The Emancipatory Potential of Political Consent

by

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Abstract

The subject of this thesis is an analysis and critique of liberal models of people's consent to citizenship in their state, and consideration of whether such consent is obtainable in contemporary liberal states. After consideration of various contemporary and classical liberal models of consent, it is concluded that substantive political consent must be voluntary and intentional, and thus that consent must be expressed rather than tacit. Furthermore, it is argued that for one to consent one must have reasons to believe the state is morally justified, and that for one's consent to be considered free and voluntary, one must be free to dissent and leave one's state. The issues of residents' freedom to dissent and liberal states' moral justification are considered, with the conclusion that many disadvantaged residents are not free to dissent and that there is good cause to believe liberal states are not morally justified. As such, it is concluded that substantive consent is currently unobtainable in contemporary liberal states, and likely to remain so until reforms remedy the problems of the lack of freedom and justification.
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Chapter I - Literature Review & Outline

Introduction

Traditional liberal theory has regarded the consent of at least a majority of citizens as a requirement for the existence of legitimate government and the exercise of power over citizens. However, much liberal theory has also been formulated with a concern not to ‘rock the boat’ (or, perhaps, not to justify the ‘crime’ and anarchy of disobedience) and hence not to question whether or not substantive consent actually exists in a given state, or whether it would be achievable were appropriate processes introduced. In fact, liberals have often failed to address either of the issues involved here: whether or not their account of consent is substantive, and whether their states or other liberal states are or would be consented to under the definition. Nevertheless, these issues are important and deserve attention: models of consent should be substantive, and it would be nice if they were achievable, but there is cause to doubt that existing liberal models are substantive and that substantive consent in existing liberal states is achievable. I intend to investigate these issues in this thesis, by asking two central questions: Do existing liberal models of consent provide a compelling account of the process of consenting to become a member of an existing state or political community\(^1\), and if not what are the central difficulties? And Is substantive consent likely to be achievable in contemporary liberal states?

In framing these questions I am beginning from the assumption that the idea that citizenship is defined by consent is an important and normatively compelling feature of

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\(^1\) I do not use the term ‘political community’ in a value laden sense; rather it is intended as a term encompassing a political domain wider than the state, including the processes and structures of citizenship and civil society. While traditional liberal accounts assume that by becoming citizens people consent merely to the state, I believe it is more appropriate to characterise the process of consent as extending to non-state political actions and structures, including NGOs, trade unions, social movements etc.
liberal theory, since consent is the most convincing (if not only) way that a concern for people’s autonomy and well-being can be reconciled with the coercive effects of membership of a political community. While consent is also a feature of various non-liberal political philosophies, including some republican and aboriginal philosophies, consideration of such alternative frameworks and models of consent is outside the scope of this thesis. Instead, I will begin with the liberal framework and premises and from this will argue that any normatively compelling liberal model of consent must employ a notion of ‘consent’ that involves freedom, i.e. that ‘consenting’ is voluntary and intentional for participants, and that this requires all participants have the practical option of not consenting. What conditions must be met for an act to count as voluntary, intentional and free consent will be explored in later chapters. In addition, I am assuming that the implementation of a compelling model of consent in contemporary liberal states could have significant political effects, since such a voluntarist model of citizenship has significant emancipatory potential for many disadvantaged groups and persons. However, I am not necessarily committed to accepting other features of the liberal framework – indeed, I will argue that establishing a model of consent based on genuine concern for the freedom of disadvantaged groups may require significant alteration of existing liberal models of politics.

While there has been a considerable volume of work on the topic of consent in political theory, I will argue that previous liberal models of consent fail to be normatively compelling, largely because they fail to adequately address the issue of freedom in the process of consent. If one begins from liberal premises regarding people’s freedom, then I believe it is clear that a model of consent cannot be reconcilable with such an account unless the act of consent is understood to be voluntary and intentional, and that any acts
which are not both intentional and genuinely voluntary fail to establish consent. Existing liberal models of consent fail these criteria in at least one of two ways: by conceptualising the act of 'consent' as involuntary, unintentional or both, or by failing to recognise what forms of practical situations and restrictions count as sufficiently free, voluntary and intentional. In particular, I will argue that existing liberal models of consent have failed to take account of the multiple restrictions on freedom to consent facing oppressed or disadvantaged persons, and the fact that these restrictions make adequately free consent impossible for many people in existing liberal societies. As such, it may be the case that the application of a compelling model of consent to actual liberal societies would first require that significant reforms remove many of the restrictions on people's freedom to consent.

Furthermore, I will argue that some of the problematic features of existing liberal accounts of consent vis-à-vis oppressed and disadvantaged persons stem from the confusion of two separable and different questions, namely a) how people become members of a political community, and b) how people acquire obligations to accept and obey the existing laws, features and/or majoritarian demands of a political community. While the two questions are related, it is clear that question a) is prior – we do not need to establish someone's obligations to the existing laws and majoritarian demands of a political community until we have established their membership in the community. There is good reason to believe that membership of a political community need not always involve an obligation to the majoritarian demands of that state or community, as evidenced by constitutional arrangements of minority rights, devolution, federalism, and limited native legislative autonomy. In addition, there may be cases in which a liberal concern for the existence of minimal freedom for disadvantaged persons may require that
minorities are not subject to all of the laws and majoritarian demands of a state or political community. Furthermore, there is a clear distinction between deciding to be a member of a state or political community because the overall advantages outweigh those of leaving, and accepting all the current laws and features. Here, I will argue that the fact that one consents to membership in a political community does not necessarily mean that one accepts or agrees with all the features of the community, and, in particular, that such consent to membership does not legitimize existing arrangements. Furthermore, while membership in a political community obligates one to obey the laws, I will argue that this is a defeasible obligation, i.e. in some situations it may be outweighed by other factors, such as moral obligation. Thus, one might consent to membership in a community despite believing that many of its laws, norms, processes etc are unjust, and work hard to amend such features. Thus, rather than assuming that agreement to join a political community involves a commitment to a specific, predetermined set of beliefs and obligations, I will claim that one might need only to agree upon a minimal set of general values and principles that will govern one's relations with the political community.

Finally, I will argue that most liberal accounts of consent fail to be convincing because they employ classical liberal models of the functions of states and their relationships to citizens, often drawing on Hobbesian and Lockean accounts, and such models are anachronistic. While classical liberal theorists such as Hobbes and Locke conceptualize the state's obligations as consisting largely in the maintenance of order and protection from external threat, most contemporary liberal states have adopted much wider obligations, including the provision of welfare services to the needy, control of the population through migration policies, and significant responsibilities for maintaining a healthy economy. The considerable discrepancies between classical liberal models of the
state-citizen relationship and the realities of contemporary liberal states suggest that a contemporary model of consent may need to deviate from the framework and assumptions of classical liberal models. As such, my analysis of consent will be responsive to the features of contemporary liberal states, rejecting or amending elements of classical liberal theory where necessary.

Despite the flaws of most previous theories of consent, there is good reason to believe that arguments about consent can provide a compelling account of membership of political communities and of political obligation. At a theoretical level, consent remains the normatively compelling solution in liberal theory for reconciling individual freedom and autonomy with the restrictions necessary for political order. At a more practical level, the normative appeal and importance of consent in determining political relationships is widely accepted within liberal theory and in much of the Western world, making it a plausible basis for informing governments’ policies. However, a normatively compelling theory of the membership of political communities based on consent presupposes a definition of consent as actual, voluntary agreement, and that all of the members of that political community have consented, either themselves or through an appointed representative. Since this understanding of consent differs from many of the definitions of ‘consent’ theorists have provided, it may be useful to distinguish between consent used, as it often is, to signify a process that is neither actual nor voluntary, and consent as I will use it, signifying a process that is concrete and voluntary. Thus, in my analysis consent should refer to actual, voluntary agreement; the reasons for this restriction on meaning are briefly explored in the literature review and methodology.
While the reason for employing the concept of consent remains much the same as when it was first invoked by political activists and theorists in the 17th Century, namely to reconcile people’s freedom and autonomy with state authority, the challenges facing consent theory are very different. While early consent theorists feared that an account proposing actual voluntary agreement to state authority would be a prescription for anarchy, history has proven that accounts of consent aimed at maintaining state authority have tended to be theorized in fashions conducive to exclusion, discrimination and subjugation in the name of ‘free choice’. The primary challenges facing contemporary theorists of consent pertain to whether consent theories can maintain substantial normative weight in the face of wide and varied criticisms, including those informed by contemporary liberals, feminists and post-structuralists, whilst being practicable enough to inform action. A successful contemporary theory of consent must find a course between the twin dangers of theorizing ‘consent’ where no free agreement exists, and of theorizing ‘consent’ in a fashion that makes it so difficult to achieve as to be wholly irrelevant to political action.

While my research question is only a limited subset of the general topic of the role of consent within political theory, the topic is of considerable significance to contemporary debates in political theory and public policy. My question is of particular significance to the subjects of the appropriate relations between the wider political community and aboriginal peoples, immigrant populations, refugees, cultural, national and religious minority groups, but is also of significance regarding the claims of women and members of the Queer community. My research aims to inform debates regarding such groups in three ways: firstly, by providing minimum criteria for determining

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2 Including, but not restricted to, Hobbes, Locke and many of the participants at the Putney debates.
whether people have consented to be members of the political communities they occupy; secondly, by providing minimum criteria for determining the legitimacy, normative and political weight of the consent (if any) that occurred; and thirdly by providing a framework for a fair process of consent. The application of a fair process of political consent for disadvantaged groups has the potential to provide a significant degree of political influence and freedom to people for whom such abilities are long overdue.

Literature Review

A vast amount of literature has been written about the term ‘consent’ in political theory, most of which is highly repetitive and irrelevant to the project of theorising substantive consent, due to the tendency within to employ notions of ‘consent’ that are either non-voluntary or hypothetical. In order to make this literature review worthwhile and manageable, I will discuss only a few examples of such theories of ‘consent’ and suggest reasons why all such accounts should be rejected. Furthermore, this literature review is partial in that it discusses only those works written about consent within political theory, and does not attempt to present or summarise the theoretical positions from which many of my criticisms of traditional consent theory are taken, including post-structuralism, feminism and post-colonialism. While accounts of these positions and the tensions and inter-relations among them will certainly be necessary in discussing the principles necessary to establish a compelling contemporary account of consenting to join a political community, the task is too extensive to hope to complete in the context of a Master’s thesis.

The central role of consent in political theory originates with the 17th Century contract theorists, particularly Thomas Hobbes in Leviathan and John Locke in Two
Treatises of Government. While there is some controversy over the precise authorial intentions, the general context of these accounts is clear: both accounts were developed in the period surrounding the English civil war, a conflict fought (at least partially) over the question of the source of governmental legitimacy and political obligation. The particular difficulty that contemporary theorists wrestled with was how to reconcile claims about the natural freedom and equality of men, often grounded in religious teachings, with the need for political authority and control. As contract theorists, Hobbes and Locke theorized that natural freedom and political authority can be mutually compatible if the legitimacy of government derives from the consent of the people, rather than from claims such as the divine right of kings, as Charles I and Sir Robert Filmer argued. However, Hobbes and Locke provide different definitions of ‘consent’, different accounts of how consent occurs and of what people would consent to.

Hobbes provides an account of how political authority could have arisen with the consent of the governed by arguing that the situation prior to the establishment of the state, the ‘state of nature’, was one of continuous conflict and instability in which the bare survival of the citizens was continually threatened. By invoking the disadvantages of this hypothesised ‘state of nature’, Hobbes argues that it would be in the rational self-interest of all citizens to consent to the establishment of a political authority, the ‘sovereign’, who would impose order over all. The understanding of consent that Hobbes proposes here is an unusual and problematic one, since he argues that the act of “covenant” which forms political society and transfers obligations onto the individual is valid even if it occurs under coercion. Furthermore, once such a Sovereign has been

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established the citizens do not have the right to resist its commands or withdraw their consent, whether or not the Sovereign acts in their best interests, since Hobbes believes that their covenant constitutes consent to all of the Sovereign’s acts. Instead, the Sovereign may only be removed if it fails in its tasks of maintaining order and security, for instance in failing to defend the citizen against aggression from other states. While this account introduces the possibility of an original, historical act of consent in establishing the Sovereign, the force of Hobbes’ argument lies in the hypothetical consent he invokes, where the benefits of the security of life ensured by the sovereign clearly outweigh those of the state of nature.

Locke’s account differs in a number of ways, beginning with the very different account of the state of nature. In contrast to Hobbes’ picture of selfish, violent individuals, Locke describes the life of men who live under the Laws of Nature but cooperate and form communities that prescribe a basic form of justice and appropriate actions. Since Locke argues that men are justified in punishing those who violate the Laws of Nature, he believes men can expect reasonable social cooperation and should this fail the society as whole is able to act to defend the wellbeing and property of members. While this conceptualisation of the state of nature does not have the manifest disadvantages of Hobbes’ account, Locke acknowledges that practical difficulties such as disagreements over punishing transgressors might mean that some forms of political authority would be preferable to this social organisation. Here, Locke invokes consent to argue that the means for establishing such legitimate political authority from the state of nature is that of “agreeing together mutually to enter into one Community, and make one

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4 The one exception is one’s natural right to self defence in preserving one’s life, which Hobbes believes to be inalienable.
Body Politic, and that until such an act occurs men remain in the state of nature. In discussing the establishment of a legitimate political community, Locke’s account uses both an historical act of consent and a notion of hypothetical consent. Thus he claims that unless a communal act of consent has occurred then men are still in the state of nature, and to support this he argues that such an act of consent would be the rational choice for men in the state of nature.

However, Locke’s account also allows a role for consent in determining events after the original social contract. For Locke, Hobbes’ Sovereign, an individual with unlimited power over the use of force in maintaining peace, represents the continuation of a state of war rather than civil society. In contrast, he argues “civil society” requires a legislature passing laws for the good of society and a judiciary interpreting these laws:

> Though Men when they enter into Society, give up the Equality, Liberty and Executive Power they had in the State of Nature, into the hands of the Society, to be so far disposed of by the Legislative, as the good of the Society shall require; yet it being only with an intention in every one the better to preserve his Liberty and Property...the power of the Society, or Legislative constituted by them, can never be suppos’d to extend further than the common good.

Locke argues that if the acts of the legislative go beyond furthering the common good, for instance by taking property against men’s consent, then he outlines the right of violent resistance against an unjust government, when the inconveniences of misrule motivate the majority to amend it. Thus, Locke’s account provides room for consent to political authority to be withdrawn, via the opposition of the majority, in cases where the acts of government threatened the public good. The final part of Locke’s argument consists in his claims regarding tacit consent. Here, Locke acknowledges the difficulty posed by the question of whether or not those who encounter a fully formed political

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community have consented to membership, for instance whether a child coming to adulthood within a community has consented to become a member. To answer this question Locke invokes tacit consent, arguing that the receipt of any benefits resulting from the existence of a political authority constitutes tacit consent to that authority and binds one to obedience to it. However, since the benefits of political authority are defined very widely, including factors such as the ownership of any property or use of the roads, then it seems impossible in practice for anyone present in a territorial area governed by such an authority not to be tacitly consenting to it, according to Locke’s definition.

It quickly becomes clear from considering Hobbes’ and Locke’s accounts that they do not deal adequately with the question of how people consent to belong to existing political societies. Initially, both theorists focus on providing accounts of how an act of ‘original consent’ that formed the political society could have occurred, and this question is the centre of both accounts. Arguments like these which focus on an account of historical consent have two important failings. The first of these failings, as argued by David Hume, is that acts of historical consent do not seem to have occurred in any society, let alone in all liberal societies:

Almost all the governments which exist at present, or of which there remains any record in story, have been founded originally, either on usurpation or conquest, or both, without any presence of fair consent or voluntary subjection of the people...it is not justified by history or experience in any age or country of the world.7

The second difficulty is that even if such acts of historical consent have occurred, this does not provide a basis for arguing that the current members of a political community have consented to such membership and the accompanying obligations. Thus, an account of historical consent must be supplemented with further arguments to justify the

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continuation of authority over new members. Hobbes and Locke differ in the ways they resolve the question of how later citizens of that society have consented: while Hobbes' account relies on hypothetical consent, Locke turns to tacit consent. These devices have both been widely employed by subsequent theorists attempting to provide evidence of people's consent to the societies they belong to, but both devices have important, if not fatal, flaws.

The primary objection with regard to the device of hypothetical consent is that it is not an argument based on consent at all, but instead an argument that the situation we are being asked to consent to is a good one. Thus, in Hobbes' account, the claim that citizens hypothetically consent is not a claim that they actually consent, in some fashion, but an argument that for any rational person the rule of the Sovereign is much preferable to the state of nature and thus there are good reasons for consenting to it. This objection has been famously used by Ronald Dworkin to challenge John Rawls' use of hypothetical consent in *A Theory of Justice*: "Hypothetical contracts do not supply an independent argument for the fairness of enforcing their terms. A hypothetical contract is not simply a pale form of an actual contract; it is no contract at all."\(^8\) While Dworkin does not rule out the possibility that one may have good reasons for complying with the terms of a ruling for which hypothetical consent has been claimed, he argues that the device of hypothetical consent does not add any further weight to the reasons for compliance: "My hypothetical consent does not count as a reason, independent of these other reasons, for enforcing the rules against me, as my actual consent would have."\(^9\)

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\(^9\) Ibid., p.18
The difficulties with tacit consent are more numerous and complex. The first, and most obvious, is that it is unreasonable and unconvincing to claim that an act constitutes real consent (whether tacit or not) unless it is voluntary, and it is unrealistic to argue that an act is voluntary if it is unavoidable, or very difficult or costly to avoid. This argument was advanced by Hume, who illustrates his objection with the example of a man shanghaied as a sailor whilst asleep:

Can we seriously say that a poor peasant or artisan has a free choice to leave his country when he knows no foreign language or manners, and lives, from day to day, by the small wages which he acquires? We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean and perish the moment he leaves her.¹⁰

Hume argues that the man cannot be interpreted as tacitly consenting to his imprisonment if, upon awaking, he chooses to remain on board the ship rather than taking the only escape route, that of diving overboard to drown. In contemporary terms, this objection may be described as the ‘lack of freedom defence’, and extends to many situations other than that referred to by Hume. For example, Harry Beran’s list of the most important conditions constituting a lack of freedom defence includes coercion, “undue influence”, “post-hypnotic suggestion”, and “exploitation of the promiser’s predicament”¹¹. The lack of freedom defence (although not necessarily Beran’s precise formulation of it) is widely accepted by liberals, and is usually taken as a conclusive reason to reject arguments such as Locke’s formulation of tacit consent and Hobbes’ claim that consent is binding even if obtained under coercion.

The second major objection, raised by a number of theorists including, A. John Simmons and Beran, is that it is implausible to regard an action as an act of consent

¹⁰ David Hume, Of the Original Contract, p5
unless the person committing the act knows and intends that their action will be interpreted in that fashion. This objection stems from the claims that “consent” is voluntary (see lack of freedom defence) and that most actions have more than one plausible interpretation. Given the existence of multiple plausible interpretations of what is meant by an action, it is possible that actions might be interpreted as signifying consent even if they were not intended to signify consent and, indeed, the actor might not consent. As a result, it seems possible that theories of tacit consent are liable to see ‘consent’ where no real consent (ie. voluntary agreement) exists, or as Simmons comments:

Locke’s notion of tacit consent undermines the whole point of consent theory. For Locke allows that tacit consent can be given by mere residence, for instance, apparently without conscious choice; such a consent theory can in no way be consistent with Locke’s affirmation of our natural freedom to choose where our allegiance will lie.12

In order to avoid such a situation, it seems necessary to restrict judgements about tacit consent to actions that are not liable to such mis-interpretations, and Beran suggests a set of conditions necessary for an action to be interpreted as tacit consent:

1) The situation is such that consent or dissent by certain persons is required. 2) Absence of dissent by these persons by a certain time counts as consent. 3) Dissent is possible for these persons and its expression is not unreasonably difficult. 4) There are no conditions which defeat the claim that such silence counts as consent. 5) The potential consenters / dissenters are aware that conditions 1) to 4) obtain.13

Beran believes that it is possible for people’s decisions whether or not to consent to membership in a state to meet these conditions, and argues that the conventions might be met if a convention existed to the effect that continuing to reside in your native state after reaching adulthood would constitute tacit consent to membership.

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13 Harry Beran, The Consent Theory of Political Obligation, p.8
These objections have not been universally accepted since some theorists, whom Beran terms 'status quo' consent theorists, wish to defend the legitimacy of contemporary liberal democracies by calling upon the tacit consent of the citizenry through acts such as voting, or even through the right to vote (ie. that since one possesses the right to vote one thus tacitly consents unless one uses this right to amend the state). Even if the claim that voting signifies tacit consent is accepted, then the argument that contemporary liberal democracies are legitimized by citizens consent through voting is problematic – for a start, considerable numbers of people never vote, while some vote in some elections but not others, which presumably means that citizens may consent to different degrees or to some but not all state processes, while many do not consent at all. Furthermore, Simmons argues that any consent that occurs is very specific and limited: “One would have to assume that since what is typically voted for is a candidate for a political office of limited term, consent is given only to the authority of that candidate for that term.”14 Thus, insofar as voting can be interpreted as tacit consent it does not seem to be consent to the authority of the state as a whole, and it is likely that only a minority of citizens have consented to the authority of any person in office.

