized. The values protected by the right of self-determination are best protected if the state has a territory where it can freely express those values.

States, then, have features analogous to the features of persons and relationships to land analogous to personal relationships with land. These properties of the state grant states rights to territory for the same reasons that the analogous properties in individuals grant them property rights. Instead of a right to property, though, a state has a right to territory. This is because the values of the right (the values of need, efficiency, desert, and self-determination) are found in a territorial relationship with the land and not in a property relationship with the land. Remember that territory is a juridical relationship between a governing body and a certain geographical region. These values (of need, efficiency, desert,

and self-determination) are realized when a state has this juridical relationship with its land—the right of a people to make, adjudicate, and enforce laws that express their values within a certain realm. The values of property rights, by contrast, are realized when the individual has a property relationship with the land.

Now we can see how the Lockean theory of territory explains a people's right to a homeland. A right to a homeland is a right to a particular piece of land to which the holders of the right have a deep and important historical connection. Like the individual right to property in land, the state's right to territory is grounded in the state's relationship with that land over time. This is a right that is earned over time. Like with the individual right to property, time is required to establish a relationship with the land that promotes the values of need, efficiency, labor, and self-determination. Individuals can't establish an immediate original property right to land. The individual must work with the land over time in order to mix her labor with it so that it becomes hers. The important historical connection between a state and its territory is analogous to the important historical connection between the individual and her acquired property rights in land. State institutions come to have a relationship with the land that promotes liberal values. This relationship grounds the right to a homeland in an institutional relationship with the land. The works of the institutions (and the labor of the individuals working through those institutions) establishes a right-granting relationship to the land. Because the right-granting relationship is not dependent on cultural or national identity, the right is not established by a nationalist or cultural account of the land's value.

### C. Homelands and Resources

The Lockean Theory of territory is a particularly fruitful theory of territory because it can account for two features of the theory of territory that other theories have a difficult time explaining. These are the right to a homeland and the state's right to control the benefits that flow from the resources within its territory.

#### *Homeland.*

A Lockean theory of territory is important to liberal theories of international justice because it explains how a group of people can have a right to a *homeland* without relying on nationalist or cultural accounts of that land's value. A right to a homeland is a right to a particular piece of land to which the holders of the right have a deep and historical important connection. Nationalist or cultural accounts of a people's right to a homeland maintain that a people's control of a piece of land is valuable because it is important to their national or cultural identity. The problem with nationalist or cultural accounts is that, as I argued in Chapter One, it allows for or encourages racist or xenophobic policies by possibly allowing religions and other groups to claim rights to territory.

There are other non-Lockean liberal theories of territory that do not rely on nationalist or cultural accounts of a land's value, but, as I argued in Chapter One, these other liberal accounts cannot give an account of the right to a homeland. These theories justify a claim to a territory, but they don't explain a right to homeland. In order to account for a right to homeland, a theory must explain the value of the historical connection between a people and a particular region, and these theories cannot explain this connection. A Lockean theory of territory, however, can explain this connection.

The Lockean theory of territory grants a state territorial rights to a land with which it has a deep, historical connection. The connection between the state and the land that gives rise to the territorial right is described in terms of the way that the state affects the land in an efficient way. The right is a right to a particular piece of land—the land that has been effected by the state’s efforts—and not just to any piece of land. The right is also built on a historical connection between the state and the land. The state must establish its relationship with the land over time (it takes time to establish justice and efficient patterns of land use) before the state acquires a territorial right to the land. This relationship can be described as a ‘deep’ relationship in that the members of the state feel deeply attached to the land because they, their parents, and perhaps their ancestors have worked hard to make the state successful in its attempts to establish justice and efficient use of resources within the state’s territory. Members of the state usually feel a strong protective and familial bond with a land and with state juridical rights within that land that they or their ancestors have helped to create. The Lockean theory of territory provides an account of a state’s right to a particular piece of land to which the state has a deep, historical connection.

*Control over the Benefits from Resources.*

Territorial rights have traditionally been understood as giving the state a right to control the benefits flowing from the natural resources within its territory. This right is exercised through the state’s rights to create systems of property rights, economic and social policies, and systems of taxation that (a) keep the benefits from natural resources within the state, and (b) keep some of the benefits from natural resources under the direct control of the state.

The Lockean theory of property, of course, gives an account of private property and individual rights to the benefits flowing from individually owned property. A Lockean theory of territory gives an account of the state's right to control the benefits flowing from the natural resources within its territory. The right to control the benefits from natural resources can be explained in terms of the values of desert and of efficiency. An agent deserves (a portion of) the benefits that flow from a natural resources if the agent's labor has helped to produce the benefits. As I argued above, the state's labor has helped to produce the benefits from natural resources within the state. Consequently, the state deserves control of some of the benefits that flow from those resources.

A system of rights that makes efficient use of land is valuable. We have a reason to prefer this system of right. A system of state territorial rights that includes the state's right to control benefits from natural resources within its territory is more efficient than a system of global territorial rights—where one political authority has control over all of the benefits from all natural resources. (I argue for this point in Chapter 4.)

The Lockean theory of territory provides a way to account for a state's right to the benefits from natural resources within its territory.

#### **D. The Problem of Initial Acquisition**

Finally, the Lockean theory of territory is faced with the problem of responding to the problem of initial acquisition. The Lockean theory of property explains how an agent can acquire just property rights to an un-owned piece of land. In the case of state territory, most state borders were formed unjustly through expansionism and war. How can stolen territory be justified by a theory meant to justify initial acquisition?

There is an extensive literature dedicated to the theory of the just acquisition of personal property. I draw on two such works (by Jeremy Waldron and by David Schmidtz) to defend a Lockean theory of territory while still acknowledging past injustice in territorial acquisition.

Jeremy Waldron argues that in some cases of unjustly acquired individual properties the historic injustice can be superceded. A supersession of injustice occurs when an unjust situation is made just by a change in circumstances (or some other event). Waldron claims that there are circumstantial conditions of property rights. This means that the legitimacy of property rights is subject to circumstantial considerations. Waldron cites the Lockean Proviso, that there must be as much and as good left for others when one originally acquires land, as one such circumstantial condition on property rights. Given different circumstances, a property holding can go from being just to being unjust, and vice versa. Waldron asks us to consider the following example.

On the savannah, a number of groups appropriate waterholes, in conditions where it is known that there are enough waterholes for each group. So long as those conditions obtain, it seems reasonable for the members of a given group, G, to use the waterhole they have appropriated without asking permission of other groups with whom they share the plains; and it may even seem reasonable for them to exclude members of other groups from the casual use of their waterholes, saying to them, 'You have your own waterhole. Go off and sue that, and leave ours alone.' But suppose there is an ecological disaster, and all the waterholes dry up except the one that G is using. Then it seems to me that in these changed circumstances, notwithstanding the legitimacy of G's original appropriation, it is no longer in order for G to exclude others from its waterhole. Indeed it may no longer be in order for members of G casually to use 'their own' waterhole in the way they did before. In the new circumstances, it may be incumbent on them to draw up a rationing scheme that allows for the needs of everyone in the territory to be satisfied from this one resource.<sup>70</sup>

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<sup>70</sup> Waldron (1992): 161.

The changing circumstances of the savannah have an effect on property rights by making G's exclusive property rights to their waterhole illegitimate, and this effect is justified even though we acknowledge the moral legitimacy of the original appropriation of G's waterhole. Waldron goes on to argue for the extension of this argument for the supersession of historic injustice.

I said that an acquisition which was legitimate at one time may become illegitimate or have its legitimacy restricted (as a basis of on-going rights) at a later time on account of a change in circumstances. By exactly similar reasoning, it seems possible that an act which counted as an injustice when it was committed in circumstances C, may be transformed, so far as its on-going effect is concerned, into a just act if circumstances change. When this happens, I shall say the injustice has been superseded.

Return to the waterholes example. Suppose as before that, in circumstances of plenty, various groups on the savannah are legitimately in possession of various waterholes. Now, one day, motivated purely by greed, members of group H descend on the waterhole possessed by group G and insist on sharing that with them. (What is more they do not allow reciprocity—they do not allow members of G to share any waterhole that was legitimately in possession of group H.) That is an injustice. But then circumstances change, and all the waterholes of the territory dry up except the one that originally belonged to group G. The members of group H are already sharing that waterhole on the basis of their earlier unjust incursion. But now that circumstances have changed, they are entitled to share that waterhole: it no longer counts as an injustice. It is in fact part of what justice now requires. The initial injustice by H has been superseded by circumstances.<sup>71</sup>

This argument can be applied in the case of unjustly acquired territory. Suppose that State G has a legitimate territorial claim to a certain land. State H, motivated by greed, conquers State G through warfare and moves its members onto State G's land. This is an injustice. After the passage of many years and generations, the original lands of State H (where the members of State H came from in the first place) have disappeared for one reason or another, and the territory of State H is more or less consistent with the land that State H unjustly took from State G. It is not possible for the descendants of the invaders to

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<sup>71</sup> Waldron (1992): 163-4.

return to their previous territory, nor is there any other unoccupied territory where the members of State H might move and establish a new territory. The point is that it is likely that State H cannot be self-determining without territorial rights (perhaps shared territorial rights) to the land. Justice now demands that the descendants of the invaders have just territorial claims to the unjustly acquired lands. The historic injustice that placed State H in possession of the land is superseded by the change in circumstances. State H now has a legitimate territorial claim to the unjustly acquired land.

This example is similar to historical accounts of many current territorial claims. Returning lands to the exclusive control of the institutions or groups that had originally justly claimed the territory would essentially terminate the states that currently claim the territory.

One worry about the supercession of historical injustice in the case of territorial claims is that by allowing historic injustice to be superseded, we create a perverse incentive for institutions to unjustly acquire territory through war of conquest (or other unjust means). Although wars of expansion are currently relatively rare, revolutionary and civil wars are not. Corrupt rogue institutions within a state rise to power and claim the state's territory as their legitimate domain. The international community, by and large, accepts this claim to territory as legitimate. The new regime has international legal powers to control its resources (natural, manmade, and human), and to negotiate deals and treaties with other states and corporations regarding those resources. It looks like, on Waldron's account, that if the rogue institution can maintain control of the territory long enough, its territorial claim will be *morally justified* as well as legally endorsed.

My position may justify or encourage imperialist acts of colonization, war, and ethnic cleansing. This is a significant worry without an easy response. I have four considerations that may serve as part of a response. First, the problem of perverse incentives highlights the fact that political institutions must do more than merely occupy a territory for an extended period of time in order to gain a moral right to that territory. It must also earn that right. This is a dis-analogy between the case of property rights and the case of territorial rights. In the case of property rights, H gains a (shared) property right to the waterhole, because without this right, H would die. We do not need to justify H's right to exist. This is taken as self-evident.

In the case of territory, State H gains a territorial right to State G's former lands if State H needs the territorial right in order to exist *and* there's a good reason for State H to exist. A political institution's right to exist is not self-evident. I propose that there is a reason for State H to exist if State H is a legitimate state. A state is legitimate if it is morally justified in its use of political power. The exercise of political power is the "attempt to achieve supremacy in the making, application, and enforcement of laws within a jurisdiction."<sup>72</sup> The theory of territorial rights that I defend here is consistent with many theories of state legitimacy, but I work with a minimal account of state legitimacy in order to demonstrate the role of legitimacy in the theory of territory. On this minimal account of state legitimacy, a state is legitimate if it provides secure access to the objects of the basic human rights of its members. (In this definition of legitimacy, I follow Allen Buchanan's theory of political legitimacy and self-determination.)

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<sup>72</sup> Buchanan (2004): 333.

Legitimate political institutions have the right of self-determination. The state's right to exist is justified by its treatment of its members' individual rights. The legitimate state is one that preserves the individual rights of its members. Therefore, the supersession of historic injustice may only apply in the case of states if the state currently in possession of the territory is a legitimate state.

Second, the supersession of injustice in the case of territory is a process that usually takes generations before it applies to any particular situation. In the meantime—before the supersession of injustice is achieved through a significant change of conditions—there is a moral imperative to prevent, punish, and forcibly remove imperialist invaders.

Third, even after the supersession of injustice is achieved in a particular area, the past injustice does not go away. It still requires attention and reparation, but this reparation may not include giving territorial rights back to the original group that was invaded. The point of the supersession of injustice is not to dismiss injustice. People, groups, or institutions that were wronged in the past deserve retribution. The point instead is to acknowledge the value and nature of territorial rights. The value of current territorial rights can, to some extent, override past claims of exclusive territorial control that were unjustly violated.

Finally, an alternative way to defend the Lockean theory of property against the problem of historic injustice is to shift the focus from the justification of individual acts of acquisition to the justification of an institution of territory. Even if some of the particular state claims to territory are unjustified, the international institution of territory—that the international community recognizes and respects state territorial rights—is justified under a Lockean theory of territory. David Schmidtz makes this move in defense of the institution of private property.

Note that there is a distinction between justifying institutions that regulate appropriation and justifying particular acts of appropriation. ... we may think of original appropriation as a game and particular acts of appropriation as moves within that game. In those terms, my objective is to justify the game rather than particular moves within the game. Particular moves within the game may have nothing to recommend them. Indeed, suppose we say (for argument's sake) that any act of appropriation will appear morally arbitrary when viewed in isolation. Even so, there may be morally compelling reasons to have an institutional framework in which claims to property are recognized on the basis of moves that would carry no moral weight in an institutional vacuum.<sup>73</sup>

Schmidtz's point is that even though some or all particular property claims are morally arbitrary (reprehensible?), the overall institution of private property is justified (in that the institution, on whole, makes humankind better off.) Can this be said of a Lockean institution of state territory? If, as I have argued, the values of the right to territory (the values of need, efficiency, desert, and self-determination) are indeed realized by a Lockean institution of territory, then the answer is yes. There are good reasons to want a Lockean system of territory because of these values for individuals. The good of the institution, then, is not overridden by the injustice of some of the individual acts within the system.

This defense does not by itself establish that instances of unjustly acquired territory can be superseded. (To get this conclusion we must turn to an argument like Waldron's, above.) But the defense does give us a reason to use Lockean systems of territory as a means for evaluating current and future particular claims to territory. And it gives us a reason to prefer a system of territorial rights that respects the Lockean values that system of states rights to territory has for individuals.

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<sup>73</sup> Schmidtz (1994):49.

## **E. Conclusion**

In this chapter I defended a collectivist version of the Lockean theory of territory. I argue that a system of state territorial rights is justified because a state has the world-altering abilities to create a relationship with the land that serves the Lockean values of need, efficiency, desert, and self-determination. This theory is fruitful because it can account for a right to homeland without relying on nationalist arguments, and it can give an account of the state's right to control benefits from natural resources within its territory.

In the next two chapters I respond to the possible objection against territorial rights that state borders are morally arbitrary. I use the fundamental Lockean values described in this chapter, and I argue that borders are relevant to these values. State borders are not morally arbitrary.

### CHAPTER 3: ARBITRARINESS

Chance and contingency are often used to describe the factors that determine the placement of state borders. Consider the way that the borders of the colonial United States were drawn. Settlers from Europe happened to settle in one place rather than another because of social, natural, and historical contingencies regarding weather, trade routes, the location of habitable lands, and relations with other European settlers and Native tribes. Wars between Europeans and Native Americans and between different groups of Europeans were waged in order to establish claims to certain lands. Where Europeans settled largely determined the location of the colony borders—the borders were drawn around the settlements.

The belief that chance and contingency largely determine the placement of borders leads some theorists to say that state borders are morally arbitrary; borders shouldn't factor into our moral decisions.<sup>74</sup> The claim, generalized, is that decisions based on chance and contingency (what I call descriptively arbitrary decisions) are morally arbitrary decisions. I respond to this claim in this chapter and in the next. In this chapter, I give reasons to doubt the generalized claim. In the next chapter, I give reasons to doubt the specific claim that decisions based on state borders are morally arbitrary.

In this chapter I do two things. (1) I define 'arbitrariness'. I distinguish between the descriptive and the moral versions of the concept. In my description of moral arbitrariness, I identify two features of moral arbitrariness that are valuable evaluative tools. I use the first of these tools in the next chapter to evaluate the claim that decisions based on state borders

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<sup>74</sup> See Pogge (1994), Beitz (1979), Kuper (2000), Jones (2001), O'Neill (2000), and Singer (2002) and (1996).

are morally arbitrary. The first tool is the affirmation of morally relevant criteria for decision making that stresses fundamental moral values. A morally arbitrary decision is a decision based on criteria that undermine the morally relevant criteria for making the decision. The second tool is that one's moral authority to make a decision (one's authority to make a decision in the first place or to make the decision based on certain criteria) plays an important role in establishing acceptable criteria for making decisions. We can determine if a decision is morally arbitrary by looking to one or both of these tools.