There is also good reason to believe that voting should not be taken as signifying tacit consent due to the fact that there is significant ambiguity over the meaning of the act of voting in contemporary societies. While some people might vote with the intention of signifying their acceptance of and participation in the state and the democratic process, others might vote in order to express their dissatisfaction with the state or democratic process. Conversely, nonvoting can be plausibly interpreted as signifying either that an individual is content with the status quo, or a statement of opposition and rejection of the

14 A. John Simmons, On The Edge of Anarchy, p.221
prevailing political processes: Simmons' response to the argument that nonvoting signifies consent is damning:

Failing to do something can only be a way of consenting when that activity is in response to a clear choice situation, only when inactivity is significant as indicating that a choice has been made (and, as we will see, not always even then). Inactivity that results from ignorance, habit, inability, or fear will not be a way of consenting to anything. Citizens of modern democracies are not continuously, or even occasionally, presented with situations where their inactivity would represent a clear choice of the status quo.

Drawing on such arguments concerning the inadequacy of accounts of tacit consent, Beran concludes that the minimal conditions for tacit consent to be read as genuine consent to membership of a political society would be if a convention to that effect existed and if a dissenters' territory were created in order that the decision not to consent should entail lower costs. Since he notes that these conditions have not been met by any existing or previous political communities, Beran argues that claims that citizens have tacitly consented to membership in their states are unjustified – while he believes such tacit consent to be possible, in principle, he holds that the conditions for its existence have never occurred in practice. In contrast, Simmons believes that one's decision over membership in a political community can never, even in principle, meet the conditions to qualify as tacit consent. In making this claim, Simmons stresses that there are defeating conditions in such an instance, since one's failure to leave one's state might result from inability to leave, or from a desire to retain one's possessions and relationships in one's current state but merely to reject the role of the state. Thus, Simmons argues that the choice of whether or not to consent to membership and obligate oneself to state authorities should not be conceptualised as a choice between accepting the state or leaving, since there is also the possibility of remaining but rejecting any state role, or consenting only to a different state role. Given this, it is Simmons belief that genuine
consent to membership in a state and acceptance of state authority can only be signified by expressed consent.

A rather different but interesting contribution to the contemporary debate about the purpose and extent of political consent has been made by Jacqueline Stevens in her article 'The Reasonableness of John Locke's Majority: Property Rights, Consent, and Resistance in the Second Treatise'. Contrary to many of the leading interpretations of Locke who see him as defending private property against a poor majority, Stevens argues that Locke is defending the rights of the poor majority against rich minorities. Stevens argues that when Locke is interpreted in this fashion his advocacy of both the right to private property and majoritarian political decision making via consent are consistent, while conventional liberal readings of Locke are at a loss to explain the tensions between his individualistic position on private property and majoritarian position on consent. Interpreting Locke in the context of the aftermath of civil war, Putney debates and Levellers movement, Stevens follows Richard Ashcraft\textsuperscript{15} in reading Locke’s *Second Treatise* as a radical and emancipatory document that claims the political rights and property ownership of poor majorities against the threat of exploitation by rich minorities including the Crown. In defence of this position Stevens cites evidence of the discontent of Parliament and the Putney debates’ participants regarding the Crown’s abuse of taxation, such as ship money, and people’s property in their person, concluding:

Until the early eighteenth century, therefore, references to the people’s right to their property were not justifications of individual property rights against the power of a progressively redistributive state. Rather, pamphlet writers asserted, the King, lords, and those who bought offices should not have the prerogative to take “the people’s” property through taxes, conscription, and practices associated with forced billeting in the counties – particularly when most of the people

targeted for taxation lacked any voice in setting the government’s policies that were essentially robbing them.\textsuperscript{16}

Furthermore, Stevens notes that Locke’s defences of property rights often refer to “the people” rather than to individual persons, implying that “the people” may be the unit of economic analysis, which “suggests the possibility of a progressive economic agenda – assuming that wealth is concentrated”.\textsuperscript{17}

Stevens argues that this concern with protecting ‘the people’ against rich minorities is also the primary concern in Locke’s writings on consent, and that it is this that motivates the majoritarian impulses in his account of consent, since a requirement of universal consent would allow an elite few to frustrate the majority’s wishes for emancipatory reform:

Locke develops the notion that consent does not refer to an individual’s consent, but rather to the consent of the majority. This explains the awkward phrase that qualifies “one’s consent” as the “consent of the majority”: Locke is finessing the Leveller difficulty of facing circumstances when “consent” could be used against them – by a minority Court and lords that would not consent to have their wealth controlled by a popular vote.\textsuperscript{18}

Thus, the characterization of consent to the formation of government, Locke’s formulation of tacit consent, and the requirement of the dissent of a majority to justify rebellion are all techniques to defend the beleaguered many against the wealthy few – in short, Locke uses the device of consent, required by natural freedom and equality, as a tool to further the emancipation of those he perceived to be disadvantaged.

If such a reading of Locke is accepted, and Stevens’ interpretation of Locke’s intentions is compelling, then there is a clear precedent for consent as a tool of emancipation. However, Locke’s formulation of consent seems inappropriate for

\textsuperscript{17} Ibid., p.426
\textsuperscript{18} Ibid., p.436
addressing contemporary social problems since no defence is provided against the ‘tyranny of the majority’, and there is ample evidence regarding the many injustices perpetrated upon unfortunate minorities by majoritarian governments. Furthermore, ‘the people’ or majority is no longer a byword for the poor and disadvantaged, as it was for Locke – instead many of the poor and disadvantaged in Western societies are members of historically oppressed and excluded minority groups, and a high proportion are women (many of whom have been oppressed and excluded despite being a majority by population). A contemporary account of consent as a tool of emancipation would have to address this difficulty, which might be done by according extra weight to the voices of disadvantaged minorities. Such an account must find a way between the Levellers’ difficulty that a requirement of unanimous (or almost unanimous) consent would allow conservative minorities to prevent emancipatory reforms and the threat of the ‘tyranny of the majority’. I propose that such a compromise might be achieved by tempering majoritarianism with a requirement that the basic principles and structures of a political community meet with the agreement of disadvantaged persons and groups – that the actual consent of the disadvantaged be regarded as a test of the legitimacy and justice of a political system.

An attempt to re-characterize political consent and obligation outside the liberal model of decision making has been made by Nancy Hirschmann, who uses feminist analysis to criticize the traditional liberal model of obligation. Hirschmann presents two central critiques of the liberal model: that it relies upon a rationalist and atomistic conception of the individual that is at odds with women’s more connected and emotional life experiences, and that by characterizing obligations as the product of consent it obscures many women’s experiences of non-voluntary obligations. Underlying this
argument is Hirschmann's claim that people may encounter important obligations that they do not voluntarily undertake, and that this problem is particularly acute for women. The example of such obligations that Hirschmann presents is that of a woman who is raped and becomes pregnant, and once pregnant feels that she has moral obligations to care for the child. Drawing upon this example, she argues that characterization of the basis of obligations as voluntary is unrepresentative of women's experiences: "Women's experience suggests that the liberal definition of obligation needs to be broadened to include some non-consensual aspects of life."\(^{19}\)

Hirschmann's argument that a political theory of obligation informed by feminist theory needs to draw upon non-voluntary obligations seems problematic for two important reasons. Firstly, Hirschmann seems to assume that liberal theory applies the consensual model of obligation to all forms and instances of obligation rather than merely applying it to the question of political obligation to the state. In contrast, many liberals would acknowledge that people of both genders experience non-voluntary obligations in their personal lives (although Hirschmann is probably correct that this is more true for women than men), for instance the obligation to care for an ailing parent, but would argue that such obligations are unlikely to be encountered in one's relationship with the state. Secondly, once one considers the limited context in which the liberal model of consensual obligation is applied, namely that of answering why people have an obligation to obey the state, it is not clear that an appeal to non-voluntary forms of obligation is appropriate. My primary concern here is that Hirschmann's argument does not take into account the ways in which present political societies have been structured

by historical processes that have been highly exclusionary and exploitative. One of the primary reasons that current notions of political obligations do not reflect women's experiences is because women have historically been excluded from public life, thus being denied opportunities to participate in or theorize politics. If women's voluntary agreement to historic political processes had been regularly sought then it is arguable that the situations in current political communities would be more responsive to and representative of their experiences. Thus, there is an important degree to which the problem of obligation in current political communities is due to the fact that women's consent (and that of many other historically disadvantaged people) has not been sought or given. Here, the just solution is not to re-characterize obligation to unjust contemporary states on a non-consensual model, but to reform the political principles and structures in such a fashion that women's consent is both sought and likely to be given.

In *The Sexual Contract*, Carole Pateman advances similar criticisms of the failure to include women's consent in political societies and hence liberal accounts of consent theory. Pateman's thesis is that the reason why women's concerns and experiences are not reflected in liberal theories of political consent is because classical theorists assumed the Social Contract rested upon a prior structure that she names the "sexual contract". Pateman explains how the early contract theorists' arguments deny women's possession of the capacities and attributes of 'individuals', naturalize gender roles through their use of the 'state of nature' and then institutionalize these roles in their account of civil society. Women's concerns are thus equated with the marriage contract and relegated to the private realm, outside the public sphere of civil society to which theories of consent apply. As a result: "Women are not party to the original contract through which men transform their natural freedom into the security of civil freedom. Women are the subject
of the contract.” Pateman explores the way that this inherited separation of public and private spheres has structured liberal political theory and consequently societies informed by liberal principles, institutionalizing patriarchy in a fashion that continues to the present day. While *The Sexual Contract* is primarily a critical analysis, in the conclusion Pateman advances a few recommendations about what form a political theory of consent and obligation should take. These recommendations include rejection of both the model of the liberal ‘individual’ and the model of ‘femininity as subordination’, in favour of a model that acknowledges sex and gender in order to create autonomous citizens. Pateman rejects all accounts referring to an ‘original’ act of contract in favour of a theory proposing free agreement as a basis for political order:

> If political relations are to lose all resemblance to slavery, free women and men must willingly agree to uphold the social conditions of their autonomy. That is to say, they must agree to uphold limits. Freedom requires order and order requires limits.

Finally, the question of consent to membership in a political community is briefly addressed by Will Kymlicka in his book *Multicultural Citizenship*. Kymlicka’s account differs from most of the others presented since he pays little attention to consent or obligation, instead discussing the question of how the claims of cultural minorities should be treated within liberal societies. Kymlicka begins from the premise that the reason for supporting the claims of cultural minority groups is because some respect and concern for individuals’ culture is necessary for them to live the free and equal lives that liberalism supports:

> We have here the two major claims that underlie a liberal defence of minority rights: that individual freedom is tied in some important way to membership in

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one’s national group; and that group specific rights can promote equality between the minority and majority.\textsuperscript{23}

In determining how these claims apply to different instances, Kymlicka begins by distinguishing between two different types of minority cultural groups: ‘poly-ethnic immigrant groups’ and ‘national minorities’. He asserts that these two forms of cultural groups have significant differences, including factors such as the number of people, their geographical cohesiveness, and the type of claims made, such as whether or not they claim a right to speak their minority language.

However, consent is one of the significant factors in Kymlicka’s assumptions about the normative weight of the claims of immigrant groups, since he assumes that almost all immigration is voluntary and that by moving to another political community immigrants voluntarily relinquish many of the political rights they might have expected as members of a ‘national culture’. Thus, Kymlicka believes that the process of immigration involves consent to giving up some elements of immigrants’ culture, particularly if it conflicts with liberal political culture:

Most immigrants (as distinct from refugees) choose to leave their own culture. They have uprooted themselves, and they know when they come that their success, and that of their children, depends on integrating into the institutions of English-speaking society...In deciding to uproot themselves, immigrants voluntarily relinquish some of the rights that go along with their original national membership.\textsuperscript{24}

This appeal to ‘consent’ is thus a way of grounding his argument that immigrants require and deserve less support for their cultural difference than ‘national minorities’:

There are many ways that special efforts should be made to accommodate the cultural differences of immigrants. But all of these measures take the form of adapting the institutions and practices of the mainstream society so as to accommodate ethnic differences, not of setting up a separate societal culture.\textsuperscript{25}

\textsuperscript{23} Will Kymlicka (1996) \textit{Multicultural Citizenship}, Oxford University Press, Oxford. p.52
\textsuperscript{24} \textit{Ibid.}, p.95-6
\textsuperscript{25} \textit{Ibid.}, p.97
Kymlicka's account has a number of serious flaws. The first of these is his adherence to a model of liberal individualism that has been modified only slightly from traditional models by the claim that individuals need access to their 'culture'—where 'culture' is conceived in abstract terms of values and beliefs. This liberal individualism is problematic from both feminist and multicultural perspectives since it fails to take into account the fact that people have important familial, social and religious ties to one another, making it unlikely that they will make important decisions without wide consultation. In many cases someone's decision to migrate may be dependent upon a consensus decision being reached among their family group, or upon the knowledge that appropriate social and religious communities, with practices similar to those in their 'home' environment, exist in the destination country. Therefore, it seems unlikely that an adequate picture of the nature and importance of culture and the related forms of consent can be arrived at using an atomistic account of the individual.

The second major flaw in Kymlicka's account is his assumption that both immigration and surrender of one's cultural practices are consensual. While he acknowledges that some people migrate as 'refugees', he does not seem to recognise the scale of the problem—that millions of people in contemporary and historical contexts have moved in order to avoid war, persecution, disease and famine, let alone the 'economic migrants' who move in search of a reasonable minimal standard of living. Whether or not such people are officially classified as 'refugees', their decision to move cannot be characterized as voluntary in the face of 'lack of freedom' conditions such as those described by Hume and Beran. If the decision to migrate under such conditions is not 'voluntary' in any meaningful sense of the word, then the accompanying
abandonment of many of one's cultural practices cannot be characterized as voluntary either. Furthermore, even where migration is voluntary it is not clear that it is reasonable to regard people's decision to move as an act of consent to abandon their cultural practices. Since no such explicit convention or legal condition exists, immigrants are unlikely to have realised that such a act was involved, thus we cannot interpret their decision to move as tacit consent to surrendering their practices. Even if a convention or legal condition did exist there is good reason to believe it would not be reasonable, since cultural beliefs and practices are an important component of a person's identity and relations to others, which it may be impossible or intolerably difficult for them to give up.

Finally, Kymlicka's account fails because it does not take into account the historical conditions and events that have led to the current status quo, which in many cases is an important factor in evaluating the claims of minority cultural groups. This is significant, because analysis of historical events makes it clear that many cultural minority groups, such as First Nations peoples, have not only not consented to membership in the political communities surrounding them and the political structures within which their claims are being considered, but have also been subject to processes of political exploitation, exclusion and intimidation. In such cases there may be a strong case for providing reparation for past injustices, thus giving extra weight to the claims of historically disadvantaged cultural groups. In the absence of such an effort towards reparation then it is doubtful that any meaningful process of negotiation over political reform could be established since the dependence of many First Nations peoples on state financial support would constitute a 'lack of freedom' defence. This objection has been notably made by anti-colonial theorist Frantz Fanon:
European opulence is literally scandalous, for it has been founded on slavery, it has been nourished with the blood of slaves and it comes directly from the soil and from the subsoil of the underdeveloped world. The apotheosis of independence is transformed into the curse of independence, and the colonial power through its immense resources of coercion condemns the young nation to regression. In plain words, the colonial power says: 'Since you want independence, take it and starve.'

Furthermore, in assuming that cultural minority groups should remain within existing states, Kymlicka does not seem to consider whether groups who have not consented to membership should be given the option of either joining or establishing an independent political community of their own, without restrictive conditions imposed by the wider political community. Historical disadvantage may affect the claims of numerous people in numerous ways that cannot be explored here, but it should be a major consideration in determining how claims are posed and evaluated.

Structure of Argument

In this thesis I intend to explore the conditions and criteria necessary for a substantive account of consent, and investigate whether and to what degree these criteria can be met in contemporary liberal states. In Chapter 2 I will analyse the conditions and criteria for substantive consent, by focusing on the critiques and proposed amendments to classical liberal consent theory provided by Harry Beran and A. John Simmons, both of whom are concerned to establish a model of consent that is intentional and voluntary, and to explain the role of moral and prudential judgements in determining one's obligations and decision to consent. Here, I will argue that a substantive account of consent should adopt the distinction between justification and legitimacy that Beran and Simmons both propose, where justification refers to whether or not a state is morally and prudentially a

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good thing overall and provides the reasons for one’s consent or dissent, and legitimacy refers to whether or not residents have consented to citizenship in the state. Within this framework, the achievement of residents’ free consent to citizenship involves both the justification and legitimacy of the state. Using this framework, I will investigate the possibility of achieving such free consent in contemporary liberal states by considering both whether residents are ‘free’ to consent or dissent, and whether they have cause to believe the state is justified. The question of residents’ freedom to consent will be addressed in Chapter 3, where I hope to show that material, socio-psychological and discursive restrictions on one’s ability to dissent qualify as restrictions on one’s freedom, and that such restrictions on residents’ freedom to dissent are extremely common (if not ubiquitous) amongst disadvantaged and oppressed groups including women and ethnic or racial minorities. The question of whether or not residents have cause to believe their states to be justified will be addressed in Chapter 4, where I will explore the significant cultural biases, ethnocentrism and colonialism present not only in liberal states but in the ideologies, concepts and structures underlying these states. Drawing upon the experiences of some Canadian-located indigenous peoples, I will argue that the inevitable injustices stemming from the continuing ethnocentrism and colonialism of liberal theory provide cause to believe that liberal states are not morally justified, and thus for residents to withhold consent. Finally, I will conclude that the problems in achieving justification or legitimacy suggest the need for fundamental reform in key elements of liberal theory and states.
Chapter II – Analysis of Contemporary Liberal Consent Theory

Overview

While much liberal theory has been disappointing on the subject of political consent for many of the reasons outlined in the previous chapter, there has been some useful and interesting work in the area. The two liberal theorists who have made significant contributions to developing more substantive and contemporary accounts of consent theory are Harry Beran and A. John Simmons. Beran’s work on consent largely appears in his book *The Consent Theory of Political Obligation*, where his project is to develop a model of political consent that is both normatively compelling and practicable for contemporary liberal democracies. Thus, while Beran provides some analysis of previous consent theories, the main part of his analysis relates to questions about what forms of obligation people owe to states, how to deal with apparent restrictions on people’s freedom to dissent, for instance their inability to leave their state, and whether the state has the right to prevent any citizens from leaving. His argument is that if freedom is taken seriously, as he believes it should be, then people must be able to reject membership in their state and thus be able to leave or to reside as a non-citizen under different rules. In order for this to be possible, he recommends that a dissenters’ territory be created so that potential dissenters are always able to go elsewhere, that territorially concentrated and viably sized populations not be restricted from seceding, and that minorities be allowed to reside without accepting membership:

Liberal democratic theory claims that the state is necessary for the promotion of liberty, justice and human welfare and that political authority is therefore, justified. It also assumes that people are capable of, and therefore, have a right to personal self-determination. It is therefore committed to the claim that the basis of political authority (and political obligation) must be the actual personal consent of those under political authority... The alternatives to accepting membership in the state into which one is born are emigration, secession, movement to a
dissenters’ territory (if such is created) or, if one cannot or does not want to leave one’s state, a public refusal to accept membership.\(^{27}\)

In contrast, Simmons is not presenting a model of how political consent ought to function but merely analysis of and commentary on some of the accounts of consent proposed by others. In *On the Edge Of Anarchy* Simmons focuses on Locke, providing several different interpretations of Locke’s accounts of consent and critiquing each account. However, Simmons has also published papers on authors and problems in consent theory, many of which appear in *Justification and Legitimacy: Essays on Rights and Obligations*. While Simmons’ treatment of consent theory is not as wide-ranging as Beran’s, a number of important issues in consent theory emerge from his analysis. The most important of these is Simmons’ claim, as mentioned in the previous chapter, that one’s failure to leave a state cannot be interpreted as tacit consent to membership. While Simmons pays considerable attention to restrictions on one’s freedom to dissent and overriding conditions, much of the force of this argument lies in his insistence that consent must not be presented as a choice between accepting the state apparatus as it is and leaving – instead, people should have the choice not to leave but to prefer self-provision of services such as protection to accepting obedience to the state. In fact, Simmons’ scepticism about justifications of the state by consent extends beyond this, since Simmons is a philosophical anarchist – he believes that no existing or previous states have been legitimate with reference to their citizens, since their authority has not been founded on consent, and argues that states do not actually deserve such consent. Simmons holds that the reason people would decide to consent to membership in a state is because they believe a state to be justified, ie. that its existence is morally and

\(^{27}\) Harry Beran, *The Consent Theory of Political Obligation*, p.150
practically advantageous, but holds that conclusive arguments in favour of the moral and practical advantages of states over efforts at self-provision have not been made and would be difficult to provide:

We must ask against which baseline we are assessing the benefits political societies provide. It is far too easy to simply gesture at the horrors of a Hobbesian “war of all against all”, concluding that of course all citizens benefit on balance from cooperative political schemes...The relevant baseline of comparison must include the effects of efforts at self-provision of goods like security, efforts that would undoubtedly occur in any realistic non-political situation. And the baseline employed must allow us to factor into the calculated costs of political life not only the obvious costs (eg. taxes, military service, frequently unreasonable restrictions, helplessness in the face of massive impersonal power, etc.), but also the less obvious costs – at least considering seriously the costs of the classical anarchists (among others) that modern states magnify (or even create) much of the alienation and violence that we fear when we imagine life without states.28

However, Simmons also advances a number of other key claims, including his conceptual distinction between the legitimacy and justification of states, and makes a useful distinction between ‘accepting’ or ‘consenting’ to something and merely acquiescing:

It is possible to go along with a cooperative scheme without consenting to it...Consent is not given to a scheme by any behaviour short of express dissent. Most participants in cooperative schemes simply go along with the schemes, taking their benefits and carrying their burdens. But if they do not expressly undertake to support the schemes, and if their behaviour does not constitute a response to a clear choice situation, I do not think we can ascribe consent to them.29

I will use the work of these two theorists to frame my argument with respect to consent, but indicate the ways in which these theories of consent fall short, particularly in relation to historically subordinated minorities. While there are a number of problems remaining in their work, including Beran’s inadequate account of restrictions on one’s ability to leave a state, insufficiently rigorous characterization of the dissenters’ territory

28 A. John Simmons, Justification & Legitimacy p.37-8
29 Ibid., p.17
and a tendency to assume existing liberal states are just, innovations such as Beran’s and Simmons’ distinction between justification and legitimacy pave the way for a more radical, emancipatory account of consent. A number of the more interesting and important issues in Beran’s and Simmons’ accounts will be discussed thematically in order to establish the areas of consent theory requiring further consideration or amendment.

*Freedom & Beran’s ‘Dissenter’s Territory’*

Beran’s discussion of consent in *The Consent Theory of Political Obligation* makes a number of important advances over previous liberal consent theories, of which the most important innovation is the introduction of a dissenter’s territory as a device to remove restrictions upon one’s freedom to leave a state. While Beran begins from fairly classic liberal premises regarding individual rationality and the need for self-determination, he is unusual in taking this requirement to apply to each individual’s relationship with the state:

Normal adults have the capabilities which entitle them to a say in the decisions that determine their political relationships. Therefore, minorities have no right to coerce or deceive majorities into arrangements the latter do not want. And majorities have no right to prevent individuals from emigrating, or territorially concentrated majorities from seceding. With regard to membership, the liberal democratic state must be, as far as possible, a voluntary association. Being born into a particular state should not make us the captives of the state.30

According to this logic, an individual’s membership in a state must be determined by personal consent, rather than merely being take for granted because the individual resides within or was born within that state. However, Beran recognises the problem that one’s consent to membership in one’s state may be invalidated by lack of freedom unless one

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30 Harry Beran, *The Consent Theory of Political Obligation*, p.149
has the realistic option of not consenting to membership. In response to this problem Beran suggests two possible solutions: the first is for one to be resident within a state but without the rights and obligations of citizenship, essentially as a resident alien; the second is to create a dissenters’ territory for those who do not consent to membership. While the concept of resident aliens is a familiar one, a dissenters’ territory is less familiar and thus merits further attention.

Beran suggests the possibility of a dissenters’ territory primarily as a way of accommodating citizens who wish to leave their state but are unable to emigrate since no other state wishes to receive them. However, he also considers that such a territory might be a home for those who “refuse to obey the state in which they live but who are unwilling or unable to leave it” since “a just liberal democratic state may be morally justified in expelling them or moving them to a dissenter’s territory”\(^3\). Beran proposes that such a dissenter’s territory should be “maintained outside the jurisdiction of all states”\(^3\) and that it should be created by “reducing the territories of existing states”\(^3\). But he does not expand upon what such a territory would look like or how it would be organized – how policing and external security would be provided, or how personal or business residents of the territory would obtain rights and recognition abroad. Although this proposal represents an admirable desire to take seriously the restrictions upon people’s abilities to decline membership of their state, it is not clear that the dissenter’s territory that Beran outlines achieves this purpose.

Firstly, it is necessary to know how large this potential territory would be and whether it is capable of accommodating the extremely large numbers of people who

\(^{31}\) Both Harry Beran, *The Consent Theory of Political Obligation*, p.67

\(^{32}\) Ibid., p.59

\(^{33}\) Ibid., p.32
might seek residence there, perhaps including some of the millions currently holding or seeking asylum or refugee status. Is there to be merely one such territory, or are there to be many applying to different people? Secondly, it is necessary to know how this territory will be organized or governed, without being a state, and with a fluid population made up of people of various cultures, religions, languages, beliefs, political ideologies etc. It seems difficult to imagine what form the organisational structure of such a territory would take, but even if one withholds pessimistic predictions of a Hobbesian state of war then it seems likely such a territory would be somewhat anarchic, confusing and unpredictable. Without assurance that such a dissenter's territory would be a reasonably acceptable place to live for all and any people, the lack of freedom difficulty has not been resolved. While it may be that Beran could provide a convincing account of how such a territory would be organised, policed, defended, etc. that would provide such reassurances, the problem remains since he has not done so. In the absence of such reassurances it seems reasonable to assume that moving to a dissenter's territory could be an extremely costly last resort option for many people, and that the question of whether they are thus 'free' to leave may be a difficult one.

Beran's position on the subject of restrictions on one's freedom to leave a state is somewhat contradictory, since, although he defines such restrictions quite widely in his introduction, this account is modified later in the text. Before beginning his analysis Beran provides a conceptual framework in which he lays out a range of defeating conditions under which a promise or agreement cannot be said to have occurred.

34 “1) Lack of freedom defence:
   a) coercion;
   b) undue influence;
   c) post-hypnotic suggestion;
   d) exploitation of promiser's predicament.
This is an extensive list and initially seems a promising one, aside from the potentially discriminatory application of the lack of competence criteria (since such criteria have previously applied by liberals towards the disabled, Queers, aboriginals, those of other cultures and women). However, deeper consideration shows that there are important omissions from this list including a consideration of situations in which one might be, practically speaking, unable to leave or leaving might be exceptionally costly or difficult. Such conditions might be deemed to hold if one were unable to leave due to being extremely poor, or dependent on somebody else for one’s physical or financial wellbeing (for instance if undergoing lifesaving medical treatment provided by the state, or if maintained solely by a state pension), or if one would only have the chance of a full cultural or religious life in one’s native state. These are all hard cases and the problem that emerges here is that of differentiating between an inability to leave, and leaving being a free and available choice albeit costly and difficult.

Beran differentiates between being unfree to leave and leaving simply being difficult and costly by relying on a negative conception of freedom, whereby one is only unfree if someone else has interfered with your action or decision. Beran illustrates his position by taking examples of people liable to die if they do not make a particular decision, and argues that regarding this threat as making one unable to enter agreements would undermine people’s ability to resolve such situations: if we do not take someone’s consent to pay for lifesaving surgery as valid then such surgery might not be performed.

2) Inadequate information defence:
   a) deception;
   b) innocent misrepresentation by the promiser of an important manner relevant to the promise;
   c) gross misunderstanding by the promiser of an important manner relevant to the promise.

3) Lack of competence defence:
   a) insanity of the promiser (or the promisee for that matter);
   b) temporary or permanent mental incapacity of the promiser (eg. complete intoxication or senility);
   c) immaturity of the promiser[0].

Harry Beran, *The Consent Theory of Political Obligation*, p.6-7
and patients would thus die. Beran thus argues that it increases people's freedom if we do not regard such considerations as rendering one unfree:

In short, being able to place oneself under a promissory obligation even when one does not want to and when the only alternative involves a high cost, may still increase the options available to one in a problem-situation. Therefore, in the sense of being 'free' in which the more options one has the more free one is, being able to place oneself under a promissory obligation in situations such as those discussed increases one's freedom. One may conclude, therefore, that the high price involved in not agreeing to do something is not a defeating condition of promising, even if the promise in question is one which one is reluctant to make.35

This argument is unsatisfactory for several reasons, the first of which being that the sense of 'free' that Beran refers to seems an inadequate one. Is one really rendered 'more free' simply by having more 'options', even if those options are profoundly unsatisfactory? Under such an account of freedom a man compelled to choose between being put to death by being shot or stabbed is rendered more free if the additional options of poison, burning and drowning are added. Beran's chosen sense of the word 'free' ignores the fact that freedom also has a positive sense that lies in one's ability to live an adequate, meaningful life, and if such an account of positive freedom or autonomy is considered then a choice between several wholly unacceptable alternatives is not 'free' at all.

This question of how to define free choices is important in evaluating the situations of numerous people in contemporary societies, including those whose leaving is restricted by religious, cultural or familial commitments in addition to those restricted by health or economic factors. If all those facing such pressures, perhaps a majority of the population, were considered unfree in their acts of consent or dissent then it no longer seems useful to argue that most people's membership of the state should be voluntary. Instead we are left with a situation in which all those with restrictions or commitments

are regarded as lacking free will or agency in some sense – a situation that is neither desirable nor realistic. To avoid this difficulty it seems necessary to make a distinction between acts that should be considered unfree and those that are merely extremely difficult or costly. Beran so distinguishes between ‘inability to leave home state’ and ‘the high cost of emigration’, but his account is flawed since it rests upon the type of reason restricting one’s action rather than the degree of restriction posed by that reason. Thus, Beran regards someone as unfree to leave his/her state if the state defines emigration as illegal, since this shows the intervention of an external actor, but he argues that one is not rendered unfree by compelling personal reasons, even if one’s life is at stake. This seems highly counter-intuitive, not only because one may be rendered unfree by personal reasons (see the Humean objection to Locke’s account of tacit consent) but also because one is not necessarily rendered unfree by the intervention of others. Even though a state might make emigration illegal and patrol its borders for would be emigrants, many citizens may nevertheless freely choose to leave their state and do so successfully – there is evidence of such acts in the former Soviet Union and in examples such as the Dalai Lama’s flight from Tibet. Given this we must distinguish between choices and actions that are unfree and those that are merely very costly and difficult on the basis of the strength rather than type of reason involved. However, it seems most realistic to conceptualise restrictions on one’s freedom of decision as a matter of degree rather than drawing a binary distinction between ‘free’ and ‘unfree’ actions. Judgements as to whether the restrictions are sufficient that an actor may be spoken of as unacceptably unfree in a certain situation may then have to be made on a case by case basis.

The question of exit rights and what constitutes substantive rather than merely formal freedom to leave has attracted some attention from liberal theorists in recent
years, although the question has usually been considered in contexts such as cultural groups rather than one’s decision to consent to a state or political community. However, many of the conclusions regarding exit rights of membership to cultural minority groups are applicable to cases where exit rights to liberal states and communities are considered. The liberal literature on exit rights embodies a conviction that individuals should be free to leave a group of which they are a member and that this right to leave should override any rights of the group. Many theorists then argue that if such rights of exit exist, individuals are free to either be part of a group or to decline membership; if they continue to be group members they clearly accept the conditions of group membership. From this it may be reasoned that members are not being oppressed or coerced since they have voluntarily accepted the conditions of group membership, which they would not have done if they found these conditions unduly oppressive. In contrast, other theorists express concerns that practical restrictions upon individuals’ ability to leave may render them unfree to leave even in the presence of formal exit rights. If so, it is argued individuals may be unable to defend themselves against the decisions of the group, even when these decisions are oppressive or unjust. While I will not attempt to analyze these issues here, more in-depth analysis of debates regarding exit rights and the case of women is provided in Chapter Three.

However, in deciding whether or not a person or group of people are free to consent or dissent to membership in a state we must first have a working definition of freedom and what constitutes unfreedom or restrictions on freedom. I have already criticized Beran’s definition of restrictions on one’s freedom to decide whether or not to be a member of a state on the grounds that he employs a conception of negative freedom whereby one is free unless prevented from undertaking an action by the intervention of
another person, or perhaps the state. Instead, I will employ a slightly different definition of freedom as non-interference, or negative freedom, that of Isaiah Berlin:

Political liberty in this sense is simply the area within which a man can act unobstructed by others. If I am prevented by others from doing what I could otherwise do, I am to that degree unfree; and if this area is contracted by other men beyond a certain minimum, I can be described as being coerced, or, it may be, enslaved...By being free in this sense I mean not being interfered with by others. The wider the area of non-interference the wider my freedom.36

Berlin also provides an amended and slightly more sophisticated definition that brings out more of the features of a substantive account of liberty, including an acknowledgement that some freedoms are more important than others in terms of their impact one one’s life possibilities and wellbeing:

The extent of a man’s negative liberty is, as it were, a function of what doors, and how many, are open to him; upon what prospects they open; and how open they are. This formula must not be pressed too far, for not all doors are of equal importance, inasmuch as the paths on which they open vary in the opportunities they offer.37

Additionally, Berlin notes that one’s freedom is restricted not only when one is prevented from doing something that one wants to do, but also when prevented from doing something that one does not actually want to do, but would otherwise have been a possibility. Berlin’s account has a number of advantages over Beran’s: it accepts that there are degrees of freedom and unfreedom, that restrictions on one’s freedom by the actions of others need not be deliberate, and that one’s freedoms may be non-existent or meaningless unless accompanied by minimal conditions for a reasonable quality of life: “What is freedom to those who cannot make use of it? Without adequate conditions for the use of freedom, what is the value of freedom?”38 However, perhaps the most

important and interesting difference between Berlin and Beran’s accounts is that Berlin accepts that one’s freedom can be restricted by social structures and processes rather than merely by discrete individuals or bodies, as Beran believes. Consequently, Berlin believes that socially determined situations such as poverty may constitute non-freedom: “It is argued, very plausibly, that if a man is too poor to afford something on which there is no legal ban – a loaf of bread, a journey round the world, recourse to the law courts – he is as little free to have it as he would be if it were forbidden him by law.” However, Berlin maintains the distinction between inability and non-freedom by arguing that the distinction rests on whether the restriction is due to the actions of other people and is capable of being altered:

It is only because I believe that my inability to get a given thing is due to the fact that other human beings have made arrangements whereby I am, whereas others are not, prevented from having enough money with which to pay for it, that I think myself a victim of coercion or slavery...The criterion of oppression is the part that I believe to be played by other human beings, directly or indirectly, with or without the intention of doing so, in frustrating my wishes.

While the effects of class systems in causing poverty is the example Berlin repeatedly refers to, it seems plain that the same criteria may be applied to other social systems including those imposing differential conditions and options on people on the basis of ‘race’ or gender. Indeed, while Berlin does not name patriarchy or radicalization as similarly resulting in non-freedom, he hints at the operation of social systems other than class:

This has been done by social and economic policies that were sometimes openly discriminatory, at other times camouflaged, by the rigging of educational policies and of the means of influencing opinion, by legislation in the sphere of morals and other measures, which have blocked and diminished the sphere of human freedom at times as effectively as the more overt and brutal methods of direct

40 Ibid., p.123
oppression – slavery and imprisonment – against which the original defenders of liberty lifted their voices.41

Legitimacy, Justice and Moral Obligation

In discussions regarding the state there has often been confusion regarding the source of an individual’s obligation to the state and the relation this bears to the state’s legitimacy or authority. Much of this confusion centres around debates about whether people are obligated to obey a state because the social consequences of widespread obedience are better than the consequences of disobedience or whether such obligations come about only where an individual has voluntarily agreed to assume them. These debates may take the form of arguments between those who propose a political voluntarist model of obligation against those who propose a model of moral or ‘natural’ obligation,42 and the arguments in favour of both seem intuitively convincing. In the political voluntarist model people are obligated to obey a state’s laws because they have agreed to do so by voluntarily accepting citizenship, and the force of this argument stems from claims about natural human freedom and the importance of political commitments being voluntary. In contrast, in the moral obligation model people are obligated to obey a state’s laws because obedience conforms with their moral system(s). For instance, a utilitarian would be obligated to obey because obedience furthers the general good – not feeling so obligated would seem inconsistent with genuinely holding utilitarian moral beliefs. Ethical philosophers argue that since the majority of people seem to hold committed moral beliefs regarding good or appropriate ways to treat people and feel obligated by these beliefs, there is good reason to accept that we have moral obligations

41 Isaiah Berlin, ‘Introduction’, p.xlviii
42 Beran seems to use the terms ‘moral’ and ‘natural’ interchangeably when discussing obligation.
governing our other-directed actions (and political actions usually fall under this heading). In addition to the differences between these models over the source of obligation, there are clear differences in the scope of this obligation: while the moral model obligates even those who have not expressly consented, the voluntarist model obligates obedience to the state even in the presence of conflicting moral reasons. If the moral obligation model is accepted it may be argued that it is unnecessary for citizens to voluntarily undertake an obligation to the state since they are morally obligated to obey in the vast majority of situations in any case, and there seems little purpose in undertaking a voluntary obligation to obey that will only be of significance where the state’s commands are not ethical. If such an objection holds it may be concluded that consent is unimportant in determining people’s obligation to the state.

On the other hand, there are good reasons to believe that such an objection to the voluntarist model does not hold. Firstly, if obligations to obey the state are merely moral, what differentiates the obligations of citizens of a state from those of visitors, and how do we determine which of the states in the world we owe an obligation to? Secondly, how are we to resolve the cases in which people’s moral beliefs differ from the state’s commandments? Should people be given the benefits and rights of membership in a state only if they comply with those directives that happen to coincide with their moral beliefs, regardless of the strength of those beliefs or of the possible harm to the authority of the state? Such questions are not easily resolved, but luckily their resolution may not prove necessary since the models of moral and voluntarist obligation may not be mutually exclusive – one may accept that there are moral obligations governing political actions without it following that voluntarily undertaken obligations are unnecessary. Instead, people may be under both moral and political obligations, for instance one is obliged not
to murder both because it is against the law one has voluntarily undertaken to obey and because it is morally wrong. While political theorists have frequently considered moral and political obligations as opposed to one another, for instance in arguments regarding justifications for civil disobedience, the two forms of obligation may be complementary rather than contradictory, and arguments to this effect are provided by Beran in *The Consent Theory of Political Obligation* and by Simmons in *Justification and Legitimacy: Essays on Rights and Obligations*.

Beran argues that both moral and political obligations are important in determining one’s actions and relationship with the state. An account of moral obligations alone is insufficient since it cannot adequately account for the political authority of the state, while an account of political obligation without moral obligation makes little sense since our agreement to be obligated to the state is explained by its promotion of morally worthy outcomes:

> What may be called the moral functions of the state, the promotion of liberty, justice and human welfare, are necessary parts of such a theory; for they explain why people *should* consent to obey the state – if it does indeed promote liberty, justice and welfare – and they point to particularly important reasons (of course there can be others) why people may *want* to consent to obey the state.\(^{43}\)

While Beran notes that these reasons might conflict in some cases, for instance if a law is valid but unjust, he argues that they will be mutually supportive in the vast majority of cases:

> The natural obligation to obey the state arising out of its usefulness, and the self-assumed obligations to obey it arising out of accepting membership, are not alternative, mutually exclusive accounts of justified political obedience. Rather they are equally necessary, complementary parts of it. The state’s usefulness explains why political authority is justified, consent why a particular state can

\(^{43}\) Harry Beran, *The Consent Theory of Political Obligation*, p.33
rightfully claim a particular person as member and why some particular individuals have a right to occupy the office which carries political authority.  

The question of conflicting obligations regarding unjust laws, for example, is likely to be rare since one would expect that those who felt the commands of their state to be unjust frequently would decide not to be obligated to it, perhaps by moving to another state. To resolve cases in which moral and political obligations conflict, Beran proposes that political obligations be thought of as reasons capable of being overridden by sufficiently important moral imperatives, for instance one might plausibly decide to disobey a generally good traffic law in order to rush an injured person to hospital. In each case one must weigh up whether “the reasons for breaking the law...override the reasons for obeying it”.  

A. John Simmons advances a similar line of argument but employs different terminology, instead referring to factors that contribute to the ‘legitimacy’ and ‘justification’ of a state’s authority over its citizens. Simmons explains that “justifying an act, a strategy, a practice, an arrangement, or an institution typically involves showing it to be prudentially rational, morally acceptable or both (depending on the kind of justification at issue)”. Simmons thus considers that both moral and prudential reasons may be deemed relevant to the justification of a state, “we can justify the state by showing that some realizable type of state is on balance morally permissible (or ideal) and that it is rationally preferable to all feasible non-state alternatives”. Thus, the justification for the state is akin to the moral reasons and prudential for cooperation with it, and a justified state is one that is, on balance, a good thing. In contrast, the legitimacy

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44 Harry Beran, The Consent Theory of Political Obligation, p.151-2  
45 Ibid., p.141  
47 Ibid., p.126
of the state is determined by the consent of its citizens, since “Political power is morally legitimate...only when the subjects have freely consented to the exercise of such power and only where that power continues to be exercised within the terms of consent given”.

According to these understandings of the terms, a state is justified if it is, all things considered, a good thing, while its legitimacy depends on the consent of its citizens. Simmons argues that both justification and legitimacy are matters of degree, but notes that while many states are justified very few are legitimate with reference to a significant number of their citizens.

The result of these distinctions is that the question of whether one has consented to membership in (and thus obedience to) the state can be conceptually separated from the question of how one is obligated to behave with regard to it: one may be obligated to refrain from stealing or be a good Samaritan even if one has not consented to the State’s authority, and one may have good moral reasons to disobey a law if one has consented. There may also be cause to extend the conceptual distinction between the questions of whether one has consented to membership in the state and how one is obligated to behave with regard to it, since the precise rights and obligations that consent entitles one to may change over time and different obligations may exist for different citizens. The former of these is reasonably obvious since legislation and even constitutional arrangements are liable to continual change and reinterpretation, a fact of which any citizen consenting to membership is likely to be aware. This continual alteration in the rights and obligations of citizenship means that a person’s consent to membership in the state cannot be conceptualised as agreement to abide by a set of precise codes. Instead, it should be seen as agreement to the general rules and principles governing the formation

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48 A. John Simmons, ‘Justification and Legitimacy’, p.129
and content of codes relating to citizens' rights and obligations; an agreement about how
codes regarding rights and obligations will be made, rather than about the rights
themselves. Someone consenting to membership in the state might not know whether or
not gay couples would have the right to marry but they would know what rules and
principles would govern the decision about such a right, for instance that discrimination
on the basis of sexual orientation was defined as illegal under a charter of rights, that the
interpretation of this charter would be made by the judiciary, and other relevant
constitutional information. While anyone consenting would expect a certain amount of
flexibility in the general rules and principles governing the formation and content of
codes relating to citizens' rights and obligations, it would be unrealistic to expect anyone
to anticipate any major alterations or volte-faces. As a result, it is unreasonable to expect
that when a citizen consents he/she is consenting to all possible future policies and
actions, and in the event of a significant, unexpected change then all citizens should be
given the right and opportunity to change their mind about membership.