(2) I argue that the connection between the descriptive and the moral versions of 'arbitrariness' is unclear, and in many cases a claim of descriptive arbitrariness does not justify a claim of moral arbitrariness. There are two general strategies for justifying moral claims of 'arbitrariness'. The first is a theory relative strategy. Under a theory relative strategy, claims of moral arbitrariness are grounded in background ethical theories or principles. The second is a theory neutral strategy. Under a theory neutral strategy, claims of moral arbitrariness are grounded in appeals to intuition or other non-theoretical means. These two strategies are exhaustive; there are no other strategies to defend normative claims of arbitrariness. I explain both strategies and show how in both cases a descriptive claim of arbitrariness does not necessarily—or even usually—justify a claim of moral arbitrariness.

This conclusion is highlighted when we look at particular claims of moral arbitrariness. In this chapter I use the claim that “Natural contingencies, like race, are morally arbitrary,” as my primary example for the purpose of analyzing the concept of arbitrariness and the connection between descriptive arbitrariness and moral arbitrariness. I conclude that this statement without qualification is false.

## **A. Arbitrariness: An introduction**

The project of conceptual analysis essentially involves capturing and articulating the common use of a term. This is an imprecise science, because our common use of a term abounds with inconsistencies and misuse. Still, the essence of the use of the term, what makes it signify a unified concept, is there, and it is this essence that I intend to articulate.

### **A.1. Descriptive Arbitrariness**

A claim of descriptive arbitrariness is an empirical statement. It says something about how the world is, not about how the world ought to be. ‘Arbitrariness’ describes how a decision is made; it describes what sort of reasoning (or not) went into making the decision. Descriptive arbitrariness refers to a decision determined by whim, chance, or contingency. A last minute decision for the chocolate instead of the caramel is descriptively arbitrary. A job hire decision between two candidates made by flipping a coin is descriptively arbitrary. A judge’s decision based on the judge’s familial relationship to the defendant is descriptively arbitrary. A statement describing a decision as descriptively arbitrary is ambiguous regarding the normative nature (how the decision morally ought to be made) of the decision itself. Even though the manner of deciding between two job candidates by flipping a coin is random, it is not obviously morally wrong. In fact, in a case where the two job candidates are equally qualified, the fairest choice procedure between two equally qualified candidates may well be one that is based on the flip of a coin.<sup>75</sup>

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<sup>75</sup> There is a distinction to make here between the decision procedure and the reasons for choosing such a procedure. My procedure for choosing between job candidates is flipping a coin. My reason for using this procedure is that it is the fairest way to make the decision. In this example the decision is still descriptively arbitrary because I do not have a non-random reason for preferring that candidate that I have chosen.

A decision that is *not* descriptively arbitrary is based on principled reasons. It doesn't matter what these reasons are, *per se*, as long as they are principled. Suppose that Joan must hire somebody to fill a position at her government-owned nuclear waste disposal facility. There are two candidates for this position, Chris and Dan. Chris is Caucasian. Dan is African-American. If Joan makes a hiring decision between an African-American candidate and a Caucasian candidate for racist reasons—for racist reasons she believes that African-Americans are inferior workers, and therefore the government should not hire them—then Joan has made a principled decision. She has a principled reason for making the decision, i.e., for racist reasons she believes that African-Americans do not deserve to be paid from money that the government earns from taxing citizens. The person that Joan hires will be paid from tax money. This is, morally speaking at the least, obviously a bad reason for making the decision, but it's still a principled reason in that it is based on a comprehensive doctrine (of racism) even though this comprehensive doctrine is morally reprehensible. Joan's decision is not descriptively arbitrary.

### **A.2. Moral Arbitrariness**

Normative descriptions tell us how the world ought to be. There are several kinds of normativity. In this chapter, I am concerned with only moral normativity, how we ought morally to do things. I refer to the morally normative notion of arbitrariness as moral arbitrariness.

It is wrong to make a morally arbitrary decision. A good deal of table-thumping is done with arbitrariness—arbitrariness is typically invoked without explanation. When people table-thump with the concept, they clearly mean for it to be understood as a moral concept. Arbitrary decisions are wrong. They're not just wrong, but intuitively, *obviously* wrong. One

should not make morally arbitrary decisions. Moral arbitrariness is one criterion by which we judge moral decisions. A decision is better, morally speaking, if it isn't morally arbitrary and worse if it is.

We want to make moral decisions in the right way, and claims of moral arbitrariness help to keep us on the right track by indicating one way that we wander off that track. With regards to moral arbitrariness, we 'wander off the track' in one of two ways (or both). (1) When we make a morally arbitrary decision, we make a decision that is based on impermissible considerations. These impermissible considerations are impermissible because they undermine the motivating influence of relevant moral criteria on the decision; by taking the impermissible considerations into account, we make it difficult or impossible for the decision to be based on morally relevant criteria. The relevant moral criteria undermined by a morally arbitrary decision usually identify something that is thought to be morally fundamental, like personhood, sentience, or equal opportunity. (2) If one doesn't have the moral authority (one's authority to make a decision in the first place or to make the decision based on certain criteria) to make a decision, or to make the decision based on certain criteria, then that person makes a morally arbitrary decision.

*Morally Relevant Criteria and Impermissible Considerations.* Claims of moral arbitrariness are based on the assumption that there are relevant moral criteria for making a decision. Morally arbitrary decisions don't follow these criteria. Morally arbitrary decisions are based on considerations that shouldn't be included in the decision-making process because these considerations do not track the morally relevant criteria for making the decision, and they undermine the morally relevant criteria that should be motivating the decision.

Joan denies Chris the job at the nuclear waste facility because he is African-American. Her decision is not descriptively arbitrary because she has a principled reason for making the decision; she believes that the government should not hire African-Americans. Joan's decision is not descriptively arbitrary, but it is morally arbitrary. Joan's reason for deciding not to hire Dan is morally arbitrary because it does not track the relevant moral criteria for making a hiring decision. The relevant moral criteria for making a hiring decision are only those criteria that concern the job candidate's ability to perform the tasks of the job. Making a hiring decision on the basis of only the candidate's ability to perform the tasks of the job is often thought to be required in order to preserve equal opportunity in employment. In this case, the candidate's race does not affect his ability to perform the tasks of his job, therefore it is not relevant.<sup>76</sup>

Moreover, morally arbitrary decisions are based on considerations that undermine the morally relevant criteria that should be motivating the decision. A fact (such as one's race or gender) will fit into one of four possible categories with regards to how it should be taken into account while making an ethical decision. Taking it into account will be *impermissible*, *permissible*, or *obligatory*. Not taking it into account may be *negligent*. Morally arbitrary decisions are based on considerations that are *impermissible* because they don't track morally relevant criteria. More than just not tracking the relevant moral criteria, these considerations undermine the relevant criteria. Arguments against beauty pageants provide an example. It is argued that in most beauty pageants, women are objectified by their appearance and sexuality, and decisions regarding the distribution of pageant prizes are awarded based on

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<sup>76</sup> In a separate paper I defend the position that a concern for social justice (such as what motivates affirmative action policies) may be included in the description of the tasks of a job.

these objectifications. According to the moral principle that all persons should be treated with respect, it is impermissible to treat a person as an object. Objectifying a person not only fails to track the morally relevant criteria, but it also undermines the relevant criteria. In this case, it is difficult to objectify a person and to treat her with respect at the same time.

It is *obligatory* to take a fact into account if the agent goes wrong if she does not take it into account. If a moral decision fails to take into account obligatory considerations, then that moral decision is *negligent*. Some negligent decisions are morally arbitrary, because the morally relevant criteria for making the decision are being ignored.

Suppose that I am the administrator of a scholarship fund for minority college students. In this position, it is *obligatory* for me to take race into account when evaluating scholarship applicants. The moral criteria for making the scholarship decisions are determined by the rules of the scholarship fund; one necessary criterion is that the scholarships must be given to minority students. To fail to take race into consideration in this case would be *negligent*. I would be making a morally arbitrary decision because the morally necessary criterion for making the decision is being ignored.

Alternatively, suppose that I own a theater company that is producing a play about the life of Martin Luther King, Jr. Chris and Dan audition for the part. I decide to hire Dan because he is African-American. In this example, I do not go wrong by taking race into account in the evaluative process. The decision is not morally arbitrary because it tracks the relevant moral criteria for making this decision. The relevant moral criteria for making a hiring decision are only those criteria that concern the job candidate's ability to perform the tasks of the job. In this case, the candidate's race does affect his ability to perform the tasks of his job. To play the part of Martin Luther King, Jr. effectively, the actor should be able to

convey the relevant characteristics of Martin Luther King, Jr. to the audience. An important part of Martin Luther King's identity was the fact that he was African-American. In this case the actor's race is relevant to the hiring decision; it says something about his ability to perform the tasks of the job. It is *permissible* for me, but not obligatory, to take race into account in this case. (I could cast a non-black person in the role of King without committing an obvious moral wrong. An avant garde production of the play could cast a Caucasian in the role of Martin Luther King, Jr. in order to make a point about the racial assumptions of the audience, for example.)

*Moral Authority and Moral Arbitrariness.* The concept of arbitrariness has its roots in the rejection of discretionary authority. An 'arbiter' can be understood as a person or group with absolute power of judging. One meaning of 'arbitrary' is despotic or tyrannical.<sup>77</sup> 'Arbitrary' is used as a derogatory description of a decision made by a person who commands power.

One understanding of moral arbitrariness, then, refers to decisions that were made by people who either (1) don't have the moral authority to make those decisions, or (2) don't have the moral authority to take certain considerations into account when making those decisions. A person has the moral authority to make a decision if some moral standard (of fairness, equality, autonomy, etc.) says that it is permissible for the person to make the decision. A person has the moral authority to take certain considerations into account when making a decision if some moral standard says that it is permissible for the person to take these considerations into account.

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<sup>77</sup> *Webster's New Collegiate Dictionary* (1977).

Robert Nozick provides an example of a decision that the state has no moral authority to make. Within the context of arguing that the state (and any other central authority or institution) doesn't have the authority to redistribute goods between persons in a society, Nozick asserts that the state doesn't have the right to redistribute mates. (For Nozick, redistributing goods is like redistributing mates.) No central authority or institution has the moral authority to redistribute mates.<sup>78</sup> A state's decision to redistribute mates would be morally arbitrary. The state does not have the right to dictate private lives in this manner. To use the state's power to redistribute mates would be a morally arbitrary use of its power.

Additionally, the moral authority that the agent has in making the decision may limit the permissible considerations that the agent can take into account. Compare the following examples. (1) Joan works for a government-owned facility, and she must make a hiring decision. (2) Julie works at a small restaurant (ten employees) that she owns herself, and she must make a hiring decision.

Julie, but not Joan, has the moral authority to make hiring decisions based on partial considerations. It is morally permissible for Julie to hire her brother even though he is less qualified than other job candidates. It is morally permissible for Julie to hire job candidates from her ethnic group because she prefers not to work with other ethnicities. It is not permissible for Joan to take these partial considerations into account. It would be morally arbitrary for Joan, but not for Julie, to base her decision on these considerations.

Why is it permissible for Julie but not for Joan to take these partial considerations into account? Joan is an employee of a state-owned facility. In her capacity as a state

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<sup>78</sup> Nozick (1974): 149-231.

employee, she is bound by state interests. Julie, by contrast, is bound only by her own interests. One way to put the difference is that Joan, in her position as a state employee, must serve the state. Julie, in her position as the owner of her own restaurant, may serve herself. This difference in position binds Joan to be impartial just as the state must be impartial. By similar reasoning, Julie is not bound to be impartial because her job does not place her in a role as a state agent.<sup>79</sup>

The feature of moral arbitrariness captured by the concept of moral authority explains an important connection between descriptive and moral arbitrariness. Some descriptively arbitrary decisions, like decisions based on familial relationships, will be morally arbitrary in certain contexts where the decision-maker does not have the moral authority to make decisions based on contingencies or luck. A judge makes a morally arbitrary decision if she decides in favor of the defendant because he is her nephew. When a decision-maker is bound by high standards of public justice (such as is the case with a judge), contingencies and luck will often be unacceptable bases for decisions because these decisions generally encourage partiality on the part of the judge. If we allow for familial relationships to count in a judge's decision, then judges will decide in favor of their nephews. Since persons in these positions are bound by justice to be impartial, decisions based on contingency and luck are generally not permissible.

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<sup>79</sup> One might ask why shouldn't all hiring decisions be bound by impartiality, or the opposite, why shouldn't all hiring decisions allow for the decision-maker to make partial decisions? One explanation is found in the tension between two fundamental liberal values: the value of individual autonomy and the value of the equal opportunity. We don't want to restrict all hiring decisions by limiting them to only impartial considerations. This would be an undue restriction on individual autonomy. Moreover, we don't want to let all persons base hiring decisions on partial reasons because this would eliminate a significant means by which we provide equal opportunity to all members of society (by eliminating racist, nationalist, (etc) consideration from many hiring decisions). We strike a balance between individual autonomy and equal opportunity by limiting the permissible considerations for many but not all hiring decisions to impartial considerations.

Sometimes the two ways that a decision may be morally arbitrary (by taking impermissible considerations into account or by lack of moral authority) come into conflict with each other. It looks like one may sometimes have the moral authority to make morally arbitrary decisions. Joan may decide to never date African-Americans because of her racist opinions. Joan has much more moral authority in the making of decisions regarding her love life than in the making of those decisions regarding whom to hire at the nuclear waste facility. The decision not to date African-Americans may be described as morally arbitrary even though it is permissible for Joan to take race into account in her decisions regarding whom to date. Taking race into account is permissible in this case, but it may also not track and even undermine morally relevant criteria for choosing whom to date. Morally relevant criteria regarding whom to date ostensibly includes considerations such as a person's kindness, respect for you, intelligence, and respect for the person. One's race has nothing to do with these relevant criteria. Joan's decision never to date African-Americans may be considered to be morally arbitrary because race is not a morally relevant consideration for this decision.<sup>80</sup> Joan also is making a decision similar to the beauty pageant judge's decision. By taking race into account, she undermines her ability to take morally relevant criteria into account. Joan's decision is morally arbitrary. Still, it looks like it's permissible for Joan to make racist decisions about her dating life, even though she's nevertheless a racist.<sup>81</sup>

*Descriptive and Moral Arbitrariness.* Claims of descriptive arbitrariness are ambiguous with respect to claims of moral arbitrariness, and vice versa. Descriptively arbitrary decisions can be morally non-arbitrary. We see this in the case of flipping a coin in order to decide

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<sup>80</sup> It may well be the case that there is no such thing as morally relevant criteria for decisions regarding whom to date. If there is such criteria, as I argue here, Joan's dating decision is morally arbitrary.

<sup>81</sup> Thanks to David Schmitz and Chris Brown for their ideas on this section.

between two equally qualified job candidates; a fair way to make such a decision is to make the decision randomly. Likewise, morally arbitrary decision may be descriptively non-arbitrary. We see this in the case of Joan and her hiring decision. Her racist reasons for not hiring the African-American are not descriptively arbitrary in that they are principled, but they are morally arbitrary in that they don't track the relevant moral criteria.

The connection between descriptive arbitrariness and moral arbitrariness may be defended, though, at a deeper level. The idea is that there's something morally fundamental that ought to be respected—not undermined—by our moral decisions. There's something morally fundamental about personhood that racist decisions undermine, because race is not part of what we think is morally fundamental about personhood. And taking race into account undermines the influence that the fundamental value ought to have. We can't really respect a person if we judge them based on race.

What does this have to do with chance and contingency? Chance and contingency aren't part of what we generally think of as morally fundamental features. It's thought that taking them into account undermines the influence of fundamental moral values in our decisions; decisions based on chance and contingency are morally arbitrary.

In the next two sections I argue against this view. There are two strategies that one can argue for the view that taking chance and contingencies into account undermines fundamental moral values: theory relative strategies and theory neutral strategies. Both strategies fail to prove that decisions based on chance or contingency are always—or even usually—morally arbitrary.

## B. Theory Relative Strategy

There are two general strategies for justifying a claim of moral arbitrariness. One is to appeal to a background ethical theory or principle for support. Call this the theory relative strategy. The other is to appeal to intuition or other non-theoretical reasons for support. Call this the theory neutral strategy. Under a *theory relative* defense of a claim of moral arbitrariness, the relevant criteria for making ethical decisions are determined by background moral theories or principles. In this section I demonstrate how a theory relative strategy does not help to bridge the descriptive/normative gap between the descriptive version and the moral version of arbitrariness.

In, “A Utilitarian Defense of Animal Liberation,” Singer argues that it is unjustified to discriminate against animals—ignoring their suffering—simply because they are a different species [Singer 1998].