Consenting to membership can thus be thought of as a judgement that
membership in the state is a good thing, all things considered, rather than as explicit
agreement to all of the set of rights and obligations current at the time of agreement.
Consequently, a person's consent is unlikely to be undermined or require renewal if
minor changes are made to citizens rights and obligations, but the possibility arises that
someone might disagree with a specific aspect of one's entitlements or obligations but
consent to membership of the system as a whole. For example, one might consent to be a
citizen of a state despite disagreeing with its law regarding abortion or euthanasia, and
one's consent to membership might be wholly consistent with strenuous efforts to reform
the law and possibly even with morally justified disobedience. There is also the
possibility that citizens might be under different rights and obligations, a possibility that is rarely acknowledged in liberal accounts of consent since citizens are generally assumed to be a fairly homogenous set of individuals. These different rights and obligations might take various forms, for instance differences in the content of legislation, such as providing different welfare services to people of different ages, genders or physical capabilities; or providing different mechanisms for legislative decisions to be made, such as devolution or native sovereignty. The existence of many different rights and obligations is taken for granted in almost all states and is often justified on the basis of factors including differences in need and desert. In contrast, the existence of differences regarding forms or mechanisms of decision making for determining rights and obligations is more contentious, and is usually justified with reference to the particular needs or characteristics of some groups. For example, a liberal justification of the latter form of rights and obligations has been provided by Will Kymlicka. He argues that national minorities (defined by cultural and linguistic criteria) should be given group specific rights where such rights are necessary to the existence of a culture “because of the role it plays in enabling meaningful individual choice and in supporting self-identity”. Cultural or national minorities have a strong case for such group specific differences in rights and obligations, but they may not be the only case in which such criteria apply – a good case might also be made for extending a different set rights and obligations to historically disadvantaged people such as the members of some racialized groups, Queers and the disabled, for instance by allowing affirmative action. Where minorities or disadvantaged persons are territorially concentrated such reforms

might also involve the introduction of different constitutional arrangements, for instance federalism or devolution. The possibility of such varied rights and constitutional arrangements removes the need for consenting to membership of a state to involve consenting to majoritarian decision making, which may significantly increase the chances of disadvantaged or minority groups being justly treated. Thus it is possible that consenting to membership may involve undertaking significantly different rights and obligations from other persons, and that the existence of such differences in these rights and obligations may be an important component of a just state.

The 'conservative confusion'

A further difficulty in Beran’s work lies in his contradictory impulses regarding the need to legitimate currently existing states and governments by arguing for the existence of widespread political consent. One the one hand, Beran condemns such a course of action since it affects the form of consent theory produced and thus attempts to avoid judgments about existing states: “Consent theorists must not take it for granted that existing liberal democracies (or any other existing states) have political authority. They, therefore, must not confine themselves to finding or assuming some consent which accounts for such assumed authority.” On the other hand, his account remains true to such conservative impulses by justifying liberal states through the backdoor: “This book claims i) that, within liberal democratic theory, consent must be the basis of political authority and obligation ii) that such consent-based political authority and obligation is possible without utopian changes to existing liberal democracies.” The latter of these

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50 Harry Beran, *The Consent Theory of Political Obligation*, p.49
51 Ibid., p.153
claims rests upon Beran’s arguments that citizens are usually obligated to obey states even if they have not actually consented,\textsuperscript{52} that the vast majority of citizens in ‘nearly just’ or ‘reasonably just’ (read liberal democratic) states would expressly consent if asked,\textsuperscript{53} and that the dissent of minorities is unimportant. The claims that most citizens are usually obligated to obey even without consenting and that the dissent of minorities are unimportant are closely related. Both stem from Beran’s assumption that states, as a rule, are justified – ie. one has a moral or natural obligation to obey them because of their usefulness, even if one has not consented or would not consent to membership. This claim that states are, as a rule, useful is closely related to the claim about the justice of states since Beran’s discussion of natural or moral obligations focuses on utilitarian reasoning. As a result, his claim that states are generally useful is closely related or equivalent to his claim that states are good, and both of these seem to be assumed of liberal democratic states, at the least.

The difficulties here are twofold. Firstly, Beran provides no convincing case for believing that states, whether liberal democratic or otherwise, are in theory generally more good, useful and justified than alternative arrangements; and secondly he does not compare existing liberal democratic states to such theoretical ideals. While the latter of these difficulties is not insuperable provided Beran is prepared to withdraw his claims regarding existing liberal democracies, the former is more significant: unless it is clear that states are justified by utility, morality or both, there is no reason to believe that

\textsuperscript{52} Since we often have moral obligations to obey states: “In addition to political obligation, citizens can have other institutional and natural obligations to obey the state.” Ibid., p.152. Beran states that these obligations certainly exist in “(nearly) just” states, p. 152, but seems to assume they may exist in many other states, albeit as defeasible reasons.

\textsuperscript{53} Beran does not explain what he understands by a ‘just’ ‘nearly just’ or ‘reasonably just’ state. However, it is clear from elsewhere in his analysis that he regards liberal, democratic states as the most just, if not the only just, form of organisation. Thus, Beran seems to employ these terms to avoid explicit reference to particular states or forms of state, whilst making clear normative assumptions and judgements about contemporary liberal states.
people are under natural or moral obligations to obey them, or that they would undertake self-assumed obligations. Beran’s assumption that states are justified is a common one in liberal theory and may be seen as inherited from the justifications of the state provided by classic liberal theorists, particularly Hobbes. If the alternative to the state is a Hobbesian ‘state of war’ then it seems clear that most or all would choose the state. The problem with this assumption, as Simmons and philosophical anarchists have pointed out, is that it provides a skewed baseline from which to make comparisons, and there is no particular reason to regard the state of war as a possible or likely alternative to the state in any case. Instead, it seems we need a fairer point of comparison by which to judge whether or not the state is justified. Simmons thus proposes:

The relevant baseline of comparison must include the effects of efforts at self-provision (or small group provision) of goods like security, efforts that would undoubtedly occur (even if they could not be completely successful) in any realistic non-political condition. And the baseline employed must allow us to factor in the calculated costs of political life, not only the obvious costs (eg. taxes, military service, frequently unreasonable restrictions, helplessness in the face of massive impersonal power, etc.), but also the less obvious costs – at least considering seriously the charges of the classical anarchists (among others) that modern states magnify (or even create) much of the alienation and violence that we fear when we imagine life without states.\(^{54}\)

In the face of a point of comparison such as the one Simmons proposes, it is no longer obvious that the state is particularly good or useful, particularly from the perspective of those, including, for example, the poor, aboriginal peoples and Queers, who have been traditionally (and are currently) ill-served by previous and existing states. Instead, for a state to be justified it might have to meet much higher moral and practical standards, for instance by being less discriminatory, more sympathetic towards the poor and disadvantaged and more effective at protecting citizens against crime (these factors may

\(^{54}\) A. John Simmons, ‘Fair Play and Political Obligation’, p. 38
not be unrelated). As a result, it seems there is good cause to question not only whether previous and existing states are legitimate (ie. whether people have consented to them) but also whether they are justified (ie. whether people would or ought to consent to them). Such an objection creates profound problems for Beran’s account since he holds that both moral / natural and self-assumed reasons for obeying the state originate from the state’s goodness / utility: if previous and existing states are not justified on the grounds of goodness and/or utility then there are no widespread reasons for obedience. At this point Beran’s claim that a consent theory of obligation could be introduced in existing liberal democracies without ‘utopian’ changes seems to collapse. Instead, it seems possible that existing states, even liberal democratic ones, might require extensive reform in order to be either justified or legitimate. Given this, any theorist with a genuine commitment to establishing consent as the principle for establishing membership of and obligation to states may have to accept that the achievement of such consent will be dependent upon significant reforms – reforms necessary to make the states in question justified, before they can hope to be legitimate. In particular, the existence of large numbers of persons in contemporary states who are poor or disadvantaged as a result of historical and existing processes of oppression, exclusion and discrimination suggests that many states are not justified, and are unlikely to be so until (at the least) the state prioritises serious and widespread measures to address and remedy such unjust processes.

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Beran’s use of the term ‘utopian’ is unhelpful since it seems self-evident that no theorist will propose an account of political reform that they deem wholly impractical and unrealistic. Consequently, I have chosen to read ‘utopian changes’ in context as simply meaning extreme or radical changes, significantly beyond those Beran himself proposes.


Revocable Consent

An additional problematic feature of classic liberal accounts of consent (such as Hobbes’ and Locke’s) is that expressed consent to membership of a state is frequently assumed to be a one-off act that does not require reaffirmation and from which one’s consent cannot be withdrawn later.\textsuperscript{56} Alternatively, other accounts that centre on tacit consent argue that consent is a continuing process, for instance by voting in successive elections, but claim that one cannot revoke one’s consent between such events, for instance midway through an electoral term, if one disagrees with the way things have gone. Instead consent is often conceptualised as agreement to almost any product of the political system you have accepted. For example, in voting for a particular political party you are described as consenting not only to the contents of its manifesto but also to the measures it would implement that are not contained in the manifesto - this is described as a “doctor’s mandate”.

I have already addressed the problems associated with tacit accounts of consent that attribute consent to membership from acts such as voting. However, the subject of revoking consent is a more complex one since opinions vary about whether consent should be revocable and if so by whom and through what process. Hobbes, for example, argues that consent to government is not revocable so long as minimal order and defence is maintained, whatever other acts the Sovereign may perform; while Locke argues that consent is revocable, but only at the level of the majority. Beran does not explicitly address the problem, but given his claims about the importance of membership of a state being voluntary, it may be assumed that he would argue consent should be revocable at

\textsuperscript{56} While Locke does allow that a majority is able to withdraw consent from a government if its actions are in clear contravention of the people’s interests, this provision is of little or no help for individuals or beleaguered minorities. See Jacqueline Stevens’ article for an analysis of the rationale behind this provision.
the level of the individual in the majority of cases. Indeed, Beran actually outlines cases in which consent might not be revocable, for instance, if one committed a crime as a citizen of a state and then attempted to revoke one's consent to membership in order to avoid punishment.

A number of reasons may be advanced in favour of an account of consent as revocable. The most obvious of these is the possibility that the cost-benefit balance of membership might alter since the rights and obligations of a citizen are liable to change over time thus changing the nature of the contractual agreement with the state: for example, if the state revoked citizens' right to a fair trial then citizens would be justified in re-evaluating their decision to consent. A second reason is the possibility that people might change their minds about membership of a state, for instance if an individual converted to a religion that was unfavourably treated in their current state, or changed in their material circumstances or moral outlook. This possibility of change is also present at the level of the group since groups are constantly involved in a process of establishing, contesting and redefining their identities, as Benhabib argues. As a result it would be unfair and unrealistic to regard the decision of any group as permanent and irrevocable. While it may be argued that this possibility introduces instability to the system for little benefit, it seems unlikely that such changes of opinion would be made lightly (given that the decision to leave the state may be irreversible) and it is important that citizens have the opportunity to express serious and heartfelt changes in opinion. A further reason is that the possibility of revoking consent at the level of the individual offers a mode of

protest against the actions of the state. While Locke's proviso that consent may be withdrawn by a majority may be seen as a form of protection against the grossest abuses of power, it provides no protection for minorities. Thus the possibility of citizens withdrawing their consent may be seen as a way of allowing citizens to express their disagreement and dissatisfaction, or in the most extreme instances, for members of maltreated minorities to escape to another state.

The question of whether citizens should be allowed the opportunity to dissent and to establish a state of their own has been addressed by Beran who argues that viably sized populations of territorially concentrated dissenters should be allowed to secede if a majority vote in favour of such an action, since any other course of action would constitute an unacceptable restriction upon their freedom. Several questions are raised here, such as what options are open to a dissenting minority who do not wish to secede, who should judge what constitutes a viably sized population and what happens to non-territorially concentrated groups favouring secession. However, it seems implausible to attempt answers to such questions at an abstract and general level. Instead, it may be enough to state that the criteria should be such as to maximize the freedom and choices of groups and individuals regarding the state or majority and that options other than secession should be provided and considered, perhaps including movement to a dissenters' territory, measures of devolution or native sovereignty.

The State or Political Community

Finally, it seems necessary to consider some alterations to the liberal model of what is involved in the 'contract' of agreeing to become a member of a 'state'. Traditionally, liberal theory has concerned itself with the relationship between
individuals and the state or government, conceptualised to include official legislative and judicial bodies, police force etc. Based on this model, the citizen’s obligation largely consists in obedience to the law and participation in schemes beneficial to all, which might include voting or military service, while the state’s obligation is largely one of physically protecting the body and possessions of its citizens. However, this model bears only a slight resemblance to what citizens in most Western states expect of the state or of what the state hopes and expects of its citizens. Most citizens also expect the state to regulate the economy, to provide (at least minimal) support for the needy or disadvantaged, to provide some form of population control through measures such as immigration policy, and to take indirect responsibility for the health of its citizenry (perhaps through the provision of health services or through regulation and education initiatives). This model also fails to take into account the large number of factors other than the state that one implicitly agrees to abide by in choosing membership in a state, including features of the political, social and economic organisation of society, cultural norms, non-state actors including NGOs, QUANGOs and cultural or religious associations.

Taking these factors into consideration, it seems a different model of the contract between people and their ‘state’ is required. Firstly, it is necessary to extend the account of what one consents to beyond merely the state to include the various other factors and organisations characteristic of a society, which I have called ‘political community’.\(^{58}\) While the state would continue to play a primary role in the political community and to be held responsible for policies and their outcomes, and for fulfilling

\(^{58}\) In this context the term ‘community’ does not imply the presence of associative bonds between citizens and should not be taken as value laden.
its obligations towards citizens, it is also important to recognise that non-state actors and citizens have direct moral and legal obligations to one another as well.\textsuperscript{59} Secondly, it is clear that the contract between a citizen and the political community is two-way and that rights and obligations are assumed on both sides. I am deliberately differentiating my account from conventional liberal accounts of citizen-state relationships in emphasizing the presence of two-way rights and obligations and the presence of obligations on the part of the state and political community beyond minimal physical protection. In so doing, I intend to emphasize the importance of the moral and contractual ‘duty of care’ a political community accepts over its citizens when admitting them to membership. While the content of the rights and obligations undertaken by the citizen and political community will vary contextually, a model that includes the wide ‘duty of care’ represented by welfare commitments etc. and wide rights against the political community represented by human rights agreements seems more appropriate than the narrow rights and duties outlined by most liberal accounts.

In conclusion, it seems clear that a substantive contemporary model of political consent should conceptualise the act of consent as being voluntary and intentional, which requires that consent be expressed since even tacit consent to membership through residence under a convention to that effect may not be intentional, since one is not responding to a clear choice situation. Additionally, an adequate model of consent should acknowledge that the act of consenting to membership creates two-way rights and obligations between citizens and the state, and that it indicates consent to membership in the political community ‘all things considered’, rather than consent to a particular set of

\textsuperscript{59} These moral and legal obligations may often overlap, for instance in ‘good samaritan’ legislation, where one is obliged to help another if it will not involve putting oneself at risk. Similarly, one is under both moral and legal obligations to refrain from harmfully disruptive behaviour towards others, including verbal or physical assault or harassment.
institutions, principles and laws. This is important since it creates room for states to change and evolve without necessarily requiring continual reaffirmation of consent, and since it allows for the possibility that residents might consent to citizenship despite disagreeing with some elements of the state’s structure and working for their reform. It is also important that a model of consent take into consideration both justification and legitimacy since, as Beran and Simmons convincingly argue, justification underlies residents’ decision to consent. As such, justification should be considered a prerequisite for the achievement of consent, and an absence of justification should be taken as grounds to doubt that widespread considered consent, and thus legitimacy, is achievable. Finally, an adequate account of freedom is an important feature of any substantive account of consent, requiring one to determine what qualifies as restrictions upon one’s freedom to consent or dissent, when such restrictions become so great as to render a person unfree, and what degree and type of differences in people’s freedom are considered acceptable. These issues regarding residents’ freedom to consent or dissent, and particularly the question of whether oppressed and disadvantaged residents are adequately free to dissent, will be explored in Chapter 3.
Chapter III - The Problem of Freedom: Case Study of Women

Defining Freedom

In the previous chapter I highlighted some of the general difficulties to be found in contemporary liberal consent theory. In this chapter I will address a more specific problem, namely that of whether and to what degree oppressed or disadvantaged persons are free to consent or dissent to membership in a state, given the restrictions on their ability to leave. The subject of this chapter is framed around the problem discussed in Chapter 2, whereby one is not free to dissent to membership in one’s state unless one is free to leave that state, and one’s consent is not free unless one is free to dissent. However, the discussion in this chapter differs from the freedom issues raised by Beran in several key ways. The first is that I shall assume that anyone dissenting from membership in their state will have to live in a state, since the dissenters’ territory Beran suggests does not exist or seem particularly practicable, and since it is clear that there is no terra nullis available for those leaving their states to settle upon. This divergence with conclusion is at odds with much traditional liberal theory, but the difference largely stems from consideration of the realities of contemporary statehood, in contrast to Lockean assumptions that there is ‘enough’, if not ‘as good’, land elsewhere for one to reside upon without encountering excessive restrictions:

But since the Government has a direct Jurisdiction only over the Land, and reaches the Possessor of it, (before he has actually incorporated himself in the Society) only as he dwells upon, and enjoys that: The Obligation any one is under, by Virtue of such Enjoyment, to submit to the Government, begins and ends with the Enjoyment; so that whenever the Owner, who has given nothing but tacit Consent to the government, will, by Donation, and incorporate himself into any other Commonwealth, or to agree with others to begin a new one, in vacuis locis, in any part of the World, they can find free and unpossessed…

60 Locke, Two Treatises p.349. The ethnocentrism and colonialism of Locke’s arguments regarding terra nullis and the settlement of North America will be considered in Chapter 4.
Secondly, my discussion of freedom to consent differs from Beran's in employing a very different account of freedom and acknowledging a much greater range of restrictions upon one's freedom. Thus, while Beran argues that one's freedom is only restricted by material factors such as being too poor to physically leave, I shall define restrictions upon one's freedom in a fashion akin to Berlin, i.e. in terms of how humanly or socially generated factors mean that one's possible options are restricted whereas those of others are not. As a result of this re-conceptualisation of freedom and restrictions upon freedom, it becomes evident that people's ability to leave their states is restricted by a far greater range of factors than Beran had considered. These limits on people's freedom include material restrictions such as lack of the necessary employment / financial resources to gain entry into another state, dependence upon or care for others, or dependence upon the state; socio-psychological restrictions such as when experiences of gender differentiated experiences and treatment make one risk-averse, give one greater obligations for childcare, or lead one to under-estimate one's abilities and options; and discursive restrictions, whereby the social, theoretical and linguistic contexts surrounding one's relationship with the political community may restrict one's ability to understand leaving it as a possibility, and to act upon this belief. Thirdly, my consideration of the problem of freedom differs from Beran's in terms of the numbers of people considered to be unfree or inadequately free to leave, a fact that follows from the different conception of freedom employed. While Beran assumes that only a very small proportion of residents in any state would be unfree to leave, particularly if a dissenters' territory existed, I will argue that a high proportion of people are inadequately free to leave their

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61 For an analysis of the differences between my account of freedom and that of Beran, see the discussion of freedom in Chapter 2.
states, namely those significantly affected by material, socio-psychological and discursive restrictions. In this chapter I will focus on the restrictions on their freedom to dissent or consent experienced by women, but will also argue that significant restrictions on their freedom may affect members of most other disadvantaged or oppressed groups, including the poor, ethnic and racialized minorities, cultural and religious minorities and Queers. As such, it becomes clear that a very large proportion of residents in many liberal states experience some degree of unfair restriction on their freedom to leave, ranging from a slight restriction to actual non-freedom. The scale of the problem implies that the issue of freedom must be acknowledged as a serious one that must be addressed, rather than being set aside as an insignificant ‘minority’ issue as Beran argues.

The question of people’s freedom to leave their states has traditionally been addressed in the context of Lockean tacit consent, wherein residence itself signifies consent, but the question is equally applicable to many cases of expressed consent and many of the same issues arise. It is clear that if consent is to be a voluntary act then the process of consenting must be reasonably free, meaning that dissenting from membership in the state should not be excessively difficult. However, in contemporary states, the process of dissenting to membership in a state and political community does not consist merely of stating one’s intention not to have membership; instead, it is likely to involve a change of one’s status and relationships regarding the state. In contemporary liberal states one’s consent or dissent to membership is closely related to many of the rights and opportunities one and one’s dependants will have and, since states favour their citizens, the decision to dissent is likely to negatively affect one’s status and relationship with the state. In many contemporary liberal states the effects of dissenting might include the withdrawal of one’s right to work or right of residence, or changes in the status and rights
of one's dependents, for instance in not receiving free education for one's children. In some cases, it is possible that dissenting to membership would mean people would lose the right to reside live in the state at all, or that continued residence would be on conditions inconsistent with many people's continued survival or well-being. In such cases, it may be concluded that one is not free to dissent and continue to live in one's state as a non-citizen, and hence one will have to move elsewhere if one is determined to dissent. However, moving to another state is also likely to be difficult, particularly for disadvantaged persons, since contemporary states impose considerable restrictions upon immigration. Given the restrictions involved in either remaining in one's state as a non-citizen or moving elsewhere, it is possible that many people may not be free to take either course of action and thus are effectively unfree to dissent to membership.