If a being suffers, there can be no moral justification for refusing to take that suffering into consideration. No matter what the nature of the being, the principle of equality requires that its suffering be counted equally with the like suffering—in so far as rough comparisons can be made—of any other being. If a being is not capable of suffering, or of experiencing enjoyment or happiness, there is nothing to be taken into account. This is why the limit of sentience... is the only defensible boundary of concern for the interests of others. To mark this boundary by some characteristic like intelligence or rationality would be to mark it in an *arbitrary* way. Why not choose some other characteristic, like skin color? [Singer 1998: 40]<sup>82</sup>

Singer’s use of ‘arbitrary’ is an example of moral arbitrariness. Singer is not saying that the distinction between humans and non-humans is unprincipled or random. The distinction is based on principles that Singer disagrees with, but this does not make the distinction unprincipled. Rather, Singer is using ‘arbitrariness’ to signify his view that the principles are without warrant. Singer argues that it’s wrong to mark the boundary between

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<sup>82</sup> Emphasis added.

beings whose suffering counts ethically and beings whose suffering doesn't count ethically by measures such as intelligence or rationality. The context of Singer's argument suggests that the best strategy for justifying Singer's moral claim is by reference to Singer's background utilitarian principles. These principles set the relevant moral criteria for making a decision.

Singer's argument begins with the moral principle that we should take all suffering into account equally.<sup>83</sup> Under this moral principle, those things that would prevent us from taking all suffering into account equally are impermissible to moral deliberation about how to treat ourselves and others (humans, animals, plants, etc. included). Because all animals possess the capacity to suffer, moral discrimination against non-human animals merely because they are non-human is a consideration that would prevent us from taking all suffering into account equally. Under this principle, to make a moral decision based on species is to make a decision based on considerations that are impermissible because they do not track the relevant moral criteria for making an ethical decision, and they undermine our ability to take the relevant moral criteria into account. Such a decision is morally arbitrary. Likewise, under Singer's view, an ethical decision based on an animal's species, gender, location, and, with regards to humans, race, is morally arbitrary.

Singer has a theory relative defense of his claim of moral arbitrariness. The defense posits a moral principle, that we should take all suffering into account equally, and deduces from that principle that a being's species is not a consideration that is part of the morally

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<sup>83</sup> Another example of Singer's theory-relative defense of normative claims of moral arbitrariness appears in Singer (1996). In this work, the moral principle is that "if it is within our power to prevent something bad from happening, without thereby sacrificing anything morally significant, we ought, morally, to do it" (696). What is impermissible to moral deliberation under this principle is anything (not of moral significance) that would keep us from preventing something bad from happening, specifically Singer mentions proximity.

relevant criteria for making an ethical decision. A theory relative defense of claims of moral arbitrariness has its advantages. A theory relative conception of moral arbitrariness clearly points out those things that do not track morally relevant criteria (with regards to the moral question at hand). Furthermore, because this defense is based on the requirements of an ethical principle, it establishes a sufficient reason to believe that certain decisions are morally arbitrary given our belief in that principle. If we believe in Singer's moral principle, for example, then we have a good reason to believe that certain decisions are morally arbitrary that do not track the morally relevant criteria determined by that principle.

Given the nature of the theory relative defense of Singer's claim that an ethical decision based on a consideration for a being's species is morally arbitrary, an account of descriptive arbitrariness will only contingently justify Singer's claim of moral arbitrariness. Under a theory relative defense, how a consideration is determined to be irrelevant with regards to certain moral criteria is a function of some background ethical theory. Only when the background ethical theory designates descriptively arbitrary facts as indefensible considerations is there a link between descriptive and normative arbitrariness. Background ethical theories and principles may (and often do) designate descriptively arbitrary facts as morally relevant. Still, descriptive accounts of arbitrariness are at most merely contingently useful in justifying a normative claim of arbitrariness.

In Singer's argument, descriptively arbitrary facts or decisions may be morally relevant given Singer's background ethical principles, but this connection between the descriptive and normative is subject to exceptions. For example, according to Singer's claims, we should take only suffering into account, and all suffering should be considered equally in our ethical deliberations. A subject's location, for example, is normatively

arbitrary. It is also descriptively arbitrary; it is contingent, i.e., not necessary, with respect to the subject's rationality and/or sentience. In practice, though, location may be essential to take into account in order to fulfill our obligation to prevent suffering. Tim is a lifeguard. During a tragedy, he is surrounded by hundreds of drowning people. He has the time to save several lives, but only if he begins saving victims immediately, and he cannot save them all. Assume that saving each life results in the same amount of prevented suffering. Whom should Tim save? Obviously, to maximize the amount of suffering that he prevents, Tim should start saving the people who are closest to him geographically. (To minimize suffering overall, Tim must take proximity into account.) The persons closest to Tim do not have more of a claim on his help than persons farther away. Nevertheless, the morally right action is for Tim to save those who are closest. He must take location into account.

According to Singer's own principle, geographic location is derivatively morally relevant if taking it into account will minimize suffering, even though it is directly normatively arbitrary. It is not the case that a person following Singer's principles should *never* take geographic location into account in his moral reasoning, even though this is implied by the general ethical principle. One may have to take geographic location into account in order to follow the principle. The derivative/direct distinction in claims of normative arbitrariness is not limited to Singer's principles or to utilitarianism. Most value theories will assign duties because they are derivatively required by the basic principles of the theory. In the same way, a descriptively arbitrary fact might be normatively arbitrary according to the basic principles of a theory, but nevertheless it may be normatively relevant to the evaluations derived from those basic principles.

A theory relative defense of normative claims of arbitrariness does not support a justificatory connection between descriptive claims of arbitrariness and normative claims of arbitrariness, at least not without serious limitations. As with Singer's claim, under a theory relative defense, descriptively arbitrary facts and decisions will only contingently justify a small subsection of all normative claims of arbitrariness. Even in these cases, descriptively arbitrary facts that, with respect to an ethical theory, are directly normatively arbitrary may be derivatively not normatively arbitrary under certain circumstances.

Further, a theory relative defense of normative claims of arbitrariness has its weaknesses. It appears that a theory relative defense of a normative version of arbitrariness robs normative arbitrariness of its bite. If normative arbitrariness is merely deduced from a moral theory, then moral decisions are normatively arbitrary only with reference to that ethical theory. A result is that persons holding different moral theories will have little reason to pay heed to each other's normative claims of arbitrariness. They will appear to be question-begging. Different ethical theories will claim that different aspects of decisions are normatively arbitrary. A utilitarian holds that all evaluations of acts that take into account things besides utility aggregation are normatively arbitrary. A person's age, talents, religion, or rights are normatively arbitrary to a utilitarian's evaluation of an act. A Kantian holds that some moral evaluations, like those based on a person's rational free choices, will be legitimate moral evaluations. With a theory relative defense of normative claims of arbitrariness, the Kantian has little reason to listen to the utilitarian when the utilitarian claims that the Kantian has made a normatively arbitrary decision. This is because the utilitarian's normative claim of arbitrariness is only relevant within his own theory.

This understanding of a theory relative defense of normative arbitrariness knocks the importance of normative claims of arbitrariness down a peg or two. I don't think this is a bad thing. An important dimension of normative arbitrariness is how it is shaped by our respective ethical theories. Instead of table-thumping about arbitrariness, people who disagree about moral issues are forced into a debate that hits closer to the heart of the issue: Is one's race a feature that should always be ignored? Is a capacity to suffer more valuable than the capacity to reason? These are important and difficult questions that normative claims of normative arbitrariness highlight, not answer. This is not to say that all moral debates should be reduced to debating the merits of one's theory. Debates containing normative claims of arbitrariness can be carried out much like other moral debates concerning what to take into consideration for a job hire or what is a criterion for international justice. These debates often cross moral theoretical paths. The important thing to remember, especially at the level of philosophical reasoning, is that most normative claims of arbitrariness are determined by background assumptions and moral perspective. If you don't agree with the background, then there usually isn't much reason to agree with the normative claim of arbitrariness.

### **C. Theory Neutral Strategy**

Under a theory neutral defense of normative claims of arbitrariness, what is impermissible to take into account in moral deliberation is not deduced from moral principles or theories. Instead, intuition is used to identify facts and decisions as morally arbitrary.

A virtue of intuited claims is that they possess credibility, a self-evident element that initially gives them a positive epistemic status. We have a (weak) reason to believe that our intuitions are true.<sup>84</sup> If an intuition is not challenged by other beliefs, and if it helps to explain other beliefs, then belief in that intuition appears to be justified—even if the intuition is foundational and cannot be deduced or explained from other beliefs.<sup>85</sup>

In this section I argue that intuitions do not supply a strong justificatory connection between descriptive and moral claims of arbitrariness. First, I argue that intuitions cannot define the *scope* of a claim of moral arbitrariness derived from a claim of descriptive arbitrariness. Second, I argue that intuitions cannot define the *strength* of a claim of moral arbitrariness derived from a claim of descriptive arbitrariness.

*Scope.* The scope of a claim identifies the contexts within which the claim is valid. Intuited claims of moral arbitrariness have trouble delimiting the *scope* of the assignment of normative arbitrariness. In the case of most, if not all, claims of moral arbitrariness, the claim is not valid in all contexts. We must have a way of telling in which contexts it is morally arbitrary and in which it is not, but intuited claims cannot provide a principled guide for defining the scope of a claim of moral arbitrariness.

There is an intuitive appeal to the claim that descriptively arbitrary decisions are also normatively arbitrary. I take John Rawls to use this approach in his treatment of the just distribution of goods—in particular, whether or not the just distribution of goods should be influenced by our place in the distribution of natural assets. One of Rawls' most significant arguments is his argument against a system of natural liberty. The argument relies on an

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<sup>84</sup> Justified belief in an intuition can be overruled if other beliefs and experiences present enough counter-evidence against the belief.

<sup>85</sup> Gaus (1996): 85-109.

intuition that it would be wrong to take (descriptively arbitrary) contingent or random things into account in our deliberations regarding the just distribution of goods. According to Rawls, the system of natural liberty is unjust because:

Since there is no effort to preserve an equality, or similarity, of social conditions, except insofar as this is necessary to preserve the requisite background institutions, the initial distribution of assets for any period of time is strongly influenced by natural and social contingencies. The existing distribution of income and wealth, say, is the cumulative effect of prior distributions of natural assets—that is, natural talents and abilities—as these have been developed or left unrealized, and their use favored or disfavored over time by social circumstances and such chance contingencies as accident and good fortune. Intuitively, the most obvious injustice of the system of natural liberty is that it permits distributive shares to be improperly influenced by these factors so arbitrary from a moral point of view.<sup>86</sup>

On this account, something goes wrong morally if factors like chance and natural and social contingencies (on my terms, descriptively arbitrary factors) largely influence our position in the distribution of goods. This is an intuitive, pre-theoretical statement. If factors beyond our control were a legitimate basis for claims to our placement in the distribution of goods, then there would be something fundamentally wrong with our moral world. According to Rawls, we commonly hold this statement to be true and use it to evaluate theories of justice—not vice versa. Decisions based on contingencies and randomness are descriptively arbitrary, and because of their descriptive arbitrariness, they are morally arbitrary.

It is important to note that a normative claim of arbitrariness is only meaningful when it is made with reference to a specific moral question. For example, one way to interpret Rawls' claim is that it is impermissible to consider any contingent or random fact

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<sup>86</sup> Rawls (1999a): 62-3.

about a person in *any* moral evaluation. But this is obviously not the case. Contingencies, for example, are often permissible and even obligatory to take into account. Here are three examples of morally non-arbitrary decisions that take contingencies into account:

1. That I am my mother's child is a contingent fact about me. Still, I can say that, it is obligatory for my mother to take this fact into account when providing for my care. She has a responsibility to me that goes beyond what she would have if I were not her child.
2. That I happen to cross a line before others in a marathon is a contingent fact about me, especially if I've won the race because I have the bone and muscle structure to be a great long-distance runner. The judge of the race must take the contingent event of my crossing the line first into account when awarding the prize for first place.
3. That I am a member of a particular immediate community is a contingent fact about me. However, this fact does not absolve me of my obligations of reciprocity to other members in this community.

The above examples raise the possibility that it is permissible, even obligatory, to base some moral decisions on contingencies. Rawls' position that a decision should not be based on chance or on contingencies should not be understood as applying to any and every moral context. Rawls himself didn't mean to say this.

Intuited defenses of normative claims of arbitrariness do not need to be abstract, non-contextual claims meant to apply in all contexts. However, many intuited claims of moral arbitrariness are made with regards to a broad moral context. Rawls' claim, for example, is made with regards to the extensive issue about how the basic structure of society should justly distribute primary goods.<sup>87</sup>

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<sup>87</sup> Rawls (1999a): 6. The context of Rawls' discussion is a theory of justice, the subject of which Rawls says is the basic structure of society—the major social institutions and their distribution of the benefits and burdens of society.

With regards to a broad moral context, a theory neutral defense may establish a *prima facie* case that a decision that takes chance or contingency into account is morally arbitrary. But the defense then faces a problem. When it is placed within a more specific context, the fact once labeled morally arbitrary becomes permissible or even obligatory to take it into account. Intuited claims of moral arbitrariness have trouble delimiting the *scope* of the assignment of normative arbitrariness. If a fact cannot be morally arbitrary in all contexts, then we must have a way of telling in which contexts it is morally arbitrary and in which it is not. Posed to Rawls, the question is “In which contexts are contingencies morally arbitrary?” While laboring under a theory neutral defense of a normative claim of arbitrariness, one has a hard—if not impossible—time answering this question.

Rawls, for instance, limits his claim that decisions taking contingencies into account are morally arbitrary by restricting it to the question of how to justly distribute primary goods. Even within this given scope, the claim has confusing exceptions. Under the Rawlsian principles of justice, primary goods are to be distributed according to what is to the advantage of the least off members of the society. Whether one is a member of the least advantaged or the best-advantaged group is clearly an example of a contingent fact. Therefore it cannot be the case that Rawls believes that contingent features are indefensible to take into account in our decisions about distribution; in a Rawlsian society, it is relevant to take one’s social status into account when goods are being distributed. A redistribution of goods will make those in the least advantaged group better off only if we are know who is in need of the goods (the members of the least-advantaged group) when we redistribute

goods.<sup>88</sup> Social status should be taken into account even though it is a contingent fact. Moreover, even Rawls claims that what one does with his natural assets can give rise to a legitimate claim to his place within the distribution of goods in that society. Our efforts, or what it is that we do with our natural assets are often thought to be the quintessential feature that allows one to make legitimate moral claims. Nonetheless, these efforts are arguably contingent themselves. They are dependent on our personal dispositions, the way we were raised, our natural assets to know how to apply ourselves correctly, etc. Yet these contingent facts remain relevant to our decisions about just distribution. Additionally, whether we belong to a society where goods are distributed according to the difference principle is a historical or social contingency. Rawls' theory neutral claim that decisions based on contingencies are morally arbitrary with respect to the just distribution of goods remains mysterious because the scope of the claim is undefined.

Our moral intuitions give us insight into specific situations, or they give us broad *prima facie* claims subject to multiple exceptions. Intuitions rarely if ever supply principled guidelines for the application of intuited moral claims. Trying to fit intuited claims to principled guidelines usually just leads to confusion.

There is a possible method to identify the specific role of an intuition in moral deliberation. One could attempt to use this method to delimit the scope of an intuited claim of moral arbitrariness. The method identifies the intuited claim's role in moral deliberation

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<sup>88</sup> This comment takes a certain economic position for granted—that in order to improve the position of the members of the least-advantaged group, we should redistribute goods to that group. One doesn't have to agree with this economic position in order to accept the general point that, if we have a general consequential view of the distribution of goods—that they should be distributed so that a certain group ends up being better off as a result of the redistribution, e.g.—then we should pay attention to the social-economic status of those who are getting the benefits. The socio-economic status of a person is an indicator of how the person will use their goods. How persons use their goods tells us how best to distribute goods in order to achieve our desired ends.

by isolating the feature about which we want an intuitive result in a thought experiment. Frances Kamm uses this method to determine the role that distance—a contingent fact—plays in individual obligations to give aid to other persons. Kamm is careful to isolate the aspect of distance in her thought experiments. It is important to know that the difference in distance and not some other factor explains the intuitions in each case. Consider her

Near/Far Case:

*Near/Far Case:* I learn that in a distant part of a foreign country that I am visiting, a child is drowning and someone is near him who knows of his plight. [You are even farther away in a different country.] Either one of us could successfully help by depositing \$500 in a device that will trigger a machine that will scoop the child out. Who has a stronger obligation to help?<sup>89</sup>

In this case all of the circumstances for the near person and the far person are identical except for their relative distance to the drowning child. According to Kamm, our intuitions tell us that the near person has a stronger obligation to help the drowning child. The Near/Far Case shows that some of us intuitively hold that relative distance plays a *prima facie* role in how we come to have obligations to aid others. Her conclusion is that intuitively distance does matter; it is *prima facie* morally relevant. Although she does not state *exactly* how or why distance matters, her thought experiments indicate that, intuitively, we take distance into account as providing a *prima facie* reason to aid persons in need.

For my purposes, the most salient objection to a method like Kamm's is that it cannot identify the scope of these connections between descriptive and moral arbitrariness. Kamm's method could be useful for making a case that a descriptively arbitrary decision is *prima facie* morally arbitrary. Yet, as I have argued, the knowledge that a decision is *prima facie*

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<sup>89</sup> Kamm (2000): 659.

morally arbitrary does not provide us with conclusive evidence that it is morally arbitrary in any specific case. Kamm's method does not yield a principled guideline for understanding the scope of her intuited claim that distance matters morally. For instance, Kamm's Near/Far Case has not given us any principled way to respond to situations in which the conditions of the case do not hold. What if it costs the distant person less money than the near person to save the child? What if the distant person knows the child, and the near person does not know the child? We do not know if Kamm's claim that distant matters holds in these other contexts. We do not have a principled way of knowing the scope of Kamm's claim.

Even if an intuitive, theory neutral connection can be made between the descriptive and normative versions of arbitrariness, this connection suffers from the major flaw of an undefined scope. With respect to many moral questions, an intuitive account of the connection between descriptive and normative versions of arbitrariness will not sufficiently serve to justify a normative claim of arbitrariness. This is because in many particular circumstances we will not know if the connection is properly applied.

*Strength.* Even if we think that our moral intuitions possess initial credibility, the strength of the intuited belief in the face of conflicting beliefs remains unclear. On the one hand we have the intuition that contingencies like race shouldn't be taken into account in our moral decisions. On the other hand, we have the beliefs that the role of Martin Luther King, Jr. should be played by an African-American, that minority scholarships encouraging African-Americans to attend college are a good idea, and that Joan (the racist) has the right to refuse to date whomever she doesn't want to date. On the basis of intuition alone, we have little reason to think that our intuition that race shouldn't be taken into account in our

moral decisions is overriding. As Gaus points out, “Considered simply as possessing initial credibility, weak intuitionism warrants ascribing only a very modest strength to those moral beliefs.”<sup>90</sup> By itself, the intuited belief can be easily overridden by opposing beliefs. At best, we can ascribe some weight to the moral belief on the basis of the intuition, but the intuition fails to provide a principled guideline for its application against conflicting beliefs because we do not know how much moral weight to assign to the intuition.

Intuited claims of moral arbitrariness have two significant flaws. They fail to provide a principled guideline for determining the scope and the strength of the claim. The result is that intuited claims of moral arbitrariness are not significantly informative. When somebody says that race is arbitrary, we’d like this bit of information to solve some of our moral quandaries. Suppose that in my company race-blind hiring practices would result in a workforce that is mostly Caucasian because of Caucasians’ statistically better educational experience. In future hiring, should I be race-blind when 80% of my community is made up of national minorities? It would be irresponsible to answer “yes” to this question merely because of an intuited belief that all decisions based on race are morally arbitrary. To answer “yes” on this basis would be to ignore several important considerations such as the possible need for company’s adjust their policies to serve their community’s needs. Intuited claims of moral arbitrariness admit of many exceptions and are often overridden. Might this be one of the exceptions? With a theory neutral defense of arbitrariness, we will have a difficult time answering this question.

A theory relative defense of normative claims of arbitrariness can give an account of the scope these claims. Under a theory relative defense, the scope of a normative claim of

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<sup>90</sup> Gaus (1996): 98.

arbitrariness is defined by the moral principle or theory from which the claim is derived. The principle applies to a set of moral issues and contexts. The normative claim of arbitrariness derived from the principle will also apply to that set and only that set. Take for example the moral principle that one should hire a person for a job based on the person's ability to fulfill the purpose of that job. When making a job hire decision for a position where the race of the applicant is not relevant to the purpose of the position, race is normatively arbitrary, there is no good reason to take it into account while making the job hire decision. One cannot deduce from this claim that race is normatively arbitrary to all job hire decisions or that race is normatively arbitrary, period. The scope of the normative arbitrariness of race, as defined by the moral principle, is limited to only those job hire decisions where race is not relevant to the purpose of the position.<sup>91</sup> It is true that race is also normatively arbitrary in other contexts, but this is not because race is normatively arbitrary in this context. If race is normatively arbitrary in other contexts it is because, according to a theory relative defense, there are other moral principles that apply to those contexts from which we can deduce that race is indefensible to take into account.

Still, the problem with a theory relative defense of normative claims of arbitrariness is that the justificatory connection between descriptive and normative claims of arbitrariness is at best contingent and limited to only a small subset of normative claims of moral arbitrariness.

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<sup>91</sup> I defend this position regarding job qualifications in another paper, Nine (2002).

## D. Conclusion

In this paper I have given an account of arbitrariness. The concept of arbitrariness can be divided into two parts: descriptive and moral arbitrariness. A claim of descriptive arbitrariness is claim that is based on arbitrary (random, contingent, unprincipled, etc.) considerations. A claim of moral arbitrariness is an evaluative claim about how one should make moral decisions; a morally arbitrary decision is wrong and is based on impermissible considerations that undermine morally relevant criteria or by an agent that does not have the moral authority to make the decision. Making explicit the difference between descriptive and moral arbitrariness is a contribution to the conceptual understanding of arbitrariness, and it will help to clarify many debates in moral and political philosophy regarding the arbitrariness or relevance of features such as contingency, randomness, race, and gender. In particular, I have described two features of moral arbitrariness that are good evaluative tools that I use in the next chapter.

In addition to conceptual analysis, I have argued that there is no clear justificatory connection between descriptive and moral arbitrariness. That a decision is descriptively arbitrary may say nothing with regards to its moral qualities.

I do not deny that there is a strong intuitive connection between descriptive and moral arbitrariness. Particular claims of descriptive arbitrariness *may* provide a *prima facie* reason for believing that these claims are also normatively arbitrary. But this intuitive justificatory connection is tenuous. First, it is not the case that all descriptive claims of arbitrariness give rise to normative claims of arbitrariness. If a justificatory connection is to be made, it is between limited cases only. Second, it is not clear that descriptive claims of arbitrariness can provide anything as strong as a *prima facie* reason for believing that these

claims are also normatively arbitrary. The numerous exceptions to such an account could prevent us from making this conclusion. Finally, given the inability of intuitions to provide a clear account of the scope of a claim of normative arbitrariness, even if we could establish that some descriptive claims of arbitrariness intuitively give rise to normative claims of arbitrariness, we would have little direction as to what to conclude about the normative status of the descriptive claim in specific cases.

I conclude that the unqualified claim “Natural contingencies, like race, are morally arbitrary,” is unjustified. There are many contexts in which this claim is false. In the next chapter I argue against the specific claim that state borders are morally arbitrary using the evaluative tools that I developed in this chapter.

## CHAPTER 4: AGAINST THE MORAL ARBITRARINESS OF STATE BORDERS

Do obligations of justice terminate at the borders of the state, or do they extend beyond state borders?

Some theorists have argued that the answer to this question must be that obligations of justice extend beyond state borders, because a decision to limit obligations of justice to state borders would be morally arbitrary. On this view, the formation of borders and the placement of natural resources within borders are morally arbitrary—these things shouldn't be a consideration in the just distribution of goods.<sup>92</sup>

I reject the claim that state borders are morally arbitrary. In this chapter I do two things. (1) I establish a set of morally relevant criteria based on fundamental liberal values for determining the scope of obligations of justice. Then I argue that state borders are relevant to these criteria. When determining the scope of obligations of justice, it is permissible and sometimes obligatory to take state borders into account. (2) I defend my position regarding the relevance of state borders against arguments that state borders are morally arbitrary. I reject two versions of the claim that state borders are morally arbitrary: the claim that state borders are historically unjust and therefore morally arbitrary; and the claim that the conditions of a fair, hypothetical social contract (such as the Rawlsian original position) would not include knowledge of state borders.<sup>93</sup>

I conclude that state borders are not morally arbitrary. They are important to consider if we want to get the right answer to the question: what is the scope of obligations of justice? One result of this conclusion is that some the scope of some obligations of

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<sup>92</sup> See Pogge (1994), Beitz (1979), Kuper (2000), Jones (2001), and O'Neill (2000).

<sup>93</sup> Important arguments for this position can be found in Pogge (1994), Beitz (1979).

justice will be confined to state borders. It is not part of my conclusion that the scope of *all* obligations of justice terminate at state borders. In fact part of my conclusion is that by taking state borders into account, we discover reasons to extend the scope of obligations of justice beyond state borders.

### **A. State Borders are Morally Relevant.**

I argued in Chapter 3, “Arbitrariness”, that there are two separate sufficient conditions for a decision to be morally arbitrary. A decision is morally arbitrary if it is based on a certain kind of impermissible consideration or if it is made by an agent that does not have the moral authority to make such a decision. In this chapter I focus only on the former of these conditions: a decision is morally arbitrary if the decision is based on impermissible considerations, and these considerations are impermissible because they undermine the motivating influence of relevant moral criteria on the decision.<sup>94</sup> By taking these considerations into account, we make it difficult or impossible for the decision to be based on morally relevant criteria. These morally relevant criteria usually identify something that is thought to be morally fundamental, like autonomy or fundamental human interests.

In this section I do two things. (1) I set up Lockean values described in Chapter 2, “A Lockean Theory of Territory”, as part of the morally relevant criteria for determining the scope of obligations of justice. These are the values of efficiency, the labor theory of desert,

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<sup>94</sup> In this chapter I do not discuss the kind of decision that is morally arbitrary because the agent making the decision does not have the moral authority to make the decision. I’m concerned with refuting a certain kind of claim of the moral arbitrariness of state borders. This is a claim that state borders are morally arbitrary because these borders are formed by injustice or contingencies. This is a claim about the impermissibility of the placement of state borders in our decisions. This is not a claim about the moral authority of the state or of individuals to make a decision about the obligations of justice. An evaluation of the claim about the moral authority of the state, e.g., to make decisions about the scope of obligations of justice would require considerable analysis of the role of the state in a theory of justice.

and self-determination.<sup>95</sup> (2) I argue that state borders are relevant to these criteria. When determining the scope of obligations of justice, it is permissible and sometimes even obligatory to take state borders into account. Thus, under the acceptance of these Lockean values, state borders are not morally arbitrary.

### **A.1. Morally Relevant Criteria**

When determining if a decision is morally arbitrary, it is useful first to identify the morally relevant criteria for making the decision. Once we identify these criteria, then we can identify which considerations, if taken into account, would undermine these criteria and make the decision morally arbitrary.

What are the morally relevant criteria for determining the scope of obligations of justice? To answer this question, we must first determine what values are fundamental to a theory of justice. Obligations of justice are ultimately grounded in these values. The scope of obligations of justice should serve these values. These values are part of the ultimate criteria for determining the scope of obligations of justice.

Within a liberal theory of justice, individual autonomy and individual welfare are the ultimate values served by a theory of justice. I argue that the Lockean values of efficiency, of the labor theory of desert, and of self-determination importantly serve these values. The adoption of these Lockean values is an important way that we value individual autonomy and welfare. The Lockean values of efficiency, the labor theory of desert, and self-determination should be part of the morally relevant criteria for determining the scope of obligations.

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<sup>95</sup> I also list the value of need as a grounding value for the right to territory. I do not mention it in this chapter because it has less relevance for explaining our limited obligations of justice.

*Efficiency.* The value of efficiency is ultimately about making humankind as a whole better off; it's about promoting human welfare.<sup>96</sup> Locke's arguments for the value of efficiency are aimed at making better use of the world's natural resources in order to improve our collective and individual well-being. He argues for private property on the basis that a system of private property will improve the land's value for everybody—not just for the person that owns the land. The value of efficiency isn't confined to Lockean arguments. Environmentalists, politicians, and scientists agree that the efficient use of resources is one of the best ways to promote human welfare.

*Labor Theory of Desert.* Desert is considered to be an important part of determining what people are owed. Persons are said to deserve punishment for crimes or rewards for hard work, for example. If justice is giving people what is owed to them, and desert is an important element in determining what people are owed, then desert is an important element in justice. The labor theory of desert is a view about a particular way that people deserve. According to this view, an individual deserves the products of her labor. If a person carves a beautiful statue out of an un-owned chunk of rock, then that person deserves the statue. The same can be said, roughly, for collective labor. If the collective labor of group C produces something of value, then it can be said that C deserves the value. Suppose that C is a group of artists that collectively creates a large mural. The mural and its value belong to C. The way in which the value of the mural should be divided between the members of C is, I think, a separate issue. What can't be said is that a different group, C2 (that had nothing to do with the making of the mural), deserves the value of C's labor, or that the value is

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<sup>96</sup> It is also perhaps about promoting animal, plant, and ecological welfare. I limit my conversation to human and personal welfare, but I think that the arguments can be inclusive of other beings as well.

deserved by nobody or no collective at all. We can say that, in some way, collectives can deserve collectively, that C deserves the mural. Considerations of collective desert are an important part of justice, just as considerations of individual desert are an important part of justice.

*Self-determination.* Locke importantly contributes to a theory of individual autonomy because of his arguments against coerced rule. An individual cannot be ruled by another individual or organization unless the former individual first gives her consent to be ruled. The arguments against coercion are importantly embodied in the idea of a state's right to self-determination. The respect for the autonomy of the individual extends to the political sphere. An individual has the right to be a member of a group that rules itself politically. The alternative is to be a member of a group that does not rule itself politically—that is subject to foreign rule. Foreign rule is almost always rule without the voluntary consent of the people.<sup>97</sup> The right to self-determination—the right to freedom from foreign rule—is one way of articulating the individual right to freedom from coerced rule.

These values, the values of efficiency, the labor theory of desert, and self-determination are important and fundamental values in a liberal theory of justice. When we deliberate about the obligations of justice, these values are part of the morally relevant criteria for making a good decision. In the next section I argue that state borders are relevant to the values of efficiency, the labor theory of desert, and self-determination.

## **A.2. The Relevance of State Borders**

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<sup>97</sup> Individuals have the right to consent to foreign rule. However, this doesn't happen very often. By and large the ruled do not voluntarily consent to the authority of a foreign power.

In this section I argue that it is permissible and sometimes obligatory to take state borders into account in order to serve the values of efficiency, desert, and self-determination. When determining the scope of our obligations of justice, state borders are important considerations.

*Efficiency.* Taking state borders into account—giving states control over the resources within their territory—achieves a more efficient use of those resources than ignoring state borders and giving over control of resources to international or global organizations. State borders mark the boundaries of state territory. Territorial rights give states the authority to make, adjudicate, and enforce laws within a certain geographical region. State jurisdictional control over natural resources and the benefits from natural resources is more efficient at getting value from land than international or global jurisdictional control. I argue for this claim generally, and then I offer empirical evidence in its defense.

John Rawls briefly discusses a justification of borders in *The Law of Peoples*. He asserts that the state serves the function of preserving resources and serving its population *in perpetuity*. The state's boundaries identify a territory for which the state is responsible. Rawls argues that there must be caretakers of territories, and these caretakers must be states. If states were not in control of and, hence, not responsible for their territory, then no party would care for the land and its resources.

As I see it, the point of the institution of property [or territory] is that, unless a definite agent is given responsibility for maintaining an asset and bears the loss for not doing so, that asset tends to deteriorate. In this case the asset is the people's territory and its capacity to support them *in perpetuity*; and the agent is the people themselves as politically organized.<sup>98</sup>

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<sup>98</sup> Rawls (1999b): 39.

States are more invested in the efficient use of their lands because their lands are *theirs*. States are more likely to be motivated to use their own lands efficiently. States use their lands more efficiently if members of the states assume that they will be the primary beneficiaries of goods earned from the use of state-controlled resources. They are more vested in the long-term efficient use of their land than they are in the lands of others. Likewise, states are more vested in the long-term efficient use of their land than is any other foreign party. Also, states are better caretakers of their territories than foreign or international organizations because states are more familiar with the best way to use their lands.

The three empirical examples that follow are of the failures of international organizations (aid organizations, WTO, etc.) to efficiently control foreign land use. These aren't (exactly) examples where the domestic state has lost jurisdictional control over their lands. Instead, these examples show that in many cases where the overriding influence regarding land use is foreign or international, the result is an inefficient use of lands. These examples illustrate the inefficiency of foreign or international control over domestic lands and the ability of local peoples to efficiently use their own lands.

(1) In Malaysia, modern fishing methods were introduced by German aid programs. This method called for the use of trawlers, dragnets with hooks attached to the bottom of the net.

There was an explosive increase in the number of trawlers, usually owned by nonfishing businessmen and operated by wage-earning crews. This led to gross overfishing...the criterion in trawl fishing was maximum catch for maximum

immediate revenue. ...crews used destructive gear that scraped the bottom of the seabed and disturbed breeding grounds.<sup>99</sup>

As a result there was a decrease in fish stock in Malaysia for both trawlers and traditional fishermen.

(2) Traditional land use in tropical rainforests involved swidden agriculture, an ecologically sound agricultural system that caused minimal soil erosion. Massive logging activities endorsed by international aid programs and encouraged by multi-national corporations have threatened this system as the rainforest is being cut down and converted for cattle-grazing for the U.S. hamburger industry.