I will explore this issue by focusing on the case of women, since this has the advantage of creating a slightly smaller topic than discussing the whole variety of modes of disadvantage or oppression, and thus allows reference to more specific state policies and contemporary difficulties. Nevertheless, it is clear that 'women' constitute a large, diverse and problematic category – there are huge variations between women's statuses and experiences, particularly where sex and gender intersect with factors such as age, class, disability, 'race', culture and religion. As such, it may be argued that is it not possible to generalise about the ways in which women are affected by states' migration policies, or about their experiences of oppression or disadvantage and the effects upon

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62 Giving up the right to work, or rights such as the receipt of welfare support and health care would likely be inconsistent with continued survival and wellbeing of many, perhaps most, people. While access to health care may be necessary for ill and elderly residents and access to welfare support may be necessary for elderly poor and seriously disabled residents, in contrast, it may reasonably be inferred that either the right to work or the right to receive adequate welfare support is necessary for all residents incapable of living indefinitely off private wealth or support from other. Thus, the right to work is likely to be a necessary condition for the survival of a large majority of residents in any state.
their freedom. While it is certainly true that such generalizations about 'women' are highly problematic, my decision to employ the category is largely strategic – if the proportion of residents' of a state unfree or inadequately free to leave determines the significance of the problem of freedom (and many liberals, Beran included, argue it does) then the inadequate freedom of women renders the problem of freedom highly significant. Thus, a major advantage of referring to women as a category is that it gives one a position of strength against implicitly or explicitly majoritarian liberal arguments that are otherwise liable to regard the problems of 'minorities' as relatively unimportant. Additionally, the decision to discuss 'women' at a general level follows from the scarcity of data regarding women's migration – finding cross-national information about women is often difficult enough; finding data about women that was broken down by other characteristics would be near impossible. Therefore, in this analysis I will employ a strategic essentialism about the term 'women', assuming it to refer to a political category of those who experience some form and degree of oppression and disadvantage based on sex and / or gender. Nevertheless, I shall not assume that all women experience oppression, disadvantage and restricted freedom in the same ways or to the same extent, merely that there are some broad themes and modes of restriction that may be common to many women. While it would be valuable to also draw upon in-depth analysis of the way people's freedom to dissent to and leave their state is affected by intersections between sex and gender and characteristics such as class and 'race', such analysis is limited by the sparse data currently available, and in any case is outside the scope of this analysis. Additionally, it is clear that it would be valuable to analyse the effects of 'race', sexual orientation, disability, and other forms of identity related to oppression or disadvantage upon people's freedom to dissent, but again such analysis is prevented by
the limited data available and the restrictions of an MA thesis. Nevertheless, while my investigation into the subject of disadvantage, freedom and dissent is necessarily a limited one, I believe that many of the issues raised are applicable to other oppressed and disadvantaged groups and persons and may lay the foundations for further work. I will offer conclusions about the generalizability of this case at the end of the chapter.

For the purpose of this chapter I will assume that consenting to membership of a state usually involves deciding to reside within that state, and similarly that deciding not to consent to membership in a state one usually involves deciding to leave that state in order to reside elsewhere. In contemporary states, residency as a non-citizen is governed by immigration regulations and is thus subject to the biases of citizenship and immigration policy, meaning that it tends to be restricted to the wealthy or those with much needed, high income or status jobs. In addition, living as a non-citizen in the state in either one's previous state or a new state is likely to be difficult, and in some cases impossible, since non-citizens are often granted far fewer rights, for instance not having the right to state-provided education, health and welfare services and legal aid, and possibly withdrawal or restrictions upon one's right to work.\textsuperscript{63} Furthermore, in instances such as the USA's 'Homeland Security Bill', a state's security concerns may even mean that non-citizens are denied basic human rights such as fair detention and arrest procedures, or free and fair trials\textsuperscript{64}. This suggests that, for some people, residence as a non-citizen may be inconsistent with their enjoyment of a minimally free way of life, or

\textsuperscript{63} Restrictions on one's right to work are a condition of entry for many statuses in most European states, and are a feature of student visa conditions in many other states. See Monica Boyd's "Migration Regulations and Sex Selective Outcomes in Developed Countries" in United Nations Department for Economic and Social Information and Policy Analysis Population Division International Migration policies and the Status of Female Migrants: Proceedings of the United Nations Expert Group Meeting on International Migration policies and the Status of Female Migrants, San Miniato, Italy, 28-31 March 1990.

\textsuperscript{64} See the Migration Policy Institute reports Immigration Policy and the Homeland Security Act Reorganization, and America's Challenge: Domestic Security, Civil Liberties and National Unity After September 11, both 2003. Reports available at http://www.migrationpolicy.org/.
in the case of the very poor, sick or elderly even inconsistent with their continued survival. Living in another state as a non-citizen is also problematised by the fact that one may be continually liable to be sent back to one’s previous state (by withdrawal of a legal right to stay in another state, or physical removal by processes such as deportation) unless one is able to obtain citizenship or, at least, a permanent right of residence elsewhere. As such, since dissenting to membership in one’s state may not be revocable, it may be assumed that giving up membership in one’s state is akin to taking up long-term or permanent residence, or citizenship, elsewhere.

Given the various disadvantages of non-citizen status outlined above, many people’s freedom to leave their state would be dependent on obtaining citizenship elsewhere, particularly where state provided education, health and welfare services were required. However, since long-term non-citizen resident status may not be readily available and since the rights provided may be inadequate to assure people’s continued survival or wellbeing, let alone their freedom, it is unrealistic to assume that living as a non-citizen in their own state or another is a genuine option for many people. Furthermore, the process of obtaining either citizenship or a long-term right to residence may take a considerable period of time and/or have several stages, for instance initial admission for short-term residence prior to application for a permanent right to reside or citizenship, or through granting naturalization and citizenship to those who have been residing illegally for long periods. As such, the eventual outcome of the process may be highly uncertain at the time of one’s initial admission to the state, meaning that it may not be clear whether someone is ‘free’ to leave their state for another until these

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65 There are currently no procedures in liberal states for re-obtaining citizenship after surrendering it, and even if the practice of surrendering citizenship in one’s state were to become more common (rather than current practices favouring joint citizenship), giving up citizenship would likely be irrevocable or difficult to revoke, so as to discourage citizens from giving up citizenship lightly.
processes have been undergone, by which point they may have been absent from their original state for some time. The risks and costs of this period of uncertainty, such as the stress and financial hardship undergone, must be included in the calculation of whether or not someone is capable of emigrating and free to do so. As a result of these difficulties, the question of determining whether or not someone is capable or free to leave is likely to be a complex one that requires estimation of the results of multiple processes, and in some cases the difficulty of making this judgement may in itself be a restriction upon leaving. In summary, one’s freedom to refuse citizenship of and leave a state is dependent upon one’s ability to obtain residence and perhaps citizenship in another state, which many are unlikely to be able to do. Those unable to obtain viable residence\textsuperscript{66} and / or citizenship elsewhere, should they wish to, are not free to refuse citizenship, and thus not free to consent or dissent.

\textit{External Restrictions, Citizenship & Immigration Policy}

The most visible restriction on women’s freedom to consent or dissent to their membership in a state is the gender bias present in citizenship and immigration policies, and thus this is the first form of restriction I intend to consider. While implicit and/or explicit gender biases are present in all or almost all states’ policies, I will largely concentrate upon restrictions on women’s migration between Western liberal states, partially since my thesis consciously focuses on liberal theory thus rendering non-liberal states less relevant, and partially since relatively few studies have been conducted on women’s migration outside Western liberal states. The reasons for this lack of research on women’s migration outside such states are twofold: firstly, that traditional literature

\textsuperscript{66} I.e. where residence involves one’s continued survival, wellbeing and at least minimally free way of life
regarding migration usually saw men as the actors in migration and ignored the role of women, a situation that is only gradually being corrected; and secondly that adequate data collection regarding women’s migration is often lacking in non-Western liberal states. While the former of these difficulties, the traditional invisibility of women in scholarship on migration, is being challenged by a number of researchers focusing on the role of women, the majority of studies on women’s migration choose to consider individual Western liberal states, a small number of such states, or conduct an overview of ‘developed’ states that focuses on the West. Thus, there is still much empirical work to be done in the area of women’s migration, particularly in considering migration outside Western or developed states. The lack of adequate data regarding women’s migration is perhaps a more serious problem, and is a major complaint of many of those conducting empirical research on the subject of women and migration, particularly those seeking to analyse migration outside liberal Western states. Thus, there are complaints that data on initial migration and gender is not collected and made available by many states, and that even Western states rarely follow and document the experiences of immigrants after their admission, making it difficult for researchers to discover how migration affects women’s situations. Such difficulties in obtaining data and conducting research on these topics are documented in Debra DeLaet’s introduction to Gender & Immigration, and in the United Nations Department for Economic and Social Information and Policy Analysis Population Division report International Migration Policies and the Status of Female Migrants: Proceedings of the United Nations Expert Group Meeting on International Migration policies and the Status of Female Migrants, San Miniato, Italy, 28-31 March

1990, particularly the section on 'Data collection', among others. This lack of data is obviously a serious restriction on the possibility of conducting research on women's international migration, and information regarding the migration of women to and from some states is seriously lacking. For example, there is little research on the migration of women to the Arab states of Western Asia and what research does exist, such as Sharon Russell’s submission to the UN report, 'Policy Dimensions of Female Migration to the Arab Countries of Western Asia', is seriously limited by the data available; in Russell’s case, the lack of data on many of these states leads her to focus almost exclusively on Kuwait, despite its being one of the least representative Arab states in the region. While there have been efforts to improve data collection and availability, including strong recommendations in the UN report mentioned, it is likely to be some time before the data necessary for an accurate and representative picture of women’s international migration is made available.

My analysis on the restrictions on women’s migration thus focuses on migration between Western liberal states. The first form of such restrictions is states’ immigration policies, which might limit people in two fashions: either through restricting who is able to leave the state, as occurs in a number of South-eastern Asian states, or more commonly by restricting who is allowed entry into a state, both of which modes of control are liable to contain gender biases. While I acknowledge the significance of the former as a practical impediment to such women’s migration and ability to dissent to state membership, I shall not address this issue here since the fact that such restrictions

on people’s exit rights restrict their freedom is usually regarded as uncontroversial by liberals. In addition, such restrictive exit policies are less common (ie. employed by fewer states) and less effective (ie. do not prevent or restrict migration as successfully) than restrictive entrance policies, and rarely found in the ‘Western liberal states’ that my analysis focuses on. Thus, my discussion of citizenship and migration policy will address restrictions upon people’s entry rather than exit.

In analysing this issue, I will largely discuss the restrictions encountered in obtaining rights of residence rather than those encountered in obtaining citizenship since, although the two share many criteria, residency is usually easier to obtain, a simpler process, and because a period of residence is often a prerequisite for citizenship. In addition, I will not analyse the availability of long-term rights of residence and the criteria employed, since these vary considerably between states and again (where they exist), tend to be similar but more difficult to obtain than a right to residence. Although the restrictions on women’s ability to obtain residence are considerable, the criteria for obtaining citizenship or a permanent right of residence are likely to be even greater. Since states’ immigration policies clearly meet Berlin’s criteria of impeding one’s choices and being humanly controlled⁷⁰, they therefore qualify as making one less free, rather than merely less able, to leave. This does not necessarily mean that restrictive citizenship and immigration policies make all affected completely unfree since, as Berlin acknowledges, there are degrees of freedom, different freedoms and those of differing significance. However, it does mean that those adversely affected by restrictive citizenship and immigration policies are less free than others who are not thus affected.

⁷⁰ "The criterion of oppression is the part that I believe to be played by other human beings, directly or indirectly, with or without the intention of doing so, in frustrating my wishes." Isaiah Berlin, "Two Concepts of Liberty" in Four Essays on Liberty, p.123
and in some cases the restrictions may be such that some people will actually be unfree to dissent to membership and leave. These restrictive citizenship and immigration policies result from the fact that the vast majority of states, and certainly all Western states, employ criteria for deciding who will be allowed to reside within or become a citizen of the state, usually basing these criteria on the perceived utility or costliness of people as residents or citizens. The United Nations report *International Migration Policies and the Status of Female Migrants* summarises the effects of these policies in constructing the conditions for women’s international mobility:

Through their policies, nation States are major actors in the international migration process. Thus, any person wishing to become an international migrant must deal with the conditions for entry and stay imposed by potential countries of destination and, in many instances, must also consider those concerning departure from the country of origin. In the case of women, the relevant conditions are often coloured by implicit or explicit assumptions about the status and roles of women both within the family and in society.71

While the criteria for entrance vary between Western, liberal states, a number of characteristics are extremely common. One of the most common sets of criteria is that one is more welcome as a citizen if one is wealthy, engaged in a career perceived as particularly valuable or at the least, if one is perceived as economically self-sufficient. Such criteria based on wealth, income and status often contain biases against women, although these biases may be implicit, or even unintentional and culturally determined, for instance in classifying common female occupations such as childcare as low status. Gender bias will almost inevitably result from admission criteria based on either wealth or employment status since in all states women, as a group, are less wealthy than men

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and less likely to have highly paid or high status jobs. Furthermore, in most countries, including Western nations, women are significantly over-represented amongst the least wealthy members of society, those reliant on government support, and those in low paid, low status and/or exploitative jobs. These gender disparities in wealth, income and employment status are closely related to the low status and unpaid or low paid nature of housework and childcare. Here, one may follow Ada Cheng in arguing that patriarchy and capitalism are complicit in devaluing the work of women in a fashion that operates to inhibit their migration:

With the relegation of women in the household sphere, women as a group are thus excluded from the category of workers even though they perform household responsibilities that are crucial to the maintenance of the family and to the continuation of society. Furthermore, with the exclusion of housework from the category of productive work, the contribution of women to sustain the capitalist system through the reproduction of its future labor force has been rendered invisible...For migrant women domestic workers, since housework is usually not considered as work, they are often denied their status as workers.

Women in some roles are thus likely to be disadvantaged by social norms defining many traditionally gendered careers as low status or low paid, perhaps including those involved in care professions including nursing, childcare and care of the elderly, and areas such as teaching. As a result of these social and institutional biases, even the ‘even-handed’ application of financial/employment criteria is likely to contain gender biases and to produce strongly gender differentiated outcomes, whereby a significantly higher proportion of men than women are likely to meet these criteria.

The second problem with such financial/employment criteria lies in their application, since prevailing norms and expectations regarding women’s financial and

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employment status may produce biases in the way that citizenship and immigration officials apply entrance criteria. For instance, social norms and expectations that construct men as workers and women as mothers and housewives cause biases such as the assumption that women should be admitted as ‘dependants’ of a spouse rather than as workers (which requires that they be viewed as providing work that is valuable to the state and that they are capable of supporting themselves), or that women are less able to sponsor the entry of a spouse. Boyd’s analysis of data regarding patterns of women’s immigration in ‘developed’ countries suggests that such biases are widespread and that they are a major explanatory factor in determining migration outcomes:

Sex stereotypes and sex stratification not only explain why more men than women enter as dependent family members, they also influence the type of work for which female migrant labour is recruited. When women enter on the basis of labour-market skills, many are in service occupations.74

Thus, it may be assumed that such biases in the application of selection criteria may often act to prevent women from gaining residency or citizenship, or affect the status on which they are admitted and through this their status and role in the host state. In particular, it is common for such biases in application to classify women as ‘dependants’ of male family members, often in situations where dependant status involves bans or restrictions on the dependant’s ability to work. Here, there is a clear risk of a third difficulty in such criteria: that the applications of state’s employment / financial policies will discursively, legally and materially construct women as dependants, and thus severely curtail their freedom in the new state, as well as having potentially harmful effects on their well-being. Again,

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Boyd’s empirical analysis suggests that such reductions in freedom and well-being frequently result from such policies:

Separating residence permits from employment permits has at least two consequences for migrant women. First, in those European countries where the spouses and children of migrants are allowed to enter the labour force only after a number of years have elapsed since their arrival, the newly arrived have no choice but to be economically dependent on other family members. Second, those migrants who decide to engage in clandestine employment become dependent on their employers and are more vulnerable to exploitation.\(^75\)

While there is little data available on the gender breakdown of dependants and sponsors, researchers also postulate that men may be less frequently admitted as ‘dependants’, largely since women are perceived as less economically able to sponsor dependants, as Boyd notes:

Approval of the application is based in part on an assessment of the sponsor’s ability to support the persons in question. In Canada and the United States, household income is used as an indicator of such ability. If it is too low according to a specified set of criteria...the applicant is not judged as qualified to fulfil the legal agreement to support the would-be migrant relatives and the application is denied. Because women’s incomes are generally substantially lower than those of men, they are considerably less likely than men to be successful in sponsoring the migration of relatives, especially if the women concerned are heads of households or single.\(^76\)

Thus, it seems immigration policies that include a status of legal and economic dependence are employed in fashions that have the effect of reinforcing and constructing women’s poverty and powerlessness. This predicted reduction in women’s freedom and well-being if admitted under dependent status must be taken into account when assessing whether or not women are free to dissent to membership in their state and migrate elsewhere, since these factors may constitute a serious restriction on women’s freedom to move.

\(^75\) Monica Boyd, “Migration Regulations and Sex selective Outcomes in Developed Countries” in United Nations International Migration Policies and the Status of Female Migrants... p.92

\(^76\) Ibid., p.95-6
The question of the effects of migration on women's role and status within the family and wider political community is an interesting and important one, and thus deserves further attention. In analysing the effects of migration on women, Lean Lim describes the differences experienced by "married women moving autonomously, sometimes followed by their husbands" and "married women who move with their families", and suggests that the experiences of the former may be more empowering than those of the latter. She notes that the experiences of the latter group depend to a considerable extent upon whether or not the women undertake paid work, since "Assessments of positive changes in their status generally involve their increased participation in productive and wage employment". But in any case:

Often, migrant women become increasingly dependent upon husbands and children, have reduced authority over their children, and are more likely to experience separation or divorce because of the instability of family relations. Even when they accept the need for their wives to adopt new roles in the host society, some migrant men may feel threatened and seek to reinforce traditional authority structures, thus producing a severe dislocation between the roles and actual status of their wives. These restrictions may be of considerable significance, since in many cases they do not simply impact upon women's activity within the home and family, but also upon their freedom to undertake work or education (and what types of work or education are regarded as acceptable), to socialise with other people (particularly those of other cultures, religions or nationality) and to participate in the political life of the community. Since Lean Lim's assessment focuses largely on the migration of women from non-Western to Western states, the conclusions may not be generalizable to other situations, such as the migration of women between liberal Western states. However, the general

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77 Lean Lim "The Status of Women and International Migration" in United Nations International Migration policies and the Status of Female Migrants.... p.50
78 Ibid., p.51
findings of this research seem consistent with Boyd’s conclusions that economically dependant women may be subject to more restrictions in their relationships with their partners or family members if they choose to leave their state for another as part of a family. More data and research on the subject is necessary before making any firmer or broader conclusions about the effects of immigration on women’s role and status, and it is likely that the effects will vary considerably between different situations. However, the possibility that women who migrate as part of a family may face considerable restrictions on their personal, social and economic freedom is clearly concerning from a liberal perspective, and this evidence suggesting that women who are economically dependent on their families face greater restrictions casts policies that construct such dependency in a very negative light. When further information about the effects of migration upon such different women is available, it may be possible to judge to what extent anticipation of such factors might impede women’s freedom to consent or dissent to membership in their state.

In addition to the gender biases present in the employment and financial criteria of immigration and citizenship policies, there may be biases in the explicit criteria and/or application of policies regarding family reunification, since such policies tend to provide a very narrow definition of a family unit. While Boyd’s analysis of the content of Western states’ immigration policies regarding family reunification suggests that explicit gender biases (whereby different provisions are made for wives joining husbands than for

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79 It is a major complaint of those conducting empirical research on the subject of women and migration that adequate data on gender is not collected and made available by states. In addition, there is the difficulty that states rarely follow and document such experiences of immigrants after their admission. For discussion of the difficulties in conducting research on this topic and obtaining data see DeLaet, Debra (1999) ‘Introduction: The Invisibility of Women in Scholarship on International Migration’ in Kelson & DeLaet (eds) Gender & Immigration and United Nations, International Migration policies and the Status of Female Migrants..., particularly the section on ‘Data collection’.
husbands joining wives; or for children joining mothers to those joining fathers) are largely a thing of the past, she notes that a number of implicit biases remain. Further, she argues, there is opportunity for bias in the application of the criteria, particularly where financial / economic criteria are also present. The family is almost invariably interpreted as a nuclear unit of two adults and perhaps children, and is restricted to couples of different sexes, thus generally excluding same-sex couples and those involved in polyamorous or polygamous relationships. In addition, it is often a requirement that the partners are legally married, thus discriminating against unmarried couples – a gender issue since many women are hesitant about the traditionally patriarchal institution of marriage, and another common way of discriminating against same sex couples. Where marriage is not an actual requirement, it is frequently the case that the conditions for entry for unmarried couples are more stringent and restrictive than those for married couples. In some cases, the biases in family reunification and financial / economic criteria may overlap and have cumulative effects in restricting entry, for instance in discriminating against members of lesbian partnerships because they are women, same sex, unmarried and because they may have lower incomes or lower status jobs. The narrow definition of a family unit also has the effect of making it more difficult for relatives such as the siblings or parents of migrants to gain entry, thus alienating migrants from their wider family, which may have the effect of removing female support networks involved in housework, childcare and women’s authority within the home. Again, the effects of these biases vary among women, and women are certainly not the only group adversely affected by such biases, since others such as gay men and those with multiple partners or spouses may also face restrictions. However, there is cause to believe that biases in family reunification policies are more likely to impact negatively upon women
than men, not least because more women enter under such policies and it is easier for men than women to enter under policies regarding their financial/employment status.