Between 1900 and 1965, half the forest area in developing countries was cleared, and since 1965 the destruction has further accelerated...The massive deforestation has myriad ecological and social consequences...massive soil erosion due to the removal of tree cover, thus causing the loss of invaluable top-soil; much-reduced intake of rainwater in catchment areas, and the loss of tree cover increases water runoff to rivers; extensive flooding in down-stream rural and urban areas, caused by excessive silting of river systems.<sup>100</sup>

(3) The Green Revolution was a program in India to introduce high-yielding seed varieties (mainly rice) to the local agriculture. It was hoped that the high-yielding seed would allow the farmers to become more productive and more prosperous because they would be able to harvest more than one crop per year. The high-yield crops required

...high doses of chemical fertilizers and pesticides, agricultural machinery, and irrigation...In many areas where this "revolution" was implemented there was an initial rise in production because more than a single crop could be produced in a year. But the corresponding rise in farmers' incomes was soon offset by the increasing costs of imported chemical inputs and machinery. High-input agriculture favored richer farmers who could afford to pay for the chemicals, and drove out poorer farmers who could not. The pesticides exacted a heavy toll in thousands of poisoning cases. In addition, the high-yielding crop varieties are very susceptible to pest attacks as insects become resistant to the pesticides. Yields in some areas have

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<sup>99</sup> Khor (1996): 51.

<sup>100</sup> Khor (1996): 52.

dropped. Meanwhile, thousands of indigenous rice varieties that had withstood generations of pest attacks have been abandoned and are now only preserved in research laboratories, most of which are controlled by international agencies and corporations in rich countries.<sup>101</sup>

There are, of course, many counter-examples to the claim that domestic states can make more efficient use of their lands than international or global organizations. However, most counter-examples can be said to be instances of a corrupt government misusing state lands or of foreign pressure on a domestic government to misuse state lands. Overall, when people have authority over their resources and expect to directly benefit from the product of their use of the resources, these people will use the land more efficiently.

Another consideration for taking state borders into account when assigning control of resources is to reduce the number of people affected by failed economic or ecological policies. We value many kinds of diversity largely because diversity minimizes the effects of disaster. We plant more than one kind of crop in order to avoid starving when disease wipes out all of one kind. One reason that we raise our children in individual homes instead of in a state facility is because one set of bad parents harms only a few children, but a bad state facility would harm many more children.<sup>102</sup> A reason to prefer state control of resources over international or global control of resources is to minimize harmful effects of bad decisions. Bad resource management at the state level affects only the resources within the state borders. Bad resource management at the global level affects all of the world's natural resources. When decisions are made on a global level, there are no more small mistakes.

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<sup>101</sup> Khor (1996): 50.

<sup>102</sup> This isn't the only reason or even the most significant reason for not raising children in state facilities, but it is an important one.

Each failed global policy affects every person and, depending on the policy, every natural resource.<sup>103</sup>

One might object that the above arguments from efficiency don't support the relevance of state borders, *per se*. On this view, my above arguments indicate that local control of resources is better than international or global control, but these arguments do not prove that local control should be understood as state control. I think this could be right. However, there is one important consideration in favor of state control, and that is that the infrastructure of state jurisdiction already exists. All things considered, it may be more efficient for existing jurisdictions to control the natural resources within their territory than to create different jurisdictions. Another thing to note is that endorsing local control—in whatever form it may take—of natural resources is to endorse borders (although perhaps not state borders). If you think that local control, but perhaps not state control, is a more efficient way of managing the world's resources, then you are affirming that borders matter for efficiency. That is, we ought to have borders (of some sort) that define local jurisdictional control over the resources within those borders. These borders are important to take into account when we think about justice, because these borders tell us one way to make efficient use of the world's natural resources—by letting those inside the borders control the resources within those borders.

If we take the value of efficiency to be a fundamental liberal value, then it is permissible to take borders into account when deliberating about justice. Taking borders into account does not undermine the attempt to serve the value of efficiency. In fact, taking

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<sup>103</sup> Thanks to David Schmitz for making this point.

borders into account may be obligatory, because observing the jurisdictional authority of states over their resources may be the best way to realize an efficient use of resources.

*Desert.* According to Lockean theory of property, in the case of individual property rights, the individual laborer deserves the product of her labor, because it is (to a great extent) her labor that made the product valuable. Likewise, a percentage of the value of a land is attributable to the state that governs that land. The state understood as a set of institutions and as the collective works of cross-generational members is importantly a part of what makes the land valuable. Because of this value of desert, the state deserves territorial rights to the resources within its borders. Also because of this value of desert, the distribution of benefits derived from the state's lands should be distributed within the state borders. The value of the land belongs to those that created the value.

This is what John Rawls has in mind when he argues against a global redistribution of goods (beyond merely the duty to assist burdened peoples.) Rawls illustrates a case where two states are both liberal and decent (they both meet a minimum liberal standard for protecting basic human rights), and they have very different socio-economic situations. Rawls states that it would be wrong to redistribute goods from the richer people to the poorer people.

...two liberal or decent countries are at the same level of wealth (estimated, say, in primary goods) and have the same size population. The first decides to industrialize and to increase its rate of (real) saving, while the second does not. Being content with things as they are, and preferring a more pastoral and leisurely society, the second reaffirms its social values. Some decades later the first country is twice as wealthy as the second. Assuming, as we do, that both societies are liberal or decent, and their peoples free and responsible, and able to make their own decisions, should the industrializing country be taxed to give funds to the second? According to [Rawls' theory] there would be no tax, and that seems right; whereas with a global

egalitarian principle without target, there would always be a flow of taxes as long as the wealth of one people was less than that of the other. This seems unacceptable.<sup>104</sup>

Rawls doesn't dwell on a justification for his conclusions in this case. It is revealing, however, that he gives the history of the two states. Because of the choices and actions of the two separate states, the states have arrived at different socio-economic situations. According to a basic theory of desert, the separate states deserve their relative situations because it results from their own choices and actions. The poorer state, on this view, does not deserve a portion of the richer state's wealth. Because of the value of desert, the benefits derived from the state's natural resources should be distributed within state borders.

It is possible that things like states just aren't the sort of things that can deserve. On this view, individual persons are the only sort of agent that can deserve. States are not individual persons. States are institutions. Therefore states can't deserve. I think that this position has some weight. However, there are two compelling challenges to this view. First, the view can't make much sense of Rawls' example above, which is intuitively compelling. We intuitively, common-sensically think that states and other institutions deserve. Germany deserved to be punished after World War II, for example. Second, states seem to have the equivalent of individual characteristics that lead us to believe that individuals can deserve. Individuals deserve on the basis of their intentional, voluntary actions. States are also capable of intentional, voluntary actions.<sup>105</sup> There is reason to believe that states can be understood as an agent capable of deserving.

If we take the value of desert to be a fundamental liberal value, then it is permissible to take borders into account when deliberating about justice; taking borders into account

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<sup>104</sup> Rawls (1999b): 117.

<sup>105</sup> Several theorists argue for this claim. See Tollefsen (2004).

does not undermine the attempt to serve the value of desert. In fact, taking borders into account may be obligatory, because state territorial rights, including the right to control resources within state territory and rights to the benefits flowing from these resources, may be the best way to honor the view that the state deserves the products of its labor.

*Self-Determination.* In liberal theory self-determination is realized when a people (in this case the members of a state) rule themselves. In liberal theory self-determination involves two things: the independence of the state from foreign rule and a set of domestic political institutions that allow the people to rule their selves autonomously. The political institutions of the state are vehicles used for the self-determination of the members of the state. I argue that there are two reasons to think that state borders are relevant to the value of self-determination. First, recognizing state borders is important for democratic processes. Second, recognizing state borders is important in order for the political institutions of the state to reflect the social values of the state, and this is an important part of self-determination.

State borders are important to self-determination because they are vital for the execution of successful democratic processes. As I discussed in Chapter One, Avery Kolers gives two reasons for excluding foreigners from decisions about the use of natural resources. First, persons have a strong interest in the stability of their cultural life, and land use is central to this life.<sup>106</sup> Historical claims to territorial rights are based on the importance of the land to individuals through the land's formative effect on the nation and the nation's formative effect on the land. Respecting a state's right to self-determination involves allowing them to have a relationship with an external environment such that their talents and

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<sup>106</sup> Kolers (2002): 34.

energies can interact with the world in a meaningful way. The self-determination of a state requires a physical space where the people's values can be brought to bear.

The second consideration is articulated in terms of the stakeholder. It is a familiar argument that decisions should be made only by stakeholders in the decisions outcome. In this context, stakeholders should be limited to those who:

... risk bearing *long-term* costs to their most important interests ought to have the loudest voice in such decisions. Decisions about land use have especially grave implications for those who live on the land in question. The way a community uses its land significantly shapes how its members eat, work, commute, use leisure time, and participate in public life; land-use decisions affect the public health, life expectancy, and democratic character of communities.<sup>107</sup>

Kolers' argument focuses on the individuals' interests in making *decisions* about the use of their natural resources. The people are able to make decisions about the use of their natural resource only if they have determinate jurisdiction over their natural resources. The people should have determinate jurisdictional control over their natural resources because this territorial right best realizes the ultimate value of the people's self-determination.

State borders are relevant because they importantly affect the ability of the political institutions of the state to connect with the social values of its citizens. One reason why we think that individual states should be self-determining instead of the whole world being self-determining together is because different societies have different values and different sets of rules that they want to live under. An important part of the self-determination of a state is the political institution's connection with the social values of the people. The political institutions of the state must reflect the social values of the members of the state. In order

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<sup>107</sup> Kolers (2002): 35.

for a state to be self-determining it must be independent from foreign rule, and the political institutions must have a close connection with the social.

Currently international pressure on many developing states has divorced the political structures of those states from the social values of the states' citizens. The members of the states no longer see their interests reflected in their political institutions. Instead, they see the interests of the more powerful international organizations. Not only does this retard the domestic institution's ability to be a vehicle of self-determination, but it also thwarts liberal democratic processes in the region as citizens see political processes as ineffectual means to express their interests.<sup>108</sup>

The self-determination of a state depends to some extent on the condition that the state has the right to control benefits derived from the state's resources. The loss of ownership of the benefits derived from the state's natural resources could cause a divide between the political institutions of the state and the social values of the people. In individual states, affluent people are those who have access to most of the goods from the global market. Poorer, marginalized members of the state resent the international community because they perceive the international community as the reason for their poverty and marginalization. In Islamic countries this is particularly evident today as members of poor and marginalized groups become more distrustful of their own governments because these governments ally themselves with the international community.

Already, then, in many states there is a culture of resentment against the international community and distrust of domestic governments. This has led to fractured states and setbacks in the building of liberal-democratic institutions. Suppose that we added to this

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<sup>108</sup> Pasha (2002): 121-132.

culture of mistrust and resentment the idea that the fruit of the people's labor doesn't belong to the people. Instead, it belongs to the international community. The heightened feelings of lack of ownership and marginalization by the international community would lead to greater feelings of mistrust of the domestic government that allies itself with this globalized reasoning. The government's ability to serve as a vehicle of self-determination would be undermined, and in places where political stability is fragile, it could be lost altogether. This last argument is a contingent one—dependent on particular social conditions, but it is important, and it's based on considerations that won't go away any time soon.

If we take the value of self-determination to be a fundamental liberal value, then it is permissible to take borders into account when deliberating about justice; taking borders into account does not undermine the attempt to serve the value of self-determination. In fact, taking borders into account may be obligatory, because not observing state territorial rights, including the right to decide how state resources should be used and rights to the benefits flowing from these resources, may undermine state self-determination.

In this section I argued that the same values that give us reason to think that there are state territorial rights (values of efficiency, desert, and self-determination) also give us reason to limit some of our obligations of justice to state borders. States borders should be taken into account. In the following section I address challenges to this position. I argue against claims that state borders are morally arbitrary and shouldn't affect the scope of our obligations of justice.

## **B. Against the Moral Arbitrariness of State Borders**

To say that a decision is *morally arbitrary* is to make a normative statement. One should not make morally arbitrary decisions. Morally arbitrary decisions are decisions based on impermissible considerations—considerations that undermine relevant, fundamental moral criteria for making the decision. The term also applies to those *facts* that are impermissible. To say that some fact is morally arbitrary is to say that a decision made on the basis of this fact would be morally arbitrary.

There are two different ways to understand the claim that state borders are morally arbitrary with regards to distributive justice. First, it could mean that borders are historically unjust, and therefore they are impermissible to questions of distributive justice. Second, it could mean that the conditions of a fair, hypothetical social contract (such as the Rawlsian original position) would not include knowledge of state borders. From this perspective, justice would require that goods be distributed between persons as if state borders did not exist. In the next two sub-sections, I explain and give reasons to reject each of these arguments for the moral arbitrariness of borders.

### **B.1. Historically unjust borders**

State borders have a history. There's a way they came about. Most state borders were formed unjustly. By that I mean that their formation was the result of or resulted in the violation of human rights or liberties that were not redressed. The U.S., Mexican, and Canadian borders, for example, were formed by unjustly taking lands from Native Americans. Borders have been formed unjustly through violent expansionism, colonization, or other reasons for war.

I argue that state borders are relevant to considerations of justice. Opponents of this claim use the fact that most state borders were established unjustly to undermine the assumption that the state has an exclusive claim to goods produced or acquired within its borders.<sup>109</sup> On this view, agents have rights (other than basic human rights) because they have done something to acquire that right. Because states initially establish their territory unjustly—by essentially stealing it—they have not done anything to acquire the right to the territory. Laying a claim to unjustly acquired goods is illegitimate. We talk this way about personal property. If you steal my car, you cannot make moral claims based on the assumption that you now own my car. You have no right to sell my car for your own benefit, for instance. An analogous claim can be made about historically unjust borders. If territory is acquired unjustly, then the state has no moral claims to the goods produced or acquired within this territory.

Because unjustly acquired territory should not give rise to special rights or obligations, a state's right to control the use of and the benefits from its natural resources are unfounded. I have three arguments against this view. First, I argue that the fact of historically unjust borders does not by itself lead us to conclude that the control of and the benefits from natural resources should be globally distributed. Second, I argue that even though a state's territory was established unjustly, the state may act in ways to acquire rights to the territory. Finally, I argue that the fact of historically unjust borders is morally relevant to obligations of justice because it indicates to whom obligations of reparation are due and what those obligations may be.

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<sup>109</sup> See, for example, Barry (1991): 198.

*Unjust borders alone can't ground universal claims to goods.* One way to interpret the moral implications of the fact that most borders are formed unjustly is to say that because states with unjustly formed territories do not have claims to the natural resources within their territory, everybody has a claim to goods produced or acquired within unjustly acquired territory.

This is a tempting move because proponents of the global distribution of goods don't want merely limited multinational distribution of goods. They don't (only) want the U.S. to distribute U.S. goods to Mexico because the U.S./Mexico border was formed unjustly. They also want—and this is the point that the internationalist is trying to make—a true international distribution of goods where rich nations distribute to poor nations regardless of territorial relationships.

But this position cannot be established merely on the grounds that some territories are unjustly founded. That a state's borders were formed unjustly is not sufficient evidence to support a position that any person can lay claim to a portion of the state's goods. The unjust formation of borders merely suggests that states have international duties only to those who were harmed by the unjust formation of our state boundaries. The thief who stole my car does not owe reparation to every person in the world as a result of his wrongdoing. He only owes reparation to me.

To support a conclusion that we should redistribute goods globally on the grounds that territories have been unjustly formed, you would have to suppose that there is no such thing as justly acquired territory at all—no state has exclusive claims to goods within its territory. Institutional claims to territorial goods would be something like Nozick's notion of manna from heaven. No institution or person has a claim to any particular bit, so the

goods produced or acquired within the territory should be distributed without any regard for territorial claims. In what follows I argue against this claim. I argue that the state can legitimately acquire territorial rights even if the state's territory was originally unjustly acquired.

*State can acquire territorial rights even after unjustly acquiring territory.* The argument that state borders are morally arbitrary because they were formed unjustly is founded on the idea that agents have rights (other than basic human rights) because they have done something to acquire that right. Because states initially establish their territory unjustly—by essentially stealing it—they have not done anything legitimate to acquire the right to the territory. The position is that once territory has been unjustly acquired, there is no way to legitimately claim a right to the territory.

In chapter 2, I argue that just territorial claims can be established even after territories are originally unjustly acquired. I draw on two arguments for this position. First, I argue that the injustice of historically unjust borders can be superceded by other factors. Second, I argue that the system of territorial rights (including state rights to control the use of the benefits from its natural resources) even in the face of particular instances of injustice. I will not re-explain these arguments here. The point is that there are ways to argue for a system of territorial sovereignty and for territorial sovereignty in specific cases even in the face of unjustly acquired territory.

Usually after a state acquires a territory (by unjust or by just means), they do something with the territory. They make use of the land and other natural resources for their own purposes. With regards to fundamental liberal values that I identified earlier in this chapter (of efficiency and self-determination), the state's use of the territory's resources

is an important part of making efficient use of natural resources and of establishing the self-determination of the state. The state can establish a right to territory through its interaction with the land and resources because the state's right to territory serves the fundamental liberal values of efficiency and self-determination.

*Unjust borders and duties of reparation.* What the fact of unjustly formed borders tells us is not that borders are morally arbitrary, but that borders are morally relevant. State borders can be drawn in just and unjust ways, and that they are drawn in a certain way is of great importance to individuals and to nations. Historically unjust state borders are important to morality and to justice because they can indicate what justice may require of governments in the future. For instance, if we think that it is important to redress harms committed in the past, then the way that historically unjust borders are placed may be an important consideration in figuring out how to redress those harms. We can say that, yes, this line on the map has been drawn unjustly, but the way that it is drawn can tell us something important about what justice requires. An obvious way that the border can inform justice is as to the redressing of harms committed in the past. Canada, the U.S., and Mexico each have unjustly acquired territories. These territories are unjust because they were unjustly taken from native peoples. Because of the placement and history of the borders, we can say that, for instance, Mexico owes certain reparations to certain native peoples, and the U.S. owes certain reparations to other native peoples. In some instances, both the U.S. and Mexico owe reparations to the same native nation. Both Sonora, Mexico, and Arizona, U.S.A., cut across the traditional territory of the Tohono O'odaham nation. The history of the U.S./Mexico border and its placement tell us something about what sort of reparations are owed by each state to the Tohono O'odaham nation.

In this section I have argued that the claim that unjustly formed state borders are morally arbitrary is unfounded. In the next section I address the claim that borders are based on contingent or random factors, and therefore they are morally arbitrary.

### **B.2. Conditions of a Fair, Hypothetical Contract**

To say that something is contingent or random is to make an empirical statement. I use the terms ‘contingent’ and ‘random’ as descriptive terms. The claim that contingent or random things are morally arbitrary has intuitive appeal. Compare the claim that I deserve special treatment because of my race (I should be treated better than a non-white person) with the claim that I deserve special treatment because of my rational nature (I should be treated better than a plant.) Treating somebody with disrespect because of their race, a contingent feature, is indefensible. Treating humans, because of their essential nature, better than plants is defensible.

John Rawls takes up a similar line of argument when he claims that our placement in the distribution of natural attributes and talents is random or contingent, and therefore natural attributes of a person are morally arbitrary to a system of distribution.

There is no effort to preserve an equality, or similarity, of social conditions, except insofar as this is necessary to preserve the requisite background institutions, the initial distribution of assets for any period of time is strongly influenced by natural and social contingencies. The existing distribution of income and wealth, say, is the cumulative effect of prior distributions of natural assets—that is, natural talents and abilities—as these have been developed or left unrealized, and their use favored or disfavored over time by social circumstances and such chance contingencies as accident and good fortune. Intuitively, the most obvious injustice of the system of natural liberty is that it permits distributive shares to be improperly influenced by these factors so arbitrary from a moral point of view.”<sup>110</sup>

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<sup>110</sup> Rawls (1999a): 62-3.

This argument has prompted many political theorists to claim that other things that are random or contingent are also morally arbitrary. Specifically, several authors have argued that the contingency and randomness of state borders render those borders morally arbitrary.<sup>111</sup> By extension, then, our obligations of justice should apply to all persons of the world, and not merely to those who share a common nationality. These arguments have taken two particular forms. In Charles Beitz's *Political Theory and International Relations*, he argues that our placement, e.g., the placement of state borders, with regards to the distribution of natural resources is morally arbitrary with regards to distributive justice. A state cannot claim an exclusive right to natural resources within its borders. The other is from Joseph Carens' article "Aliens and Citizens: The Case for Open Borders." Carens argues that where and to whom we happen to be born is morally arbitrary with regards to the distribution of national citizenship.

What follows in this section is a critique of this general Rawlsian line of argument. I first lay out some general objections to the argument that state borders are contingent and/or random and therefore morally arbitrary with regards to distributive justice. Then I analyze these two variations of the general argument.

*A note on Rawls.*

It is difficult to understand Rawls' conception of moral arbitrariness because it is a theory neutral conception. That is, his claims that contingencies and random facts are morally arbitrary with respect to a theory of justice do not seem to be deduced from a moral

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<sup>111</sup> Beitz (1979) and Carens (1987) argue along these lines. They are mentioned later in the paper.

theory or principle.<sup>112</sup> With a theory neutral claim of moral arbitrariness, it is hard to identify the scope of the claim of moral arbitrariness; the contexts in which it is appropriate to apply the claim are undefined. Additionally, it is difficult to know how to extend the claim of moral arbitrariness to other facts. Rawls identifies natural attributes as morally arbitrary. Presumably, then, other things that are relevantly like natural attributes are also morally arbitrary. The problem is to identify what a relevant similarity is. The authors that I discuss below, Charles Beitz and Joseph Carens, argue respectively that the distribution of natural resources and parentage and birthplace are morally arbitrary under a Rawlsian theory of distributive justice because they are relevantly like natural attributes. Although both authors are careful to argue strictly within a Rawlsian framework, it is not clear that the distribution of natural resources or birthplace and parentage are relevantly like natural attributes because it is not clear what it is about natural attributes that makes them morally arbitrary.

*A Variation on the General Rawlsian Argument: Beitz and Natural Resources.*

Charles Beitz argues that the placement of state borders with respect to the distribution of natural resources is morally arbitrary with regards to distributive justice.

Reasoning analogously [to Rawls], the parties to the international original position would view the natural distribution of resources as morally arbitrary. The fact that someone happens to be located advantageously with respect to natural resources does not provide a reason why he or she should be entitled to exclude others from the benefits that might be derived from them.<sup>113</sup>

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<sup>112</sup> Thaddeus Metz (2000) argues that Rawls' conception of moral arbitrariness is deduced from a Kantian theory of moral personhood. However, even Metz admits that this does not render many of Rawls' claims about moral arbitrariness consistent. For this reason, and because Rawls' himself does not allude to any moral principle from which his claim that contingencies and random facts are morally arbitrary is deduced, I maintain that Rawls means for his claim to be intuitive and pre-theoretical.

<sup>113</sup> Beitz (1979): 138

Beitz argues within a Rawlsian framework. If our placement with respect to the distribution of natural attributes is morally arbitrary with regards to distributive justice, then things that are relatively like our placement with respect to the distribution of natural attributes must also be morally arbitrary. Our placement in the distribution of natural attributes is morally arbitrary with regards to distributive justice because it is the result of contingencies such as social circumstance or chance. Likewise, our placement with respect to natural resources is morally arbitrary because it results from contingencies such as geographical and social circumstance or chance.

Beitz admits that there are good arguments against the claim that our placement with respect to the distribution of natural talents is morally arbitrary. But he maintains that these arguments do not apply to our placement with respect to the distribution of natural resources. Therefore our placement with respect to the distribution of natural resources is a purer case of something being morally arbitrary with regards to distributive justice than is our placement in the distribution of natural talents. Contra Beitz, I argue that there is a strong parallel between our placement with respect to the distribution of natural talents and with respect to the distribution of natural resources. We have a prima facie claim to our natural talents. Likewise, states have a prima facie claim to natural resources within their borders. This parallel is enough to suggest that our placement with respect to the distribution of natural resources is not morally arbitrary with regards to distributive justice.

One strong argument that our placement with respect to the distribution of natural attributes is not morally arbitrary is that to claim otherwise could cause unjustifiable harm to persons. If a claim to my natural assets is up for grabs, then another could claim the right to control my natural assets. This could unjustifiably harm me in two ways. First, my natural

assets and my development of my natural assets are an important part of my individual identity. Beitz argues that natural talents and their development are a source of a “special kind of pride.”<sup>114</sup> The talents that one chooses to develop and the effects of its development can have effects of forming an identity and of being an expression of that identity. To take control of my natural talents and their development away from me is to harm my sense of self identity in a deep way because that control is constitutive of my individual identity.

If individual identity is relevant to the question of how goods should be distributed under a Rawlsian liberal theory, then things that are constitutive of individual identity are morally relevant to this question also. By individual identity, I refer to the psychological feature of persons and not to the particular facts that make up a particular identity. For instance, I refer to the psychological fact that strong familial relationships are important to forming an individual identity and not to the fact that I have a loving family. We can take into account in a Rawlsian framework the fact that strong familial relationships are essential to forming a healthy individual identity by contending, for instance, that institutions should not redistribute mothers. My argument says something similar about territory and natural resources. It does not seem to matter whether a thing must be acquired first before it becomes an important constitutive part of our self identity, what matters is that it is important, and that it would significantly harm the person if it were taken away or changed.

There is evidence to suggest that a territorial relationship with natural resources can serve this identity forming role. Avery Kolers convincingly argues that a people’s culture is shaped by and shapes the land shared by the people. “For not only indigenous communities but every population with a shared culture—organizing its members’ diet, kinship,

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<sup>114</sup> Beitz (1979): 138.

educational trajectory, and work, for instance—is deeply shaped by the land it inhabits, and deeply shapes that land, in turn.”<sup>115</sup> Culture, in turn, significantly affects individual identity. It forms a foundational background of values and practices through which individuals form desires and create a sense of self identity. For an external group to take control of a people’s land and resources is similar to another person taking control of my natural assets. It changes the background assumptions with which the individual members of the group have made individual decisions and come to form a sense of self identity. The individual is harmed when control of her people’s land is taken from them. There is a significant harm done to individuals when control of their people’s territory is given to outsiders. The threat of this harm is enough to establish that our placement with respect to the distribution of natural resources is not morally arbitrary with regards to distributive justice.

The second way that loss of the right to control my natural assets could unjustifiably harm me is by a significant loss of personal liberty. “Because the development of talents is so closely linked with the shaping of personal identity, it might seem that one’s claim to one’s talents is protected by considerations of personal liberty.”<sup>116</sup> If another has the right to control my natural assets, then I am literally this person’s slave.<sup>117</sup> Furthermore, the state’s determinate relationship with the natural resources within its territory represents the ultimate values upon which the right to territory is founded, those values of efficiency, desert, and self-determination that are discussed earlier in this chapter.

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<sup>115</sup> Kolers (2002): 36.

<sup>116</sup> Beitz (1979): 139.

<sup>117</sup> A counter-example to this claim is the relationship between parent and child. To a great extent, a parent has a legitimate right to control her child’s natural assets and their development. I think that this special relationship between parent and child is not a relevant counter-example, however, since I am assuming that the individuals under discussion meet all of the normal requirements sufficient for claiming certain basic freedoms, (they are sufficiently intelligent and rational, e.g.).

Beitz presents a counter-argument. He states that the arguments for the moral relevance of individual identity might render natural talents morally relevant, these arguments do not apply to natural resources because “resources do not stand in the same relation to personal identity as do talents.”<sup>118</sup> Talents are necessary for our self identity. They are constitutive of it. Natural resources, claims Beitz, are contingent to our self identity. Both talents and resources are used in the process of the formation of self identity. But natural resources must be acquired first before they can be worked on and incorporated into our sense of self and self esteem. Natural talents are there as parts of the self to begin with.<sup>119</sup>

...it is not clear what it means to say that the distribution of talents is “arbitrary from a moral point of view.” While the distribution of natural talents is arbitrary in the sense that one cannot deserve to be born with the capacity, say, to play like Rubinstein, it does not obviously follow that the possession of such a talent needs any justification. On the contrary, simply having a talent seems to furnish prima facie warrant for making use of it in ways that are, for the possessor, possible and desirable. A person need not justify the possession of talents, despite the fact that one cannot be said to deserve them, because they are already one’s own; the prima facie right to use and control talents is fixed by natural fact.<sup>120</sup>

Unlike with natural talents, argues Beitz, there is no prima facie warrant that natural resources should be used for the benefit of persons who are located near the natural resources. Natural talents and natural resources are alike in that they are not deserved, but they are dissimilar in that natural resources are not naturally attached to persons. Natural resources must be appropriated before they can be used. According to Beitz, there is an intuitive presumption that natural talents belong to their possessors, and that there is not a

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<sup>118</sup> Beitz (1979): 139.

<sup>119</sup> Beitz (1979): 140.

<sup>120</sup> Beitz (1979): 138.

similar intuitive presumption that natural resources belong to any person. This is because natural resources are not metaphysically attached to persons the way that talents are.

I argue that there is an intuitive presumption that natural resources belong to particular persons or groups of people, even though the land is not metaphysically attached to the person. This is the Lockean presumption that once a person works with a piece of land and improves it, the person has a right to the land. If a person were to work the land with the intent of improving it and with the expectation of receiving benefits from her work on the land, and another party takes away the land or all of the benefits from the work on the land, we have a strong intuitive reaction that the person who originally worked the land has been wronged. They had a right, not necessarily an absolute right, but a right nonetheless, that was violated. The person who worked the land has a *prima facie* claim to the land. It may be the case that the *prima facie* claim can be overridden, but that does not make the *prima facie* claim go away. There is an intuitive presumption that workers and improvers of land have a proprietary claim to that land, and this presumption is similar to the intuitive presumption that persons possessing natural talents have a proprietary claim to their talents. In Chapter 2 I argue for a state's right to territory predicated on basic Lockean arguments for the natural right to property. On the basis of these arguments, the institution of a legitimate state has a *prima facie* right to territory, just as an individual has a *prima facie* natural right to property.

Beitz could argue that there is still a difference between the presumption that a person owns her talents and the presumption that a person owns her land (or that the state has territorial rights). The difference is that the ownership of talents does not need a justification, but the ownership of land does. I do not see why this should make a difference

in the overall argument, as long as a justification *can* be given. Rights to natural resources could face the opposition that when one has rights to natural resources, others are excluded from it and made worse off by their exclusion. Territorial rights face this opposition. Other institutions are excluded from the benefits of controlling the state's territory. In the face of these consequences of ownership and of territory, the justification for these rights must be strong. Yet ownership of talents faces the same opposition. If one person possesses great talents, others are made worse off by the fact that they possess weaker talents. One cannot be a basketball star, for instance, if he does not possess the height or speed that others who also wish to be basketball stars possess. The claims to talents and to resources have similar needs for justification.

It is not my intent to prove that Lockean claims to property have the same intuitive appeal as claims to natural assets. I don't believe this to be the case. I demonstrate that there exists an intuitive prima facie right to the right to territory including the right to determinate jurisdiction over the state's natural resources and the right to distribute goods primarily within state borders. The intuitive prima facie right of a state over its natural resources is similar to the intuitive prima facie right to natural assets. It establishes an assumption that a state has a right to its territory (acquired in the relevant Lockean way), unless another party can give a convincing justification for this right to be revoked. Hence there is a compelling reason to assume that some relevant territorial rights are relevant to distributive justice in the same way that natural assets or familial relationships are relevant.

*Carens and Birthright.* Joseph Carens states that "Citizenship in Western liberal democracies is the modern equivalent of feudal privilege—an inherited status that greatly

enhances one's life chances."<sup>121</sup> Where one is born and to whom "are natural contingencies that are 'arbitrary from a moral point of view.'"<sup>122</sup> Carens claims that the circumstances of one's birth are contingent and therefore morally arbitrary with regards to distributive justice. In this case, the good that is being distributed is citizenship. Carens argues that, under a Rawlsian conception of justice, citizenship should not be allocated according to parentage or birthplace.

My response is that parentage and birthplace can be morally relevant with regards to distributive justice in two ways. First, they may be the single most influential feature that determines our self identity. Our family and our community teach us values and customs that serve as the background for our identity formation. Additionally, our surroundings are the most influential factor in the formation of our relationships. Generally, we only form relationships with those that we interact with personally. Second, parentage and birthplace are the most influential means of acculturating a member of a community. If it is important that an institutional community share a common culture, then it is important to consider one's parentage and birthplace in the allocation of citizenship. If a person is born within the country and to parents who are citizens, then it is likely that the person will adopt the common national culture. It is more likely that a person will adopt the common national culture under these circumstances than by other means.

I am not arguing that citizenship should be decided according to parentage and birthplace. My argument is only meant to show that these contingent facts can have

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<sup>121</sup> Carens (1987): 252.

<sup>122</sup> Carens (1987): 261.

significant implications that can legitimately be taken into account when distributing citizenship.

### **C. Conclusion**

In this chapter I have argued for the relevance of state borders to theories of liberal justice. There are good reasons to think that state territorial rights, including the right to control the use and the benefits from the state's natural resources, are justified on fundamental liberal grounds.

I argued that the Lockean values of efficiency, desert, and self-determination should be part of a set of morally relevant criteria based on fundamental liberal values for determining the scope of obligations of justice. Then I argued that state borders are relevant to these criteria. When determining the scope of obligations of justice, it is permissible and sometimes even obligatory to take state borders into account. I defended my position regarding the relevance of state borders against two influential arguments for the moral arbitrariness of state borders. I rejected the claim that state borders are historically unjust and therefore morally arbitrary, and I rejected the claim that the conditions of a fair, hypothetical social contract (such as the Rawlsian original position) would not include knowledge of state borders because borders are based on contingent or random factors.