It might be argued that some of the restrictions described above can be avoided if one moves to a state without such stringent entry criteria, and thus one is actually free to leave – leaving merely involves the high cost of going to a non-liberal and, often, less wealthy state. This objection may possibly hold in principle, but is wholly implausible in practice. Firstly, there is the problem that entry criteria must be met even in non-wealthy and non-liberal democratic states, and such criteria still tend to display gender biases. Additionally, the need to move somewhere where one’s continued survival is practicable may seriously restrict women’s choices, since many states are overtly patriarchal to the extent that women without a husband, male partner or protective male family member may be unable to economically support themselves or live in reasonable safety – continued survival is impracticable for ‘single’ women in such states. There may also be restrictions and difficulties that result from differences in language, culture, religion or other socially and politically significant factors. While such factors affect both men and women, in many cases women are likely to experience greater difficulties in adjustment to these factors, or might experience the different role and attitudes expected as unacceptably restrictive.

Finally, there are also material restrictions upon one’s freedom to migrate other than state’s citizenship and immigration policies, a major one of which is the effect upon one’s freedom to leave of emotional connections with others. Here, there is an issue to be addressed about the effect upon one’s freedom to leave of being dependent upon the care of another, or of having dependants to care for, including children, disabled or elderly relatives, but also of having valued relationships to others that one does not wish to
break, such as to family members. Traditionally, liberal theory has failed to address questions of care and personal relationships, avoiding the issue by conceptualising everyone as self-sufficient individuals, often assuming that all will act to rationally maximize an individualistic conception of their self interest, and thus arguing would not choose to care for others. In contrast, many feminist theorists have argued that care and dependency are inescapable parts of the human condition: we are all dependent for a considerable portion of our lives (as children and often during sickness and in old age) and some, including the disabled and long-term ill, are dependent upon others' care for much or all of their lives. It seems clear that anyone who is dependent upon the care of others is restricted in his/her freedom to leave, and these restrictions may take a variety of forms – legal, financial, physical, psychological, etc. Some of these impediments to leaving would not usually be regarded as restrictions on one's freedom but rather upon one's ability, to leave. For instance, most liberal theorists regard limitations of physical disability as restricting one's ability to act but not one's freedom. In contrast, many including Berlin hold that legal and financial limitations qualify as restrictions on one's freedom. However, arguments that accept poverty as a restriction upon one's freedom but reject ill health or disability fail to address the links between ill health or disability and poverty – not only that being unable to work, restricted in the work one can undertake, or discriminated against makes one poorer, but that being wealthy increases the resources available for empowering the ill or disabled. The distinction between freedom and ability to leave in the case of the disabled breaks down when it is considered that an extremely wealthy physically disabled person would likely experience little difficulty in leaving his/her state for another. Thus, those of either gender who are dependent on others may
be characterized as less free or unfree to leave, depending on the extent of their dependency and the dynamics of the decision process between them and the carer.

Conversely, those who care for others may be less free to leave as a result of these responsibilities, which might include providing food, accommodation, access to health care, education and mental stimulation, and supervising activities to prevent harm. As such, the provision of care may be highly demanding in terms of time and financial resources, and the decision to move to another state will likely depend on the ability to sustain oneself and the other person(s) in the new state. Furthermore, the dependant(s) willingness to move may be important in such cases.\textsuperscript{80} Again, many liberals would question whether most such instances qualify as restrictions upon one’s freedom, acknowledging perhaps that a legal responsibility to care for a child might restrict one’s freedom to act but that moral obligations do not. This is a complex question, but it is significant that responsibilities to care for others are not randomly distributed amongst the population but show strong gender patterns: there are far more female carers than male carers and even legal responsibilities of care, for instance for children, tend to be skewed towards women. If the gendered dimensions of care for others is at least partially a socially constructed trait\textsuperscript{81}, then it falls under Berlin’s definition of a restriction upon one’s freedom as a result of human action, as cited earlier:

It is only because I believe that my inability to get a given thing is due to the fact that other human beings have made arrangements whereby I am, whereas others are not, prevented from having enough money with which to pay for it, that I think myself a victim of coercion or slavery...The criterion of oppression is the

\textsuperscript{80} In some cases such agreement may be a legal condition of moving, in many others it is likely to be experienced as a moral requirement.

\textsuperscript{81} The source of the gender discrepancies in care is a subject of some debate, but even if there is a ‘natural’ dimension to women’s care for others, as cultural feminists argue, it seems likely that at least some of current gender discrepancies can be attributed to social construction.
part that I believe to be played by other human beings, directly or indirectly, with or without the intention of doing so, in frustrating my wishes.  

Thus, if it is conceded that a responsibility to care for another or several others restricts one’s ability to move the gendered dimension of responsibilities of care would seem to qualify these limitations as restrictions upon one’s freedom to move. This is clearly problematic in terms of one’s freedom to dissent from the state, but also in terms of wider issues of freedom in liberal theory, as Kymlicka notes:

For [liberal] justice not only presupposes that we are autonomous adults, it seems to presuppose that we are adults who are not care-givers for dependents. Once people are responsible for attending to the (unpredictable) demands of dependents, they are no longer capable of guaranteeing their own predictability.

The overall picture regarding women’s freedom to migrate, and thus their freedom to dissent to membership in their state, is not optimistic. Many women might be unable to gain even a right of residence in another state, let alone a permanent right to reside or citizenship; others may be able to gain a right of residence but not be permitted to work or allowed access to welfare support, thus making their continued survival impracticable. Others might be able to gain a right of residence but only as a partner or dependant of a (usually) male family member, thus potentially sacrificing their freedom, an option that might be unthinkable for many women given the risks and restrictions it can involve. Difficulties seem most likely to be encountered by women without long-term partners or support from a family member, women in relationships with other women, and women without highly paid or high status employment, particularly if they also lack high levels of education. The overall result is that women’s ability to leave their state in favour of another liberal democratic state is highly restricted, and this fact limits

\[82\] Isaiah Berlin, “Two Concepts of Liberty” in *Four Essays on Liberty*, p.123

women's ability to free themselves from or protest against unjust or discriminatory treatment in their home states. Boyd's conclusion regarding female migration in the developed world and the justice of Western states policies is considerably more damning, since she implies that discriminatory immigration policies are part of an agenda to subjugate women:

Migration policies are part of the large domain of State policies that assume and sustain female dependency. In fact, the admission of women on the basis of family ties and their vulnerability to deportation for no fault of their own are consistent with the argument that State actions emphasize female familial roles and devalue the economic contributions of women.\(^8^4\)

It seems reasonable to conclude that women are systematically discriminated against in the content and application of immigration policy, that many are less free to migrate than men, and that many can migrate only under restrictive and potentially harmful conditions. Whether or not these factors are the result of deliberate state agendas against women, it seems undeniable that these factors seriously reduce or remove many women's freedom to dissent from membership in their states. As such, even the explicit consent to citizenship of an indeterminately large proportion of women would be unfree or unacceptably restricted; women are not adequately free to dissent or consent.

**Socio-psychological restrictions & the (in)effectiveness of exit rights**

In addition to the restrictions on women's ability to leave their state caused by the difficulties in finding viable residence elsewhere, there may be internal, psychological restrictions on women's freedom to make such a choice. This notion of internal restrictions on one's ability to act has often been associated with a concept of positive

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\(^8^4\) Monica Boyd, "Migration Regulations and Sex selective Outcomes in Developed Countries" in United Nations *International Migration policies and the Status of Female Migrants*..., p.97
liberty or autonomy rather than the negative liberty framework of available choices. It is not clear that this is the correct way to understand the question. In this instance, the distinction between 'positive', internal and 'negative', physical or material liberty is an indistinct one. Instead of referring to external or material factors, Berlin defines negative liberty as “liberty from, the absence of interference”\(^{85}\) while positive liberty refers to “freedom as self-mastery, with its suggestion of a man divided against himself...this splitting of the personality into two: the transcendent, dominant controller, and the empirical bundle of desires and passions to be disciplined”.\(^{86}\) According to these definitions, it is clear that the distinction between positive and negative liberty is not merely one of internal versus external restrictions, but rather one of restrictions due to oneself versus restrictions due to others. After all, Berlin seems to accept that the restrictions for which others are responsible need not be purely external, as in the case of poverty, where one “lives in poverty, disease and ignorance, a situation in which the enjoyment of the poor and weak of legal rights to spend their money as they pleased or choose the education they wanted became an odious mockery”.\(^{87}\) Such a concern also seems to be behind Berlin's view that one's freedom is restricted not only by impediments to what one desires to do, but to possible choices:

The sense of freedom, in which I use this term, entails not simply the absence of frustration (which may be obtained by killing desires), but the absence of obstacles to possible choices and activities...The extent of my social or political freedom consists in the absence of obstacles not merely to my actual, but to my potential choices – to my acting in this or that way if I choose to do so.\(^{88}\)

Once Berlin's distinction between the two types of liberty is couched in these terms, it becomes clear that the self-others distinction is problematized by evidence regarding

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\(^{85}\) Isaiah Berlin, “Two Concepts of Liberty”, in *Four Essays on Liberty* p.127
\(^{86}\) Ibid., p.134
\(^{87}\) Berlin, 'Introduction' in *Four Essays on Liberty*, p. xlvi
\(^{88}\) Ibid., p.xxxix and xl
socialization and social construction, which suggests that the restrictions of others become internalized and are consequently also self-imposed. Thus, in the instance of poverty, the restrictions imposed by others in denying one goods and opportunities may be internalized into one's self-conception and beliefs. In such cases, deciding to what degree one is rendered unfree by others rather than by one's internalized oppression is likely to be a difficult task, and it is not immediately clear that it is a productive one. Furthermore, it is not apparent that the terms of the positive freedom debate are particularly convincing or offer much emancipatory potential, since they tend to demand guesses about what people's higher nature is, what choices people would (and should) make in their 'real interest', and dubious allegations that people can be forced to be 'free' through coercion.

Thus, instead, of applying the concept and criteria of positive liberty, I intend to retain the terms of the negative freedom debate where freedom is defined in terms of available options, but will focus on how these terms apply to the socio-psychological restrictions resulting from human generated systems, particularly oppression. The possible effects of such restrictions have been documented in research on how socialization alters people's choices, which suggests that restrictions in freedom might operate internally through decision-making mechanisms. An article summarising the conclusions of this research is Virginia Sapiro's 'Sex and Games: On Oppression and Rationality'. Sapiro summarises empirical research on the effects of oppression on "strategic decision making or goal seeking" by analysing the results of empirical studies that used game theory situations to investigate the way oppressed persons (particularly women) behave in different game situations. Sapiro's hypothesis is that learned experiences about oppression, such as gender-differentiated treatment, often negatively
affect oppressed persons’ assessments of their opportunities and capabilities and may therefore lead them to prefer different courses of behaviour from non-oppressed persons, and from rational choice theorists’ predicted ‘rational’ behaviour. She notes that empirical game theory studies often find evidence of ‘irrational’ behaviour on the part of some participants, and hypothesises that such behaviour might not actually be evidence of irrationality. Instead, Sapiro argues that oppressed persons learned experiences may lead to them to hold expectations and preferences that differ from non-oppressed persons’ and those of conventional rational choice theory. Thus Sapiro hypothesizes that experience of oppression may both alter and explain the behaviour of members of oppressed groups:

In the study of oppression we are particularly interested in those who have experienced a long pattern of losing, and who have reason for insecurity, distrust, and, perhaps, confusion. We may find the oppressed among those here labelled with the term, ‘conventional irrationality’. Sapiro’s overview of empirical studies comparing participants’ behaviour by gender finds trends consistent with these hypotheses: women are more risk averse than men, even when this means passing over utility maximizing actions:

Both women’s and men’s behaviour appear systematic across the series of games discussed above...It appears that the goal of men’s choice behaviour is to maximise the probability of winning...Instead, women appear to minimize both the risk of loss and the probability of winning...Observation of the causes and logic of ‘conventional irrationality’ should lead women, men and oppression theorists to the conclusion that this behaviour is not irrational at all. It is behaviour induced by a system that diverts the oppressed from the goals that are valued by the powerful and leads them to participate in maintaining their dependency.

Observing this trend, Sapiro is highly sceptical about assuming the existence of processes of free and fair consent in situations where oppression is present. Indeed, she suggests

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90 Ibid., p.405
that in such contexts, social choice procedures may fail to benefit the oppressed and actually act to sustain systems of oppression:

In these cases such a calculus of ‘democratic consent’ becomes a mask for a system that maintains inequality... Such studies may reveal the folly of employing social choice procedures that assume equality of human preferences and values in societies where such equality does not exist.\(^9\)

Unfortunately, measuring differences in men’s and women’s goals and decision-making procedures in choosing to consent or dissent to their state is considerably more difficult than analysing behavioural trends in straightforward game situations with known payoffs. In addition, it is clear that Sapiro’s research is a simplification of the behavioural differences that might be expected in society – people experience oppression to different extents and for different reasons, so while not all women may have experienced considerable oppression, some men may have experienced oppression based on characteristics such as “race” or religion, and other women may have cumulative experiences of oppression on the basis of gender and other characteristics. Nevertheless, it seems possible to consider Sapiro’s analysis in the context of citizens’ decisions whether or not to consent to membership of a political community. In this context, the effects of oppression on women’s evaluations of their abilities and choices would impact their assessment of the possible costs and benefits of leaving their state for another, and the likelihood of attempts at migration being successful. Here, women’s risk aversion would be likely to manifest itself in a tendency to remain in their home state in the face of an alternative that might be either better or worse. While the situation of deciding whether or not to trust and cooperate with someone in a prisoner’s dilemma game is clearly different to deciding whether to trust a foreign state and its citizens, it is likely

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that learned experiences of oppression would lead to distrust in both situations. Indeed, one might be more likely to distrust the government and citizens of a state with which one was not familiar. As such, it seems possible that those who have experienced oppression have reduced freedom to decide to leave their state. Ironically, those who experience the most ill-treatment from a state may be those most strongly socialized into expecting ill-treatment, most averse to trusting their fate to the uncertain choices of others, and thus least able to move in order to escape these experiences.

The question of substantive options of exit for women has also been addressed within the liberal literature on exit rights, which has particularly focused on the question of whether women are substantively free to leave cultural groups that impose apparently restrictive customs upon women’s behaviour. Susan Moller Okin has been an important contributor to this debate, arguing that the importance of exit rights has been over-stated by many theorists since the existence of a formal exit right is of little help if there are considerable practical and socio-psychological impediments to these rights being exercised. Here, Okin echoes Sapiro’s concerns about the ways in which apparent ‘choice’ may reinforce or justify the existence of apparently oppressive practices: “The right of exit is cited as helping to legitimate the illiberal treatment of some or all group members.”

Okin’s argument rests on the claim that the restrictive or oppressive conditions that provide reasons for people to reject group membership also render them less free to leave, since their bargaining power within the group is reduced by their inability to leave (or threaten to do so):

If girls and women are treated unequally in various important ways within their cultural groups, it cannot but affect their capacities to exercise the right of exit

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that is of crucial importance to each theory. Moreover, women’s having an unequal capacity to exit leads to another significant inequality, for it cannot but affect their potential to influence the directions taken by the group...including being able to remedy their status and to achieve gender equality within the group.  

The causes of restrictions on women’s freedom to leave that Okin identifies are various, including practices concerning education, marriage, divorce, and other gender socialization. However, Okin does not specify which or how many cultures she sees restricting women’s freedom in such fashions, so it is unclear whether she refers only to refer to the non-liberal cultures referred to elsewhere in the article or whether liberal cultures are equally at fault. While it is acknowledged that liberal cultures are not perfect, since Okin cites unrealistic expectations regarding women’s physical appearance as implicated in eating disorders, and implicitly criticises liberal states for their failure to better protect female citizens who are members of more patriarchal cultural minorities, most of Okin’s concern about the effects of oppression and inability to exit is directed at non-liberal cultural groups. Here, Okin stresses that the danger of focusing on exit rights is that individuals are only given the unfair and perhaps impossible choice between accepting their culture exactly as it is or leaving it, rather than allowing the possibility for needed reform. As such, disadvantaged members of cultural groups seem to bear a disproportionate burden and responsibility for group practices and may be given no free or satisfactory choices:

In many circumstances, oppressed persons, in particular women, are not only less able to exit but have many reasons not to want to exit their culture of origin; the very idea of doing so may be unthinkable. Rather, they want, and should have the right, to be treated fairly within it.  

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93 Susan Moller Okin, "’Mistresses of Their Own Destiny’", p.207
94 Ibid., p.207
While Okin's arguments concerning the risks of focusing on formal rights of exist rather than substantive exit options are important and convincing, it is ironic that she does not recognise the existence of these very same issues of oppression, socialization and exit rights within liberal states. Although Okin correctly notes that liberal consent theory misconceptualizes freedom by failing to consider the psychologically restrictive effects of oppression, whereby leaving may be regarded as impossible or inconceivable, she does not seem to recognise that such oppression may affect one's ability to leave a state, or that significant and widespread oppression of women exists in liberal cultures and states. Instead Okin apparently assumes that the problem of exit rights is largely confined to 'illiberal' groups or cultures and is not a serious difficulty in liberal societies. Thus, despite protesting that a formal right of exit is used as a "palliative for oppression" in other groups and cultures, Okin fails to recognise the same arguments being used to legitimate discrimination and oppression of women within liberal states, in the name of consent and free choice. Nevertheless, such criticisms of arguments resting on the formal right of exit are central to the issue of whether or not women are free to dissent to membership in their states. Furthermore, Okin's observations about the effects of the ability to leave (and to plausibly threaten to leave) upon one's bargaining power within the group and upon the injustice of a binary choice between staying or leaving provide important starting points for the process of addressing and resolving such policies and situations.

Even further restrictions on women's freedom to dissent to membership may be identified if one turns to a model that considers the effects of wider social and discursive conditions, such as that employed by Nancy Hirschmann in *The Subject of Liberty: Toward a Feminist Theory of Freedom*. Hirschmann applies a social constructionist
model rather than a socialization model such as Sapiro and Okin use, and within this framework is able to pay greater attention to the role of the wider social context, and the structure of social and linguistic meanings and identities:

Going beyond socialization to social constructionism requires examination of not only constraints on belief and self-conception – difficult enough to define and articulate by their very nature, for the individual experiencing the constraints often does not realize that she has them – but the contexts in which claims of freedom and unfreedom are made. “Internal barriers” are neither individualistic nor strictly internal; they reflect, and work interactively with, a social context that determines the limits of the conceptually possible. Both individual and collective beliefs and self-conceptions are ‘embedded in the very fabric of the social order’. 95

Within such a social constructionist framework, restrictions on one’s freedom may not only result from factors such as education, but from factors including the conceptual vocabulary available and rules determining the meanings and usage of this vocabulary. Since the discursive context determines the identities available to one and, indeed, what counts as ‘personhood’, social constructionism claims that people are not merely ‘socialized’ by their context, but rather that the social and political context shapes understandings of what constitutes a ‘person’ or ‘citizen’, and thus actually creates its subjects. Thus, according to Hirschmann’s theoretical framework, oppression restricts freedom not only through direct impact on people’s choices, but also by affecting and constructing the subject who chooses, what they want, and in what terms their desires are evaluated and expressed.

However, this all-encompassing social constructionist model seems rather ill at ease with a discussion of freedom: if we are all unavoidably constructed and restricted by discourse, in what sense can anyone be ‘free’ as the term is recognisably understood?

Hirschmann terms this problem "the paradox of social construction", and argues that it need not undermine freedom but rather requires that freedom be reconceptualized within a more useful and realistic framework than conventional liberal models of the individual as a self-contained unit that is largely autonomous of society. As an alternative, she proposes an interesting conception of freedom in the light of discursive restrictions upon one’s choices:

If freedom involves the ability not only to pursue my desires and preferences but to define myself, and hence my desires and preferences; if such definition must logically require a context in and through which such definition and my "self" can occur; and if this definition is more difficult for women within a masculinist epistemology and language, as it is for people of color within a white epistemology and language, and lesbians and homosexuals within a heterosexual epistemology and language – then this greater difficulty means that women and other “excluded others” are less free within these respective contexts, and within the terms of white masculinist discourse itself.96

Hirschmann employs this conception of freedom to analyse the various ways in which women are being restricted, which she does through a number of case studies, including ‘battered women’ and women dependent on welfare. The issues raised in these cases are relevant to investigating the question of women’s freedom to leave the state in various ways, including acknowledging the importance women place upon maintaining ‘connection’ with a partner, child, family member(s) or cultural group even when this involves their physical or emotional abuse, or other harm. This theme of the tension between a desire for ‘connection’ and a fear of harm is present throughout Hirschmann’s case studies, but is particularly cited as a reason behind battered women’s failure to leave their abusers or to decide to return to them. While it is clear that such beliefs can be problematic in the case of battered women, the existence of such beliefs needs to be acknowledged and incorporated in models explaining women’s choices and behaviour.