One should not conclude from this chapter that there are no international or global obligations of justice. Sometimes the observance of fundamental liberal values demands that the obligations of justice extend globally. In the final chapter I build on the idea that the state can be responsible for harms done to foreigners. I establish that the state is responsible for fulfilling certain global obligations of justice.

## CHAPTER 5: INSTITUTIONAL RESPONSIBILITY

What do we owe to foreigners?

One obstacle for understanding global and international responsibility is that it's difficult to identify one's causal responsibility for distant global harms. I may think that I owe nothing to foreigners because I don't perceive my actions as affecting foreigners. I can see the effects of my actions on members of my family and community, but not on foreigners.

In the case of vast or distant global consequences it's difficult to establish who is causally responsible for a particular consequence, and *how* responsible that person is. In this chapter I address the problem of assigning responsibility for global harms.

I assume that there are harms today that can be described as global harms. These are harms, such as death and disease caused by unsafe toxic waste dumping by international corporations, that can be attributed to, at least in part, global, large-scale social interactions. I assume that these are harms worth addressing.

I do three things in this chapter. First, I argue that the commonsense conception of responsibility as restricted to individuals fails to regulate large-scale social interactions that are the cause of much global harm today. Second, I argue that by considering institutions to be morally responsible agents, we broaden the commonsense conception of moral responsibility. As applied to institutions, this conception of responsibility is less restrictive because institutions have greater powers than individuals. Institutions can be held responsible for addressing problems for which, under the restricted, individualistic conception of commonsense responsibility, we cannot hold individuals responsible.

Finally, I raise a significant limitation of this view, that it has difficulty accounting for the appealing claim that individual agents are ultimately responsible for institutional actions. I discuss and give reasons to doubt Thomas Pogge's attempts to connect individual and institutional responsibility. I do not think that this is a reason to reject the view of institutional responsibility. Instead, I highlight the complicated relationship between individual and institutional action and the importance of assigning responsibility to both sorts of agents. Despite the problems with this view, I think that it is one worth pursuing.

### **A. Commonsense Responsibility**

*The commonsense conception of responsibility is restrictive.*

In this section I give Samuel Scheffler's account of the commonsense conception of normative responsibility. This conception is a restrictive conception of responsibility. It restricts those consequences for which we are responsible to consequences that are the direct result of my individual actions, and it restricts the community of morally responsible agents to individual agents. A commonsense conception of normative responsibility is ill-equipped to regulate responsibility in an age where much significant harm, like extreme poverty, is the result of extremely large institutional structures, complicated bureaucracies, and corporate actions. The commonsense conception of responsibility is ill-equipped because it is too restrictive.

Our commonsense conception of normative responsibility is restrictive. Samuel Scheffler explains that the commonsense conception of normative responsibility restricts responsibility to individual agents, and it limits individual responsibility to those events that

an individual herself causes.<sup>123</sup> This view is restrictive because it limits the consequences for which an individual can be held responsible. One is responsibility for the consequences of the acts that she commits herself. I am responsible for the consequences of my actions, and not for the consequences of others' actions.

The focus of the commonsense conception of responsibility is on the individual. Individuals are considered to be the only agents who can be held morally responsible. Under the commonsense conception of responsibility, even if we think that collectives can be held morally responsible, we think that the actions of the individual members of the collective caused the collective action, and therefore the individual members should ultimately be held morally responsible.<sup>124</sup>

The fact that the commonsense conception of responsibility focuses on the individual adds an additional layer of restriction to this sense of responsibility. Given the kinds of agents individuals are, it makes sense that individual moral responsibilities have a certain structure.<sup>125</sup> Individuals have limited powers. Our conception of individual responsibility should take our limited powers into account. Three features of our limited power are particularly important to the concept of responsibility. First, individuals have limited means to collect and process information. An individual who has no medical training should not be held responsible for failing to give medical aid to a heart attack victim. Second, individuals have limited powers to affect the world around them. If I see one hundred drowning children, and I only have time to save twenty, I should not be held

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<sup>123</sup> Scheffler (2001): 37. Scheffler also describes the commonsense conception of responsibility restrictive in that it holds us responsible only to those with whom we have special relationships. I'm not going to talk about that aspect of his conception here.

<sup>124</sup> Green (2002): 80.

<sup>125</sup> Green (2002): 86.

responsible for the eighty lives that I could not save. Third, individuals can bear only so much cost in order to address a problem. Suppose that I could save all one hundred children if I could have purchased a large boat that I could have used to save all of the children in time. But the boat costs two million dollars, and I don't have two million dollars. I can't save all of the children because I'm unable to assume the cost of saving all of the children.

*The Problem: Can't regulate large-scale social interactions.*

The problem with the commonsense conception of responsibility is that it can't take into account the modern global perspective of global harms. Scheffler explains this problem in two steps. First, the common-sense conception of responsibility is a product of cultural and social conditions that are eclipsed in modern society by new conditions produced by globalization. The commonsense conception of responsibility results from a largely implicit conception of social relations as "consisting primarily in small-scale interactions, with clearly demarcated lines of causation, among independent individual agents."<sup>126</sup> The social relations that gave rise to this commonsense conception of responsibility currently make up only a portion of our morally relevant social relations. Modern developments of technology, travel, and communications connect remote parts of the world through economic, political and social interdependency.

These developments have made it more difficult than ever to sustain the conception of human social relations as consisting primarily in small-scale interactions among single individuals. The earth has become an increasingly crowded place. The lives of its inhabitants are structured to an unprecedented degree by large, impersonal institutions and bureaucracies. The interactions of these institutions across national borders have profound effects on the lives of people worldwide, and serve to link the fates of people in different parts of the world in multiple ways. Thus, the quality

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<sup>126</sup> Scheffler (2001): 39.

of life for people in any one part of the world is, to a large extent, a function of a network of institutional arrangements that supports a very different quality of life for people in other parts of the world. And important political and economic developments in one area of the globe often have rapid and dramatic effects on people in other areas, effects that are frequently intensified by the speed with which information about them is communicated.<sup>127</sup>

Current socio-economic conditions include large-scale collective actions that affect persons all over the world. The commonsense conception of normative responsibility, based on small-scale individual interactions, is ill-equipped to account for normative responsibility under these modern circumstances.

Second, under a common-sense conception of responsibility, responsibility for outcomes that are an individual's own doing are more serious for that individual than responsibility for outcomes that result from actions to which she only contributed in part. Responsibility diminishes if the individual is part of a group that collectively causes a harmful consequence. Suppose that I am one of a hundred farmers whose separate individual farming patterns taken collectively result in the extinction of an entire species of wildflower. I am not, by myself, responsible for the extinction of the wildflower. At most, I am partially responsible for its extinction.<sup>128</sup> Responsibility diminishes even more if the individual action is one tiny contribution to an extremely large number of individual actions that together collectively affect an outcome. Responsibility is almost non-existent if the individual's action is a tiny contribution to a large collective action, and an individual's contribution to the outcome is part of an extremely complex economic chain that the individual does not understand.

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<sup>127</sup> Scheffler (2001): 40.

<sup>128</sup> This is not always the case. If two people together murder a third person, we can hold each murderer responsible for the murder of the third person.

Combine the modern global perspective of the collective causes of world harms with the common-sense view that one is only or primarily responsible for outcomes resulting from her own actions, and you get a state of affairs under the commonsense conception of responsibility where nobody is assigned responsibility for some catastrophic global harms. For example, I buy bread in a local grocery market. The bread is made from grains that have been grown with chemical fertilizers. The company that made the chemical fertilizers has contracted with the government of a small African country to dump toxic waste in that country. The toxic waste's exposure to the surrounding eco-system has had crippling effects on the health of the surrounding people, animals, and eco-system.

It is difficult to explain who is responsible for the harmful effects of the toxic waste dump. Buying the bread doesn't harm anybody on a small-scale interpretation of individual responsibility. The action, isolated, doesn't cause any harm. It is one contributing factor in the overall state of affairs that results in the devastating health conditions in the African community. It may be difficult to hold the employees at the chemical waste facility responsible for the harmful consequence of the dumping because they are working within the institutional structure of the company, the global market system, and the international legal system all of which may combine to create an incentive to economically interact with the African country in this way (in a way that gives the African country a bargaining advantage over other countries because the African country and not other countries will agree to be a home to the toxic waste). It may be difficult to hold the members of the African country's government responsible for the harmful consequence because they are working within the same international economic and legal structure that encourages them to

reach out to rich international companies and make these kinds of economic investments on behalf of their country.

The problem with the commonsense conception of normative responsibility is that it can't regulate these large-scale, global social interactions and institutional structures. Somebody (or some institution, as I discuss below) should be held responsible for the crippling health of the African community where the toxic waste has been dumped. On the individualistic account of responsibility, it's difficult to assign responsibility because each person's action is influenced and justified by an overall state of affairs that seems to be arranged such that the consequence just happens.

### **B. Institutional Responsibility**

I do not seek to reject the commonsense conception or to replace it altogether. It's important to note that we still have a wealth of small-scale social interactions that a commonsense conception of normative responsibility is able to regulate well. Additionally, there are some features of the commonsense conception that are useful for evaluating large-scale social circumstances. For instance, the commonsense conception focuses on causal interaction between agents. On this conception we don't hold agents responsible who did not contribute to the consequence (—by contribute, I mean caused or could have prevented). This feature of responsibility is useful for regulating both small and large-scale interactions.

Instead of rejecting the commonsense conception of responsibility, I suggest that the conception should be broadened to include institutions as well as individuals as responsible agents. Under this broadened conception, we can hold institutions responsible for circumstances that were caused by the institution. For example, the institution of the state

(or a local political institution) sets speed limits on highways. The institution can be held responsible in part for the frequency of deaths by car accident on highways where speed was a contributing factor, and the speed limit was not exceeded.<sup>129</sup>

When we hold an institution responsible under the commonsense conception of responsibility, the sense of responsibility can become less restrictive. In the case of individuals, the sense of responsibility is more restrictive because individuals have limited powers. In the case of institutions, this sense of responsibility is less restrictive because institutions have less limited powers than individuals. Michael Green argues for three reasons to think that the “case for a restrictive conception of responsibility is much weaker for institutional agents than it is for individuals because institutional agents do not face the same limitations as individual agents.”<sup>130</sup> Institutions are better at collecting and processing information; institutions are better able to change and organize mass behavior; and institutions are able to handle the cost of regulating the problem.

...one way that institutional agents are different from individuals concerns information. Institutions are better than individuals at collecting and processing information about the distant or indirect consequences of their actions. They have multiple sources of information, can use a division of labor to gather and process it, and appoint special officers whose job it is to look out for particular problems. Because this is so, institutional agents are more capable of taking the remote effects of their actions into account than individuals are. ... A second difference concerns power. Institutional agents can alter mass behavior; simple rules can alter the average speed on the highways or the amount of water used to flush a toilet. Individuals, by contrast, can have significant influence on mass behavior only in the rarest of cases and even then usually by virtue of occupying an institutional role, such as being the head of the state. As is well known, even groups of individuals with shared interests will often find it difficult to coordinate their behavior. Finally, institutional agents can spread the costs of regulating the problem. Governments spread costs through uniform taxation and regulations; firms do it by passing on costs to consumers... Since institutions have different capacities as agents than

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<sup>129</sup> Michael Green argues for this conclusion in Green (2002).

<sup>130</sup> Green (2002): 86.

individuals, there is less reason to apply the restrictive conception of responsibility to them.<sup>131</sup>

The benefit of the less restrictive sense of responsibility applied to institutions is that we now have a way to assign responsibility for global harms caused by large-scale social interactions. I've given at least one example of a harm caused by large-scale social interactions (toxic waste dump by international company) that should be regulated by a sense of moral responsibility—we should be able to hold some agent accountable for the harms done by the toxic waste dumping, and we should be able to say that this agent is responsible for addressing these harms. We want for these problems to be addressed. The problem is that under a restricted, individualistic conception of responsibility, nobody's held responsible for addressing these kinds of harms. Pointing a finger at individual agents seems unjustified because, under the circumstances, individuals seem justified in their individual actions. The individual actions of the individual buying bread, the individuals working at the chemical corporation, and the individual government agents representing the small African company all seem reasonably justified under the circumstances. With a broadened understanding of responsibility where institutions are held responsible, we can point a finger at institutions for creating such a disastrous state of affairs, and we can hold the institutions responsible for changing the state of affairs. In the case of the toxic waste dump, we can perhaps name several responsible institutions—the international legal institution for allowing corporations to unsafely dump toxic waste, world health and aid organizations for allowing a country to be so vulnerable that the country is motivated to sacrifice the health of its citizens and ecosystem for a small economic investment, the state of the African country itself for allowing

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<sup>131</sup> Green (2002): 86.

itself to be in such a vulnerable position, and the chemical corporation for dumping waste in an area where the negative effects on the population were predictable.<sup>132</sup>

Of course, we can't say that institutional action has nothing to do with individual actions. Institutional action involves individual action, but not merely individual action. It requires individual action within and in accordance with a large institutional structure that is guided by the overall aims and purposes of the institution. The institutional structure is what makes each small individual contribution part of the large-scale approach to addressing (or causing) a problem. When we hold an institution responsible for a harmful consequence, we are saying that the larger institutional structure (that directs and organizes individuals' actions) is the cause of the harmful consequence.

An advantage to including institutions as morally responsible agents is that this is already a part of our way of thinking about responsibility. Scheffler states that an alternative to the restricted, individualistic conception of responsibility "would need, at a minimum, to be capable of being internalized and of coming to function as a guide to everyday thought and action." In order for a broadened conception of responsibility to motivate change such that the problems caused by large-scale social interactions are addressed, this broadened conception must be capable of being internalized by the general populace. We already incorporate institutional responsibility into our conception of normative responsibility. We commonly blame institutions as well as individuals for certain outcomes. We blame state and federal governments if our schools perform poorly. Opponents to the war in Iraq blame the United States for the war. The Catholic Northern Irish blame Britain for what

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<sup>132</sup> Holding institutions responsible does not involve giving individuals a 'get out of jail free' card. Individuals can still be held responsible for their individual actions that, under a restricted, individualistic conception of responsibility, contribute to the harmful consequence.

they regard as imperialist colonization. We also partly blame individuals for these consequences. We blame mayors that divert school funds away from schools; we blame George Bush for inciting the Americans to war in Iraq. But part of the blame is directed at the institution itself because the individual actors are empowered by the institutional structures within which they are acting.

This broadened conception of responsibility that includes states as responsible agents functions as a guide for individuals. We vote against government agents that tend to take the institution in directions that fail to meet the institutional obligations. Individuals want to be a part of a state that meets its moral responsibilities, and individuals direct their political participation to shape the state such that it meets its obligations.

So far I have argued that the commonsense conception of responsibility as restricted to individuals fails to regulate large-scale social interactions that are the cause of much global harm today. By considering institutions to be morally responsible agents, we broaden the commonsense conception of moral responsibility. As applied to institutions, this conception of responsibility is less restrictive because institutions have greater powers than individuals. Institutions can be held responsible for addressing problems for which, under the restricted, individualistic conception of commonsense responsibility, we cannot hold individuals responsible.

In the following two sections I discuss a limitation of this argument. I discuss the challenge that individuals are the agents who are ultimately responsible for institutional actions and structure.

### **C. Limitation: Individuals are Ultimately Responsible**

One challenge to the view of institutional responsibility is the argument that individuals are ultimately responsible for causing harms. Institutions are only groups of individual actors after all, and those individual actors are responsible for making the institutions what they are. I think this is probably right. At first blush, it looks like the view of institutional responsibility has difficulty taking this fact into account. There is a lot of theoretical work to be done to connect individual responsibility to institutional responsibility in a way that preserves the concept of institutional responsibility.

In this section I consider one possible way to explain the connection between individual and institutional responsibility. This view comes from Thomas Pogge. Pogge argues that individuals are ultimately responsible for the harms resulting from their actions even if (or specifically because) the harms are the result of large-scale, complex state of affairs. Pogge's approach is to hold individual's ultimately responsible for institutional actions. This view makes the commonsense conception of responsibility less restrictive by expanding the actions and consequences for which individuals should be held responsible. Under Pogge's view, the person buying bread is responsible for the effects of the toxic waste dump in Africa because she participated in the institutional structures that caused the harms.

I argue that Pogge's approach is not a helpful way to connect individual responsibility to institutional responsibility because Pogge's view continues to suffer the same problems as Scheffler's commonsense conception of responsibility.