96 Nancy Hirschmann, The Subject of Liberty, p.99
Here, it is important that women’s agency in making choices, choices that are rational given their priorities, is acknowledged, since if we automatically deny women’s agency where women’s behaviour does not correspond to masculine models then we construct women as victims.

Here, Hirschmann’s call for a closer understanding of the social and discursive framework around battering is applicable to the situation of women as regards the state, since it is clearly counterproductive to characterize women as victims who lack agency, but also necessary to acknowledge the existence of multiple and serious restrictions on women’s freedom of choice. Furthermore, it is clear that the material, socio-psychological and discursive restrictions upon women’s freedom of choice need to be challenged and resolved, as well as identified. Unfortunately, this process is likely to be anything but simple. Challenging and resolving the discursive restrictions on women’s freedom is necessarily a gradual and contested process and one that will never be complete – discursive conditions will always be more conducive to some identities, actions and choices than to others. Even the comparatively straightforward task of addressing the material restrictions is difficult in this case, since many of the material restrictions on women’s ability to leave are due to restrictive immigration and residence policies in other states. Nevertheless, any state wishing to obtain genuine and free consent from its citizens would have to address the issue of restrictions on freedom at the more complex social and discursive levels as well as through material policy, for instance by challenging and overturning social norms that give women fewer opportunities, lower pay, lower status and lesser promotion prospects, by redefining the meaning of the citizen, the worker and the family, and by reconceptualizing the important and valued characteristics of a state’s population under less patriarchal terms. Perhaps only such
efforts can address the numerous material and socio-psychological restrictions on women's freedom to consent or dissent.

_Disadvantage, Freedom & Choice_

While this chapter has largely discussed the restrictions women face in making life choices, including choices about their political relationships, many of the same issues are encountered by other disadvantaged groups. Thus, members of ethnic, racial or cultural minorities may find themselves disadvantaged by biases in the application of employment and financial criteria in immigration regulations, and by social mechanisms that often mean they are less wealthy and have fewer opportunities to obtain high status or income jobs, or higher education. It may also be the case that they suffer restrictions on their options as a result of social constructions of their role and identity, and that these restrictions might impede their freedom to consent or dissent from membership in their state. Similarly, material and socio-psychological restrictions on freedom are likely to be experienced by most other disadvantaged peoples and groups, including the disabled and mentally ill, the poor, religious minorities, gays, lesbians, bisexuals and transgendered people. Nevertheless, the forms and degrees of restrictions on freedom vary considerably between groups and between individuals, meaning that it is certainly not the case that a given set of people considered 'disadvantaged' for one reason or another, or for multiple intersectional reasons, are unfree to leave and everyone else is considered free. Instead, people may be considered more or less free in their life options, and particularly regarding their ability to consent or dissent to membership in the state, depending on the forms and degrees of restrictions experienced. While all members of a society experience some restrictions upon their freedom to leave, it is clear that some experience far greater
restrictions on their freedom than others and the most disadvantaged, who often experience multiple biases against them, may not be substantively free to dissent to membership in their state.

In conclusion, it seems that the freedom of citizens to consent or dissent to membership is not something that can be taken for granted -- a state and society that is 'reasonably just' towards all or most of its members is a precondition for the existence of substantive freedom to consent. As such, members' consent to the state should not be conceptualised as merely the 'rubber-stamp' most liberal theorists seem to consider it, but a significant process of negotiation and reform that affects the state and society's decisions and future direction. While obtaining substantive consent from all, or nearly all, members would be a very powerful legitimation for a state, such an achievement seems beyond contemporary states. Nevertheless, the impossibility of achieving such free consent is not a reflection of problems in liberal assumptions regarding the importance of freedom and of consent as a principle of legitimating authority. Instead, the impossibility of achieving such free consent should be read as a condemnation of the widespread processes of injustice and disadvantage in contemporary states which need to be addressed before members are likely to be fairly equally and substantively free to leave their state, and as such free to consent to membership in it. The problem of many, if not all, contemporary states and societies is summarised by Duncan Ivison's comment on the (non)existence of freedom under situations of colonialism: "The freedom to exit is an empty option in circumstances where relations of power are such that the weakest and
most vulnerable members are least able to question or criticize the social roles imposed upon them."  

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The Problem of Justification: Case Study of Aboriginal Peoples

Origins Of Liberal Ethnocentrism

In this chapter I intend to explore the problems posed for existing liberal accounts of consent by the issue of justification, that is by the fact that people consenting to membership in a state must have reason to wish to consent, and these reasons must stem from the moral and prudential advantages of the state. As I have discussed in chapter 2, the importance of the moral functions of the state in any model of consent is a central feature of both Beran’s and Simmons’ discussions of consent:

What may be called the moral functions of the state, the promotion of liberty, justice and human welfare, are necessary parts of such a theory; for they explain why people should consent to obey the state – if it does indeed promote liberty, justice and welfare – and they point to particularly important reasons (of course there can be others) why people may want to consent to obey the state.\(^\text{98}\)

According to the model of justification and legitimacy that Beran and Simmons propose, a state is only legitimate if the majority of people have consented to it, and that such consent can only be successfully achieved when citizens hold that their state is morally and prudentially justified. Here the theorists diverge, with Beran seeming to assume that most existing liberal states are “nearly just” and thus justified, while Simmons proposes conditions for deciding if a state is justified that require the advantages of state versus non-state organisation to be demonstrated: “we can justify the state by showing that some realizable type of state is on balance morally permissible (or ideal) and that it is rationally preferable to all feasible non-state alternatives”.\(^\text{99}\) While acknowledging the importance of the issues raised by Simmons, I intend to take a different approach to investigating whether or not states are justified, namely by exploring whether or not

\(^{98}\) Harry Beran, *The Consent Theory of Political Obligation*, p.33

\(^{99}\) A. John Simmons, ‘Justification and Legitimacy’ in *Justification and Legitimacy,...*, p.126
liberal states can be described as "nearly just" or "on balance morally permissible". I will focus upon the treatment of indigenous peoples in liberal states, and will argue that the oppression and disadvantages they have faced and continue to face provide cause to seriously doubt that existing liberal states are "on balance morally permissible" or "nearly just". Furthermore, since many of these difficulties do not stem merely from the misapplication of western political systems and political philosophy with regard to aboriginal peoples but rather from the fundamental ethnocentrism of liberal theory, there are reasons to believe that just resolutions for indigenous people may be impossible under prevailing liberal political philosophies. If this is the case, the achievement of justice is dependent on reform of the concepts and assumptions of liberal political philosophy, and thereby reform of the relationship between indigenous peoples and the state. Since the achievement of widespread consent is dependent on residents' belief that the state is morally justified, and the existence of deeply seated ethnocentrism and injustice in liberal theories and states suggests that states are not morally justified, evidence of such biases and injustice may undermine the possibility of achieving consent. As such, I will argue that the issue of justification may raise a basic inconsistency between the achievement of the widespread consent of residents and various features of prevailing liberal political philosophy with regard to indigenous peoples.

In recent years there has been a surge of interest in the ethnocentric and colonialist biases present in historical and current liberal theory, which has identified tensions within liberal thought, as well as between liberal and other philosophies. While some theorists such as Duncan Ivison believe that just resolution of indigenous claims is possible within the scope of liberal theory, others such as Bhikhu Parekh are more
sceptical about the liberal legacy. As Parekh, argues "Liberalism is both egalitarian and
inegalitarian, it stresses both the unity of mankind and the hierarchy of cultures, it is both
tolerant and intolerant, peaceful and violent, pragmatic and dogmatic, sceptical and self-
righteous." Nevertheless, there is an increasing body of opinion documenting the ways
in which liberal theory has been used to justify and legitimate colonialism. This use of
political theory as a mode of "legitimating untoward social actions" has been discussed
at a theoretical level by Quentin Skinner, who argues that societies establish and alter
their moral and political identity by manipulating the set of terms and concepts available
to them. According to Skinner, "innovating ideologists" may be able to justify actions
that would currently be conceived of as unjustifiable:

His [the innovative theorist's] concern, by definition, is to legitimate a new range
of social actions which, in terms of the existing ways of applying the moral
vocabulary prevailing in his society, are currently regarded as in some way
untoward or illegitimate. His aim must therefore be to show that a number of
existing and favourable evaluative-descriptive terms can somehow be applied to
his apparently untoward actions. If he can somehow perform this trick, he can
thereby hope to argue that the condemnatory descriptions which are otherwise
liable to be applied to his actions can in consequence be discounted.

Skinner actually illustrates this claim with the example of the way classical liberal
philosophy was used to justify colonialism, although he does not say this in so many
words. Instead, he refers to the ways in which "novel commercial and capitalist
enterprises" were justified in the early seventeenth century, when historical agents
sought "to describe it in terms of concepts normally used to commend an ideal of the
religious life". He notes that "It was, moreover, plausible to make such an attempt, since

of the Imagination p.82
Meaning and Context: Quentin Skinner and his Critics, Princeton University Press. p.111
102 Ibid, p.112
103 Ibid, p.113
there was a certain element of structural similarity – which they eagerly exploited –
between the specifically Protestant ideal of individual service and devotion (to God) and
the alleged commercial ideals of service (to one’s customers) and devotion (to one’s
work).”

The connection between justifying capitalist enterprise and religion was indeed
close in seventeenth-century liberal thought, particularly in those works that were
influenced by Kames’ account of the four stages of human development, as outlined in
his Historical Law Tracts. This theory argues that human cultures range in their degree
and stage of civilization from hunting and fishing, in which state there is no law or
government, to agricultural development, and the pinnacle of civilization in trade and
industry. According to Kames, man’s moral wellbeing can only be developed in the latter
two stages of development, agricultural and industrial societies, where affluence and
cooperation ensures that: “the moral sense is openly recognised and cheerfully submitted
to”, thus allowing the development of individual liberty. Similar claims can be found
in the work of a wide range of seventeenth century scholars, including David Hume and
Adam Smith. Smith, credited as the founder of classical economics, was writing in the
context of increasing wealth in Scotland’s cities, largely driven by the supply of goods
such as tobacco from the colonies. As a result, it is hardly a surprise that theorists such as
Smith sought to justify colonialist endeavours by arguing that huge material and
intellectual advantages are to be gained by the pursuit of commerce and
entrepreneurship:

It is this which first prompted them to cultivate the ground, to build houses, to
found cities and commonwealths, and to invent and improve all the sciences and

104 Quentin Skinner, “Some Problems in the Analysis of Political Thought and Action”, p.113
arts, which ennoble and embellish human life; which have entirely changed the
whole face of the globe have turned the rude forests of nature into agreeable and
fertile plains, and made the trackless and barren ocean a new fund of subsistence,
and the great high road of communication to the different nations of the earth.

According to such a model, cultivation and industry are responsible not only for the
wealth of nations, but for the development of societies and nations as well, because they
are a prerequisite for the development of moral and intellectual faculties. Thus, Smith
strongly implies that the introduction of peoples to agriculture and industry could lead to
their improvement while, conversely, a people's failure or refusal to make use of land
and natural resources for cultivation or industry is evidence of an absence of imagination
and civilization.

Various theorists including James Tully, Barbara Arneil and Bhikhu Parekh have
documented the presence of similar assumptions and arguments in Lockean thought,
where the emphasized connection is between civilization (again defined in terms of
economic structure and land use), political culture and intellectual and moral
development. Locke draws explicitly upon the stages of development theory in his
account of the development of societies and political authority, positing that aboriginal
peoples exemplify the earliest stage of development and Europe once passed through
such a stage. This stage is described by Locke as the 'state of nature', a pre-political
society in which there are no civil laws or property ownership, a state that contrasts with
Locke's description of European states:

First, Locke sets the stages of world history in place and identifies Aboriginal
peoples within it as the earliest and most primitive members of the human
race...European societies, by contrast, are in the most 'improved' or 'civilised'
age...In Locke's classic formulation of the concept of individual popular

Scots Invention of the Modern World*, p.199
sovereignty, the first age represented by America is a ‘state of nature’. There is neither nationhood nor territorial jurisdiction at this early stage.\(^{107}\)

The fact that there are no laws or property rights in such a situation follows from Locke’s definition of political society and nationhood in terms of the existence of a “Sovereign” which requires the powers and institutional features of European government, including the separation of powers between legislative, judiciary and executive. According to Tully, the perceived absence of nationhood or territorial jurisdiction amongst aboriginal peoples allow Locke to make two important conclusions which together justify English colonialism towards aboriginal peoples. The first of these conclusions is that Europeans settling in America have the right to use violence and force against anyone they come across, thus removing the need for government by consent and justifying imperial wars, as Tully argues:

"In the state of nature, all encounters, such as ‘between a Swiss and an Indian, in the woods of America’, are dealt with under the law of nature. Since the Amerindians have no governments to deal with and no rights in their hunting and gathering territories, they violate the law of nature when they try to stop Europeans from settling and planting in America and Europeans, or their governments, may punish them as ‘wild Savage Beasts’ who ‘may be destroyed as a Lyon’.\(^{108}\)"

The second of these conclusions is that Europeans can occupy and cultivate lands in North America without the consent of the users or occupants since Locke defines mere use and occupation of land as insufficient to provide a right to jurisdiction of a territory. This follows from an account of land rights as a process of property acquisition, and excludes the claims of aboriginal peoples in two ways – firstly by arguing that “property” only legally exists once state authority is established, secondly by claiming that one


\(^{108}\) *Ibid.*, p.73
establishes property in land by labouring upon it, and thirdly by arguing that property should be held by individuals rather than ‘in common’ by groups:

Every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. WHATSOEVER them he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joined to it something that is his own, and thereby makes it his Property... ’Tis the taking any part of what is common, and removing it out of the state Nature leaves it in, which begins the Property; without which the Common is of no use.  

Tully sees these arguments as influential in subsequent, and indeed contemporary, policies and approaches towards aboriginal peoples. In particular, he notes the continuity of Lockean assumptions in a tendency to consider land only in terms of its resource value or productivity:

It is difficult to overestimate the influence of this economic argument in the justification of planting European constitutional systems of private property and commerce around the world and in justifying the coercive assimilation of Aboriginal and other peoples. Even theorists who believe that Aboriginal peoples have some rights in their territories, contrary to Locke, often argue that they are nevertheless more than compensated for their loss of land by the material abundance and greater productivity of the commercial societies which have displaced theirs. Locke’s standard of comparison, ‘greater conveniences’, in its many reformulations, such as the gross domestic product, is taken for granted as an impartial standard in judging different cultures.  

Tully also describes the way in which the restrictive Lockean understanding of sovereignty and nationhood have justified the non-recognition to aboriginal governments: “Because Aboriginal governments are an ancient form of direct democracy in which the people do not delegate their powers of war and peace to an institutionalized legislature and executive, as Europeans have done, they are not sovereign.” However, Tully does not explore the question of whether contemporary liberal understandings of

110 James Tully, Strange Multiplicity, p.75  
111 Ibid., p.78
Sovereignty, or of related concepts such as nationhood, self-government or self-determination, continue to be implicated in misunderstanding and denying the validity of aboriginal claims.

Arneil also identifies economic imperatives as a major feature of Locke's argument, but differs from Tully in her analysis of Locke's position regarding the use of force in colonialism. According to Arneil, Locke's defence of property and trade is more precise than Tully identifies, referring not to the general acquisition of native peoples' land for commercial reason but rather to the particular use of colonial land for the cultivation of crops. Arneil stresses that the 'economic defense of colonialism' provided by contemporary economic theorists such as Thomas Mun and echoed in Locke's thought particularly favoured the cultivation of land since this form of economic activity was thought to be most beneficial to English interests, in contrast to the risks and lesser benefits of uses such as mining, industry, or keeping animals:

The English were the best planters; other forms of labor tried by English colonists were considered to be less beneficial to the nation's interests. Mining and grazing in particular were often discouraged by supporters of the plantations...Grazing or raising cattle was discouraged because it tended to benefit intercolonial trade within America rather than that between the colonies and England.112

Thus, Locke's account of the importance of labour upon the land as a mode of acquiring property is consistent with his preference for English colonial expansion through the farming of crops. In addition, Arneil argues that Locke's theory of property acquisition was affected by other aspects of English colonial policy, particularly policies in Carolina since Locke was secretary to the Lord Proprietors of Carolina and the Council of Trade and Plantations and thus heavily implicated in the management of the colony. One

example of such influence that Arneil cites is Locke’s specification that one should only be able to own and enclose as much land as one is capable of labouring upon, a criterion that she attributes to his experiences with excessive land appropriation in Carolina:

Locke’s concern with the taking of too much ground, like Child’s and Davenant’s, is again rooted in the experiences of the colonies, in which land was too often appropriated in vast quantities and even enclosed without having the people necessary to cultivated the land therein. The principle of limiting land to that which can be cultivated was a fundamental premise for those overseeing the colonies.¹¹³

These arguments regarding the importance of labour in land acquisition and property are also important to Arneil’s claim that Locke did not intend to justify the use of violence against native peoples. Here, she cites textual evidence that Locke opposed the use of violence and explicitly denied that it gave one the right of land ownership, and regarded modes of colonialism based on violence, as practiced by the Spanish, as unhealthy and ineffective.

In addition, Arneil analyses the whole of Locke’s theory of property in the specific context of native peoples practices, outlining the numerous ways in which Locke’s theory misrepresents and excludes the claims of native peoples. These various exclusionary criteria include the insistence that land be literally ‘enclosed’, that is fenced in, that it be cultivated, and the argument that the natural right of land ownership belongs to the ‘industious and rational’, by which he means the English. Furthermore, Arneil notes the importance of Locke’s arguments regarding the use of money to store wealth, particularly silver and gold, thus bypassing the natural law condemnation of spoilage and consequent limitations on the amount of property one may accrue. As a result, there are effectively two rules concerning the amount of land one may appropriate; one for money-

using Europeans and another for the supposedly pre-political and pre-commercial indigenous peoples:

Clearly, the only people who could appropriate the ‘ten thousand or an Hundred Thousand Acres of excellent Land’ are not the Inhabitants who Labour on it, but those who have money and can engage in commerce with the rest of the world, namely the English colonists. It is the potential to exchange the wealth of the land through trade in hard currency with other countries which both causes and justifies the massive appropriation of land by English colonial interests.\(^{114}\)

Finally, Arneil explicitly repudiates Tully’s claims regarding Locke’s advocacy of violence and his argument that Locke denied the rationality of the native peoples, arguing that Locke saw the aboriginal peoples as potentially rational, just like any other human being. Similarly, she argues that Locke’s denial of property rights to aboriginal peoples is a result of their cultural practices, and that this failure to understand or respect indigenous peoples’ traditional cultural practices continues to explain policies regarding land ownership and use:

One might argue that Locke is, by definition, excluding the Amerindian from any right to property in land. He is not. The doctrine of natural rights allows that anyone may lay claim to the soil of America if he adopts a settled agrarian style of life, joins the rest of mankind in this use of money and commerce, establishes laws of liberty and property, and adopts the primary principles of God, and secondary principles of arts and sciences as the basis of knowledge. The difficulty is that in meeting all the requirements of Locke’s property owner, the Amerindian must in all significant respects become European...The reconciliation of liberal theory with aboriginal rights is still plagued by this underlying dichotomy between the state of nature and civil society, and the assumed inevitability that the former, through the vehicles of private property, commerce and reason, will ultimately be transformed into the latter.\(^{115}\)

On this analysis, liberal theory has made little progress in its treatment of aboriginal peoples and handling of contestation over land rights. The façade of contemporary liberal


\(^{115}\) Ibid., p. 74
tolerance of difference may prove to be little more than a remaining hope that aboriginal people can be successfully assimilated.