Thomas Pogge argues that we can hold individuals responsible for human rights violations committed globally through collective, institutional action. Pogge contends that individuals, through their institutions, have extensive negative duties to protect human rights

abroad. Generally, negative rights are understood by reference to their negative correlative obligations. Negative obligations are obligations of inaction. A negative obligation requires that a person(s) refrain from acting in a certain way towards the right-holder. The right not to be tortured is a negative right held by all humans. It places a correlative obligation on all others to refrain from acting in a certain way, i.e., to refrain from torturing other humans. With respect to political institutions, a negative right is a freedom to control the use of certain objects and to hold and act on certain values with regard to which political institutions should not intervene. Negative rights and obligations are contrasted with positive rights and obligations. Positive rights have correlative positive obligations. Positive obligations are obligations to act. A positive obligation requires that a person(s) actively provide access to the object of the right to the right-holder.

Pogge argues for the position that individuals, through their institutions, have extensive negative duties to protect human rights abroad by introducing the distinction between an interactive and an institutional approach to human rights. An *interactive* approach postulates certain principles of ethics that refer to the actions and attitudes of individuals. These principles serve as ground rules for the interaction of individuals. An *institutional* approach, by contrast, postulates certain principles of justice. These principles serve as ground rules for institutional organization.<sup>133</sup> Human rights, Pogge asserts, should primarily be understood as institutional. He states that he conceives “of human rights as furnishing a primary a criterion of justice, which assesses a global institutional framework as being the more unjust the less protective of human rights it is on the whole.”<sup>134</sup> He continues:

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<sup>133</sup> Pogge (1992): 90.

<sup>134</sup> Pogge (1992): 90.

On the institutional view, human rights impose constraints upon shared practices, and direct responsibility for their fulfillment thus rests with institutional schemes. Here the responsibility of persons is then indirect: a shared responsibility for the justice of any practices one supports. One ought not to participate in an unjust institutional scheme (violative of human rights) without making reasonable efforts to aid its victims and to promote institutional reform.<sup>135</sup>

The institutional approach to human rights imposes a negative duty on individuals to not participate in unjust institutions. Pogge finds this approach to human rights appealing because it presents a way to connect the rich and mighty—who are significant players in upholding institutions that commit human rights violations, but do not directly commit the violations themselves—to a moral responsibility for those violations. Also, this approach gives all persons who actively participate in unjust institutions a moral responsibility to abandon or to change those institutions.

Responsibility for a person's human rights falls on all and only those who participate with this person in the same social system. It is their responsibility, collectively to structure this system so that all its participants have secure access to the objects of their human rights. ... The most remarkable feature of this institutional understanding is that it can go well beyond minimalist libertarianism without denying its central tenet: that human rights entail only negative duties. The normative force of others' human rights for me is that I must not help uphold and impose upon them coercive social institutions under which they do not have secure access to the objects of their human rights. I would be violating this duty if, through my participation, I helped sustain a social order in which such access is not secure, in which blacks are enslaved, women disenfranchised, or servants mistreated, for example. Even if I owned no slaves or employed no servants myself, I would still share responsibility: by contributing my labor to the society's economy, my taxes to its governments, and so forth.<sup>136</sup>

A central feature of this approach to human rights is the acknowledgment of what Scheffler calls the global perspective, the fact that many harms today are the result of large-scale social

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<sup>135</sup> Pogge (1992): 91.

<sup>136</sup> Pogge (2002): 66.

interactions. Pogge's view focuses on the institutional role of global human rights violations, and, on the institutional view, individual responsibility for global human rights violations are explained by the individual's participation in an unjust institution.

Under Pogge's collective responsibility understanding of institutional human rights violations, all participants in the same social system are responsible for the human rights violation. If an institution causes human rights violations, then every participant in that institution is responsible for those human rights violations. Pogge's institutional approach to human rights makes each participating member of an institution responsible for that institution's human rights record. Participants in the institution are responsible for institutional harm to other members because, according to Pogge, it is their actions that sustain the institution. Individual participants (taxpayers, legislators, tolerators, consumers, voters, etc.) build and sustain institutions. It is only through individual support that the systemic reinforcement of human rights violations continues. When a coercive institution fails to provide secure access to the objects of human rights to some of its members, then the individual participants who sustain the institution violate the negative rights of those members not to be harmed. The individual participants are responsible for the human rights violations.

If we accept Pogge's theory, then we can establish that all individuals have are responsible for the desperate circumstances of the world's poor. We are all members of global institutions through our membership in separate states. The actions of individual members of states, are constitutive of the actions and policies of the states themselves and of the international institutions that states construct. If the global institutions are arranged so that some of the world's population do not have secure access to the object of human rights,

then the individual players in the institutions because they constitute the institution have a negative duty to abandon or to change the institution.

Under Pogge's view, although focus is on the role of the institution in providing secure access to the objects of our human rights, it is the individual members of the institution, and not the institution itself, who are responsible for human rights violations.<sup>137</sup> This understanding of Pogge's theory raises several problems. In particular, it raises the questions: Are people blameworthy for merely being participating members of an institution? If so, how blameworthy are they? Pogge's theory has difficulty responding to these questions because his view of responsibility fails to account for the complexities of individual contributions to the causal chains of institutional action and the limited powers of the individual.

According to Pogge's view, each participating member of an institution has a moral responsibility for at least some of the actions of that institution, in particular those actions that effectively keep others from having secure access to the objects of basic human rights. What is meant by 'participating member' is difficult to discern. Certainly it includes individuals that effectively support the institution. One may privately hate their state institutions, but by paying her taxes and participating in the economy, she effectively supports her state institutions. She is a participating member. The label ostensibly does not extend to those who are coerced to effectively support the institution. Slaves practically support their oppressive institutions by providing labor upon which the institution depends.

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<sup>137</sup> Notice, for instance, on Pogge's view current generations are not held responsible for what past generations have done, even if they are members of the same institution. There is no barrier to assigning blame for past harms to the morally responsible party. In this case, if the institution is morally responsible, then the institution, including its current members, would be morally blameworthy. The problem with assigning responsibility for harms committed in the distant past occurs when individuals are assigned responsibility, and these individuals are no longer alive.

Yet, given that Pogge uses the term ‘participating member’ to denote moral responsibility, and given that persons acting under coercion are usually not held morally responsible for their actions, I will not include these individuals as participating members. As it stands the label ‘participating member’ applies to most citizens of most countries.<sup>138</sup> What is difficult to understand, then, is how each participating member of a state is responsible for each human rights violation supported (directly or indirectly) by the state. On Pogge’s view, for example, I am morally responsible for the rape and murder of a village woman in Guatemala by militias because I am a participating member of an institution, the U.S., who effectively supported the government of Guatemala at the time.<sup>139</sup>

Obviously, I am not blameworthy for the rape and murder of this woman in the traditional sense of blameworthy. I did not commit the acts. I did not order the acts. I did not stand by and allow them to happen when I could have intervened. I did not even know about the acts until many years after they occurred. Despite these facts, if I am still somehow morally blameworthy for the acts, then there must be another explanation. Pogge contends that individual responsibility for the harms of institutions can be explained by dividing the harm done by the institution by the number of participating individual members. The resulting number is the amount of harm for which each participating individual member is responsible.<sup>140</sup>

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<sup>138</sup> The subject of who is a participating member is an important and interesting discussion that Pogge must tackle. For example, would a person who works in a sweat shop be a participating member in the institution of sweatshops? What kind of coercion counts as coercion that alleviates one’s moral responsibility for the actions of the institution? I leave these interesting questions for another day.

<sup>139</sup> Pogge has agreed with this claim via personal correspondence.

<sup>140</sup> Pogge refers to Parfit’s theory of collective responsibility in a personal correspondence. See Parfit (1984), chapter 3.

The problem with Pogge's assessment of individual responsibility is that it fails to take into account ethical distance.<sup>141</sup> Gregory Mellema calls ethical distance, "the issue of the distance between the moral agent and a state of affairs which has occurred."<sup>142</sup> Moral responsibility and ethical distance are inversely related. The more one is ethically distant from an act, the less they are morally responsible for that act. Mellema uses the concept of ethical distance to explain how we can hold several people responsible for the same wrongful act, even though we do not hold them equally responsible. This concept also can explain how participating members of a collective are responsible for harmful acts merely by virtue of their participation even though they were not directly responsible for the harm itself. Suppose the members of my private club vote to embark upon illegal activities to supplement the club's revenue. I vote against the proposal, but I am outvoted, and the illegal activities commence with the result of extra revenue for the club. I do not commit the illegal activities. But I remain a participating member of the club, and I do nothing to stop the illegal activities. Although I am more ethically distant from the crimes than the members who directly carry them out, I am still responsible for the crimes because, as a participating member, I share part in the collective responsibility for the club's actions.

It is more difficult to implicate me in the rape and murder of the Guatemalan. Pogge's theory is committed to the position that I am morally responsible for this human rights violation. If I am not responsible and other members of the institution of the United States are not responsible for these violations, then it will be difficult to establish that the

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<sup>141</sup> There are ethical theories that do not endorse the concept of ethical distance, per se. Utilitarianism is one such theory. However since Pogge intends for his theory to incorporate commonsensical ideas about responsibility, and the idea of ethical distance applies to these ideas, I will assume that the idea of ethical distance applies to Pogge's view.

<sup>142</sup> Mellema (2003): 125.

U.S. as an institution is responsible for this violation, since the U.S. obligations are merely derived from the obligations of its members.

According to Pogge, I may not have committed the acts of rape and murder myself, but I participated in the institution that made the acts possible and perhaps even benefited from these acts. On the basis of my participation in the institution alone, although I am (very) ethically distant from the acts, I am still responsible for the acts (although much less so than the persons who ordered and committed the acts.) I share responsibility with all of the other participating members in the institution.

Pogge's position seems implausible. It is possible of the group to be held responsible without holding all of its participants individually responsible. It is possible for some members of a group to commit a wrongful act without all other participating members of the same group being held morally responsible for that act. The janitors at Enron, for example, should not be held responsible for the transgressions of the management of Enron, even though the janitors were participating members of the corporate institution.<sup>143</sup> We can see why this is by examining various hypothetical cases describing possible actions by the janitor.

*Janitor (1)* · The janitor intentionally acted to bring about unethical Enron accounting practices. Like Dilbert's garbage man, the janitor expertly advised upper management on deceptive accounting practices.

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<sup>143</sup> There may be a case for making a distinction between the members of an institution who contribute to the decision-making of the institution and those members who contribute to the well-functioning of the institution. This option might be worth pursuing. However, on Pogge's view at least, both kinds of participation make one responsible for the institution's actions because both kinds of participating members has the ability to change the function of the institution.

*Janitor (2)* · The janitor knowingly disposed of documents that contained damaging information for Enron.

*Janitor (3)* · The janitor knew of the management's unethical practices and did nothing to aid or prevent it.

*Janitor (4)* · The janitor did not know of but suspected the management's unethical practices and did nothing to aid or prevent it.

*Janitor (5)* · The janitor had no knowledge or suspicion of the management's unethical practices.

In each of these cases, the janitor, by Pogge's description, is a participating member of Enron. His job performance is important to the effective functioning of the corporation. Moreover, in each case the janitor benefits from the unethical practices, because the unethical practices allowed him to keep a steady job with decent pay (--assume he retired or changed jobs before the downfall of Enron.) In each case the janitor is part of the collective that brought about an undesirable state of affairs. We would not say, however, that in each case the janitor is morally blameworthy for the unethical transgressions of Enron's management. Collective responsibility and assignment of blame do not always coincide.

Perhaps the example is best served by imagining a series of concentric circles of collective responsibility. The center circle holds those who deserve the most blame. The succeeding circles hold those who deserve less or perhaps no blame, and the blame diminishes the farther the circles are from the center. Those freely, actively, and directly causing the harm are in the center circle. These persons include the upper management of Enron who devised and carried out deceptive accounting practices. The next circle(s) includes those encouraging or advising the management to commit these acts and those who

freely and actively perform acts that support the primary unethical acts. Janitor (1) and Janitor (2) are included here. The following circle includes those who know of the acts but do nothing to try to stop them. Janitor (3) is in this circle. The next circles include those who have no knowledge of the unethical actions but are suspicious. Janitor (4) is in this circle. The final circle includes those who neither have knowledge nor suspicions. Janitor (5) is here. It is difficult to make the case that Janitor (4) is morally blameworthy for the resulting state of affairs, and it is almost impossible to make a case that Janitor (5) is morally blameworthy. Even though Janitor (5) shares in the collective responsibility for the resulting state of affairs, he has not done anything for which we can hold him morally accountable with respect to the management's unethical accounting practices.<sup>144</sup>

Compare the janitor case to the case of participating members of an international institution that does not provide secure access to the objects of human rights to each of its citizens. In which circle do the citizens of the world belong? Obviously, the answer is going to vary greatly from person to person because different people have different roles to play in different institutions. The answer is further complicated by the fact that individuals are generally considered to be members of states and not participating members of a network of international institutions. (We have voting rights in states, not in the international order, e.g.) An analogous Janitor:

*Janitor (6)* · The janitor works for Anderson Consulting, Enron's accounting firm.

He is vaguely familiar with the fact that Enron is an Anderson client, but he has no knowledge of any unethical actions by Anderson in support of Enron's unethical

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<sup>144</sup> This view of ethical distance and collective responsibility is taken from Mellema (2003): 130.

actions. He may have read about Enron's transgressions in the paper, and is vaguely suspicious of Anderson's involvement.

By and large, most people in the world will fall into the same category of collective responsibility as Janitor (6) with regards to the human rights violations committed by foreign nations. If they are even aware of human rights violations in other states, most people do not understand the particulars behind how the actions of their state are connected with the human rights violations by other governments.

It seems that Janitor (6) should be included in a circle either with Janitors (4), or (5) or further from the center than Janitor (5). That is, because of the extreme ethical distance of Janitor (6) from the actions of Enron's management, it is very difficult if not impossible to hold Janitor (6) morally blameworthy for their actions. Here's an interesting feature: if we think that Janitor (6) is as responsible as Janitor (4), then there is some reason to believe that Janitor (6)'s contributions to the overall functioning of the institutions has little or nothing to do with his accountability. That is, his suspicions of wrongdoing and failure to act on them are what make him responsible, not his membership to Anderson. If this is the case, then a participating member with no suspicions of wrongdoing has less responsibility for the wrongdoing than a non-participating member who does have suspicions. Under this understanding, Pogge's view is less broad than he had hoped. Fewer people can be held morally responsible for the actions of their institutions when moral responsibility is limited to negative duties.

Pogge's view seems to be caught in the horns of a dilemma. Either he must stretch the idea of moral responsibility so far that it becomes meaningless (and the janitors 4, 5, and 6 are held blameworthy for the transgressions of the management) or only some members of

the institution are held responsible for the wrongful acts. If the latter is the case, the number of responsible members (people like Janitors (1)-(4), i.e., not the majority of participating members in an institution such as a state), would shrink enough that we would no longer consider the duty to respond to foreign needs as a collective individual duty, since collective duties imply that all (or most) individuals share the duty

Pogge's theory faces another problem of creating perverse incentives for individuals. Because on Pogge's institutional view, collective duties are negative duties, what it takes to satisfy the obligation is unclear. Being a hermit seems to satisfy the obligation. Mounting a revolution seems to satisfy the obligation, given that the revolution will establish a more just set of political institutions. Since these are not realistic options for most of us, and probably not what Pogge has in mind, what does satisfy the obligation? Pogge argues in terms of positive actions to change the institution. But this is not the only action that would satisfy my moral requirement. Ceasing to be a participating member would also satisfy the obligation. If I stopped voting, stopped paying taxes, stopped consuming (within reasonable limits), I would practically cease to be a participating member of the institution. If these forbearances satisfy the obligation, then perhaps this way of thinking about our obligations could create perverse incentives—creating more harm by hobbling a for-the-most-part good institution. Along similar lines, Pogge's theory would demand that Janitor (6) quit his job. This might be morally admirable of Janitor (6), but it is not required, and it might even be seen as foolish—if the janitor acts on only his vague suspicions, and an equally valuable alternative job is not available.

## **D. Conclusion**

I start this chapter by assuming that there are harms today that can be described as global harms. These are harms, such as death and disease caused by unsafe toxic waste dumping, that can be attributed to, at least in part, a global, large-scale social interactions. I assume that these are harms worth addressing. In this chapter I argued that the commonsense conception of responsibility as restricted to individuals fails to regulate large-scale social interactions that are the cause of much global harm today. By considering institutions to be morally responsible agents, we broaden the commonsense conception of moral responsibility. As applied to institutions, this conception of responsibility is less restrictive because institutions have greater powers than individuals. Institutions can be held responsible for addressing problems for which, under the restricted, individualistic conception of commonsense responsibility, we cannot hold individuals responsible.

I also raise a significant limitation of this view, that it has difficulty accounting for the appealing claim that individual agents are ultimately responsible for institutional actions. I discuss Thomas Pogge's attempts to connect individual and institutional responsibility. I think that Pogge's view is flawed in that it faces the same limitations as the restricted, individualist commonsense conception of responsibility; it is ill-equipped to regulate responsibility within large-scale social interactions. I do not think that this is a reason to reject the view of institutional responsibility. I hope to present an opportunity to pursue the complicated relationship between institutions and individuals, and the real ways that they both affect the world.

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