While Parekh also considers the biases of liberal economic theory, his criticisms focus on the complicity of certain notions of social and economic organisation in liberal accounts of moral and intellectual wellbeing. Parekh criticises elements of Locke's arguments that continue to be central features of liberal thought, such as the account of the autonomous, self-interested individual. Consequently, he emphasizes the way that Locke imagines the possession of 'higher' intellectual faculties, or rationality, as dependent upon certain beliefs and forms of social and economic organisation:

As Locke put it, "God gave the world to man in common, but...it cannot be supposed he meant it should always remain in common and uncultivated. He gave it to the use of the Industrious and Rational." Locke's juxtaposition of 'Industrious' and 'Rational' is striking...Locke had no doubts as to how a truly rational man should live and how a truly rational society should be organized. The former exhibited such qualities of character as industry, energy, enterprise, self-discipline, acknowledgement of others as his equals and all that followed from it: control of passions, obedience to the law, and reasonableness. A truly rational society established the institution of private property and provided incentives for industry and the accumulation of wealth, without both of which men could not discharge their duty to develop the earth's resources and create a prosperous society.116

Parekh explains how, given these premises, Locke goes on to conclude that, in contrast to the English, Indians in North America were insufficiently industrious and rational to control or govern their land. Furthermore, he notes that this argument allows him to portray colonialism as not merely morally acceptable, but actually good for those Indians affected:

It respected the natural equality of Indians, it was relatively peaceful, it used force only when they did not voluntarily part with their vacant and wasted lands, it civilized or morally uplifted them and drew them into an economically interdependent world, and it furthered the interests of mankind. Locke had no

116 Bhikhu Parekh, "Liberalism and Colonialism: A Critique of Locke and Mill", p.84
doubt at all that in colonizing America, the English performed the remarkable moral miracle or serving God, mankind, Indians, and themselves.\textsuperscript{117}

In contrast to Tully’s focus on the role of economic wellbeing in justifying colonialism, Parekh draws attention to the way that man’s moral or intellectual development was used to justify colonialism, in the name of religion, the promotion of freedom, or both. The presence of such arguments in later liberal thought is explored by analysing the ethnocentrism present in Mill’s influential account of freedom and human development. Here, Parekh shows how the liberal concern for opportunities for the full development of human capacities contain both emancipatory and oppressive potential since it involves making judgements about whether or not people are intellectually and morally developed and an imperative to remedy the situation of those who are deemed to be insufficiently developed:

For Mill, man was a progressive being whose ultimate destiny was to secure the fullest development of his intellectual, moral aesthetic and other faculties...Like Locke, Mill divided human societies into two, but his principle of classification was different. In some societies, which he called civilized, human beings were in the ‘maturity of their faculties’ and had ‘attained the capacity of being guided to their own improvement by conviction or persuasion’. In his view most European societies had ‘long since reached’ that stage. By contrast all non-European societies were ‘backward’, and human beings there were in a state of ‘nonage’ or ‘infancy’...Such backward societies were incapable of being improved by ‘free and equal discussion’ and lacked the resources for self-regeneration.\textsuperscript{118}

Considering Mill’s and Locke’s cases, Parekh argues that classical liberal thought contains fundamental and important tensions that often lead to ethnocentric conclusions, and that these tensions remain in contemporary liberal thought. While acknowledging that contemporary liberals show much greater tolerance and concern for diversity than

\textsuperscript{117} Bhikhu Parekh, “Liberalism and Colonialism: A Critique of Locke and Mill”, p.88
\textsuperscript{118} Ibid., p.93
Mill or Locke, Parekh argues that they continue to classify some people and societies as undeserving of respect and just treatment:

Liberals do believe in equal respect for all human beings, but they find it difficult to accord equal respect to those who do not value autonomy, individuality, self-determination, choice, secularism, ambition, competition and the pursuit of wealth. In the liberal view, such men and women are ‘failing’ to use their ‘truly’ human capacities, to live up to the ‘norms’ of their human dignity or ‘status’, and are thus not ‘earning’ their right to liberal respect…This explains the liberal attitude to communists in the 1950s and to the ethnic minorities, Muslims and other religious groups today.119

Parekh is correct to be concerned at the continuing presence of ethnocentric assumptions in liberal thought, even though liberal judgements of non-European and non-liberal cultures have mellowed over time. In a sense, the contemporary liberal position here is reminiscent of the infamous Bernhard Shaw comment about prostitution: that a woman would sell her body for a million dollars is little different from one who would sell hers for a hundred dollars: ‘we’ve already established what you are, now we’re just negotiating the price’. If contemporary liberals continue to justify the use of violent, oppressive or disrespectful measures towards non-liberal societies or cultures by arguing that it is for their greater ‘convenience’ or development, the difference between their arguments and those of Locke or Mill is merely one of degree, not one of type: we’ve established that they are ethnocentric, now we’re just haggling over how many people these judgements are applied to.

While Tully and Parekh criticize the ethnocentrism present in a variety of key liberal concepts, including the autonomous individual, freedom (particularly what Berlin terms ‘positive freedom’), sovereignty and property ownership, I shall focus on only the final two of these concepts. Here, I will investigate the ways in which the liberal

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definitions of sovereignty and one's relationship to land pose contemporary obstacles to the expression and recognition of the claims of indigenous peoples. In analysing this subject I will largely draw upon material from two sources concerned with the case of indigenous peoples in Canada: the reports of the Royal Commission on Aboriginal Peoples, and the work of academic and activist Taiaiake Alfred. These two sources are intended to represent a range of opinions on the subject, since the Royal Commission on Aboriginal Peoples provides an institutional and somewhat conservative perspective, while Alfred represents a slightly more radical indigenous position. In addition, there is some diversity of opinion within each source, since both the Royal Commission and Alfred consult and quote other sources, both aboriginal and state-centred. As a result, although the views and proposed solutions of these sources differ, they share concerns with the difficulty of achieving justice for indigenous peoples within the language and conceptual apparatus of contemporary liberal thought.

Sovereignty

"Sovereignty" is a key concept in liberal and constitutional thought, and contemporary understandings of the term have been highly influenced by the Hobbesian account of the concept, and by Locke's more democratic reformulation. As such, it is as well to provide both Hobbesian and current constitutional definitions of the term. According to Hobbes, sovereignty lies with the unitary person who ultimately holds political power, as the Sovereign is the "one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all, as he shall think expedient, for their
peace and common defence.”\textsuperscript{120} Thus, according to Hobbes, sovereignty lies in the possession of the ultimate and highest authority over the state, and since Hobbes argued that divided or limited sovereignty leads to conflict and disaster, the Sovereign is assumed to be a single individual\textsuperscript{121}. Locke seems to hold similar assumptions about the content of sovereignty, but makes a number of amendments to the concept. His definition of the content of political power is similar to Hobbes’ in most respects, but differs in the institutional focus and in the limitation of the extent of authority to promoting the public good:

Political power then I take to be a Right of making laws with Penalties of Death, and consequently all less Penalties, for the Regulating and Preserving of Property, and of employing the force of the Community, in the Execution of such Laws, and in the defence of the Common-wealth from Foreign Injury, and all this only for the Publick Good.\textsuperscript{122}

This distinction regarding the institutional nature of political power or Sovereignty is significant, since Locke argues that the possession of this power should not be unitary, but rather divided between legislative, executive and judiciary. Nevertheless, he implies that the legislative retains Sovereignty:

This Legislative is not only the supreme power of the Common-wealth, but sacred and unalterable in the hands where the Community have once placed it; nor can any Edict of any Body else, in what Form soever conceived, or by what Power soever backed, have the force and obligation of a Law, which has not its Sanction from that Legislative, which the publick has chosen and appointed...Therefore all the Obedience which by the most solemn Ties any one can be obliged to pay, ultimately terminates in this Supream Power, and it directed by those Laws which it enacts: nor can any Oaths to any foreign Power whatsoever, or any Domestick Subordinate Power, discharge any member of the
Society from his Obedience to the Legislative...it being ridiculous to imagine one can be tied ultimately to obey any Power in the Society, which is not the Supremam.\textsuperscript{123}

Similar definitions embodying these features continue to be used in Western constitutional law, and Bouvier's text \textit{A Law Dictionary Adapted to the Constitution and Laws of the United States of America and the Several States of the American Union} consequently defines sovereignty as:

The union and exercise of all human power possessed in a state; it is a combination of all power; it is the power to do everything in a state without accountability; to make laws, to execute and to apply them: to impose and collect taxes, and, levy, contributions; to make war or peace; to form treaties of alliance or of commerce with foreign nations, and the like.\textsuperscript{124}

In contrast, Alfred rejects the use of the term or concept of sovereignty by aboriginal peoples, arguing that although use of the concept has been strategically useful in debating with liberals, its emancipatory potential is limited by the discursive conditions surrounding the term. Alfred argues that the concept of sovereignty is problematic both because it is philosophically opposed to traditional indigenous culture and political organisation, and because such a model is simply impractical for today's indigenous peoples:

Traditional indigenous nationhood stands in sharp contrast to the dominant understanding of 'the state': there is no absolute authority, no coercive enforcement of decisions, no hierarchy, and no separate ruling entity...‘Sovereignty’ implies a set of values and objectives in direct opposition to those found in traditional indigenous philosophies. Non-indigenous politicians recognize the inherent weaknesses of assertions of a sovereign right for peoples who have neither the cultural framework nor the institutional capacity to sustain it. The problem is that the assertion of sovereign right for indigenous peoples continues to structure the politics of decolonisation, and the state uses the theoretical inconsistencies in that position to its own advantage.\textsuperscript{125}

\textsuperscript{123} John Locke, 'Second treatise', p.356
\textsuperscript{124} John Buvier (c.1856) \textit{A Law Dictionary Adapted to the Constitution and Laws of the United States of America and the Several States of the American Union}, Story on the Const. Sec. 207.
Alfred criticizes the theoretical and institutional contradictions within the liberal account of aboriginal sovereignty, arguing that any substantive sovereignty or nationhood is inconsistent with a situation in which the government controls the right to define aboriginal peoples' identity, through use of the Indian Act, and in imposing restrictions on their rights, such as fishing. In addition, Alfred questions the way sovereignty is applied to colonial states, arguing that their powers are illegitimate, even with reference to liberal philosophy, not least since colonial power is not based on consent. His conclusion is that justice for aboriginal peoples cannot be practically obtained under the current relationship or terms of debate with the state, and moreover that attempts to do so merely serve to legitimize the unjust state apparatus:

To argue on behalf of indigenous nationhood within the dominant Western paradigm is self-defeating. To frame the struggle to achieve justice in terms of indigenous 'claims' against the state is implicitly to accept the fiction of state sovereignty. Indigenous peoples are by definition the original inhabitants of the land. They had complex societies and systems of government. And they never gave consent to European sovereignty over them (treaties did not do this, according to both historic Native understandings and contemporary legal analysis)...The mythology of the state is hegemonic, and the struggle for justice would be better served by undermining the myth of state sovereignty than by carving out a small and dependent space for indigenous peoples within it.\textsuperscript{126}

Thus, instead of signing on to the concept of sovereignty with its implications of coercive power, Alfred argues that native peoples need to reassert their ability to define their own identities and rights. This includes asserting understandings of native identity that do not define aboriginality in terms of static residence, use and cultural practices, thus portraying change and adjustment as positive forces rather than automatically involving a loss of aboriginal identity. Furthermore, he argues that native leaders must 'expose' the imperial myth involved in accepting state sovereignty, capitalism and the

\textsuperscript{126} Taiaiake Alfred, \textit{Peace, Power, Righteousness: An Indigenous Manifesto}, p.58
rule of law, and to recognise the realities of the process of conquest. As an alternative, Alfred insists on the need for native peoples to retain traditional values that conceptualise non-coercive authority and the relationship between people and other elements of creation. For Alfred, this relationship is central to aboriginal identity, and is the primary point of contrast with Western traditions and philosophies: “In indigenous philosophies, power flows from respect for nature and the natural order. In the dominant Western philosophy, power derives from coercion and artifice – in effect, alienation from nature.”

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In addition to his own analysis of the concept of ‘sovereignty’, Alfred’s book also includes transcriptions of his discussions with other aboriginal people and scholars which show a common theme of discomfort with the Western concept of sovereignty. Thus, Alfred cites Audra Simpson’s observations on the distinction between nationhood and sovereignty:

My opinion is that ‘Mohawk’ and ‘nationhood’ are inseparable. Both are simply about being...Now, sovereignty – the authority to exercise power over life, affairs, territory – this is not inherited. It’s not a part of being, the way our form of nationhood is. It has to be conferred, or granted – it’s a thing that can be given and thus can be taken away. It’s clearly a foreign concept, because it occurs through an exercise of power – power over another.”

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Alfred also describes his discussion with the leader and campaigner Atsenhaienton about the issue, noting that Atsenhaienton seemed comfortable with the term if not with its Western meaning. Instead, he seemed to be appropriating the term but rejecting its legal connotations and ‘historical development’ in favour of a meaning akin to self-government: “To me it’s the Mohawk people using our terminology to express our self-determination – how we will exist, how we will relate to each other and to other

127 Taiaiake Alfred, Peace, Power, Righteousness: An Indigenous Manifesto, p.60
128 Quoted in Ibid., p.65-6
people." Interestingly, Atsenhaienton is opposed to the use of the term ‘independence’ in describing aboriginal peoples since he feels the word *implies* alien Western characteristics such as the right to arm and defend oneself against external states, a characteristic traditionally associated with sovereignty. Instead, he proposes an understanding of self-determination based on the Two-Row Wampum tradition:

It’s also because of the Two-Row Wampum model of relationships between independent peoples, which existed before European contact as a common way of dealing with other indigenous peoples. We believe that we have a right to be independent; in the realpolitik sense, I do believe we can coexist with the Canadian and American governments without violating our own constitution...We can agree with Canada not to raise our own army if they promise not to use an army against us, and we can agree not to try to acquire nuclear weapons because it’s not in our mutual best interests, etc...In our case we have to find a way to apply the Two-Row in a modern situation.\(^{130}\)

In contrast to Alfred’s frank discussion of the concept, the word “sovereignty” is infrequently used in the Royal Commission on Aboriginal Peoples report *The Right of Aboriginal Self-Government and the Constitution: A Commentary*. This avoidance of the term is indicative of concerns over its meaning and applicability to aboriginal peoples. Instead, when discussing the matter the Commission usually refers to “self-government”, but notes that even this is a contentious concept among aboriginal peoples, liberal constitutional thought and the government:

For reasons that will become clear, we believe that without common understanding of the key concepts involved, an impasse could develop that would block the explicit recognition of the right of the Aboriginal self-government in the Constitution and, in turn, impair the Commission’s ability to fulfil its mandate effectively.\(^{131}\)

Insofar as the term ‘sovereignty’ occurs in the Royal Commission report, it usually seems to be associated with a fairly conventional, liberal understanding of the concept,

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130 *Ibid.*, p.113
including the right to negotiation and recognition by other nations, and the implication is that this is unobtainable for aboriginal peoples. In one such reference, the Commission’s report cites the concerns of the government Minister for Constitutional Affairs that aboriginal claims “could be used as the basis for a claim to international sovereignty or as the justification of a unilateral approach to deciding what laws did or did not apply to Aboriginal peoples”. Elsewhere, the term is used in describing previous debates over the meaning of ‘self-government’:

The debate centred on the question of whether the right of Aboriginal self-government flowed from an inherent and unextinguished Aboriginal sovereignty, from existing treaty rights, or from the Federal and Provincial governments by way of constitutional amendment. The federal government took the ‘contingent right’ approach, which required the content of self-government to be defined by agreement among Federal and Provincial governments prior to any entrenchment in the Constitution. The approach was unacceptable to the Aboriginal peoples’ representatives because it presupposed that the right was to be created by the Constitution.\(^{132}\)

Again, the implication seems to be that sovereignty refers to a particular conception of powers, status and the source of authority.

Given these concerns about the meaning of key concepts, the Commission attempts to define what aboriginal self-government means in the context of constitutional recognition, and this definition touches upon several of the features usually associated with ‘sovereignty’:

In assessing proposals to recognize explicitly the right of Aboriginal self-government in the Constitution, it is helpful to distinguish three separate issues, which can easily be confused. These issues are: 1) the source of the right of self-government; 2) the scope or extent of the right; and 3) the status of the right.\(^{133}\)

The reason why these three issues might be confused seems fairly clear: classical liberal constitutional thought conceptualises self-government as sovereignty and assumes that

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\(^{132}\) Royal Commission on Aboriginal Peoples *The Right of Aboriginal Self-Government and the Constitution: A Commentary*, p.2

\(^{133}\) *Ibid.*, p.6
either one has sovereignty, in which case one has a right to government ceded by the people that is unlimited in extent (or limited only by the 'public good') and non-subordinate, or one does not. Since it is clear to the Commission that the Canadian government would not accept such a definition of Aboriginal self-government and, furthermore, that most aboriginal peoples are not seeking such a definition, it attempts to separate these characteristics. While alternative models of political power and sovereignty have been developed in federal systems, as the Commission notes, such models still do not resolve the tensions over the source of the right to aboriginal self-government. Nevertheless, the Commission draws upon such federal models, concluding that a constitutional right of aboriginal self-government should as be specified as inherent (ie. not created by constitutional recognition, but “from sources within the Aboriginal nations”) circumscribed (ie. not competent to legislate in all areas), and proposes a solution for the status of the right that is modelled on the federal system:

Within a certain constitutional sphere, the powers of Aboriginal governments should be sovereign, so that Aboriginal laws will take precedence over Federal and Provincial laws. In other spheres, Federal or Provincial laws will take precedence. Some areas of jurisdiction will be exclusive to Aboriginal governments, while others will be shared. The resulting pattern of exclusive and overlapping spheres or jurisdictions is, of course, a familiar feature of the existing federal system in Canada.134

Although the Royal Commission takes the view that this definition of self-government resolves the question of the status of aboriginal self-government, it is not clear that it addresses the key questions. Firstly, the concern Alfred expresses about the right to define aboriginal identity is not addressed at all. This is highly problematic as an issue of principle, but also as a practical question, since unless aboriginal peoples are

given such a right the possibility remains that the state will undermine aboriginal selfgovernment by simply withholding or removing aboriginal status. Secondly, the proposal to overlap jurisdictions seems impractical given that the Commission acknowledges the history of injustices by the state towards aboriginal peoples and frequent disagreements between federal or provincial governments and aboriginal peoples. Finally, the Royal Commission is clearly limited by the scope of its remit, ie. that to investigate the relationship of aboriginal peoples within the Canadian constitution, thus ensuring that its discussions are placed within the tradition of liberal constitutional thought, and that the sovereignty of the Canadian state is taken for granted. Although many difficulties with the concept of sovereignty cannot, therefore, be expressed or addressed within the liberal constitutional tradition, it is clear that the concept is still a difficult, contested and somewhat contradictory one.

Relationship with the Land

While the relationship between individuals or states and territory has not traditionally been regarded as a central feature of liberal thought, it is a fundamental feature of aboriginal philosophy. Insofar as liberalism addresses the question of land, it tends to refer either to individual ownership, an essentially commercial relation, or to the concept of nationhood, which assumes the existence of a reasonably sized territorial concentration of citizens but pays little attention to the particular land settled upon or to its history. The classical liberal conception of property ownership is often attributed to Locke’s account of taking possession of uncultivated land through the act of labouring on it and enclosing it from others, whereby “As much Land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property. He by his
Labour does, as it were, inclose it from the Commons.” Locke’s claim follows from his assumptions that the only value of land lies in its ability to produce goods, and that land is vastly more productive if cultivated, both of which assumptions are open to question. This attitude towards land displays at least two traits that are problematic from the perspective of aboriginal philosophy: the assumption that the purpose of land is for enclosure, improvement and resource extraction; and the assumption that one does not have a particular attachment or relationship with any specific area of land. These assumptions are also present in a further feature of Locke’s argument that, although less influential in legal thought, has been significant in the justification of treaty agreements with aboriginal peoples: the criterion that there be “enough, and as good left”. This restriction follows from the concern that one’s enclosure of land would otherwise deprive others of the ability to use the land, thus unfairly disadvantaging them and constituting an act of harm that would contradict the laws of nature. Locke avoids applying this conclusion to prevent colonial acquisition of land in North America, arguing that no harm is done if there is sufficient land elsewhere for residence and cultivation. The question of whether the land was actually ‘as good’ does not seem to have been applied in colonial contexts, where there is little evidence that the acquisition of land from aboriginal peoples by governments, settlers or organisations has ever been restricted by concerns that equally productive, unoccupied land remained.

However, tensions within the Lockean theory of property rights and enclosure are evident even within the context of England. The ‘enough and as good’ criterion was potentially very important in England during the period of Locke’s writing, since the question of enclosure had become salient and controversial due to a growing trend of rich

135 John Locke, ‘Second Treatise’, p.290
landowners 'enclosing' traditional common land farmed by the poor. This issue was salient in the period surrounding the English Civil War when the activities of the Levellers represented a high point in political and social activism on the issue of land – a fact of which Locke would almost certainly have been aware, given the significant presence of the Levellers in the publication of political pamphlets and at events such as the Putney debates. From one perspective, the rich landowners' desire to monopolize land in order to use it for more profitable farming practices, usually keeping sheep, seems an example of the 'industrious and rational' claiming common, and thus by Locke's criterion, unowned, land. On the other hand, Locke intends this model to apply to the acquisition of lands from people in the state of nature, and so such actions might be illegitimate within a state of political society. The basis of this difficulty seems to lie in Locke's assumption that land held in common is not 'property', and that such common ownership does not occur within a state of political society, since according to the Lockean definition, legitimate ownership consists in the exclusion of others from use. Given these difficulties, the 'enough and as good' proviso may be seen as a way of ensuring that Locke's arguments could not be used to justify enclosure in Europe, where population densities could be argued to be too high for the 'enough and as good' proviso to apply.

Thus, Locke's formulation of relations to property can be seen as a response both to the need to justify colonialism and to defend the poor in England against enclosure. The contradictory impulses in the Lockean and other liberal accounts of property rights are evident in the European context, where the absence of complicating cultural and

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racial factors makes the tension between the desire for freedom and for productivity more explicit. Thus, Asa Briggs notes coyly that in judging acts of enclosure, “Thoughtful contemporaries were at pains to distinguish between a farmer’s enclosure of his land for ‘improvement’ and rich men’s enclosure of ‘other men’s commons’.” Nevertheless, if Locke intended to provide a defence against enclosure for the poor then it must be concluded that it was ineffectual - despite such arguments and opposition, almost all common or uncultivated land in England was enclosed by the mid-nineteenth century, often by act of Parliament and always under the justification of greater productivity as consideration for freedom or equality was largely disregarded:

Continuing enclosure was a necessary part of the process of agricultural ‘improvement’...The procedure was usually enclosure by Act of Parliament rather than by voluntary agreement or pressure...Contemporaries thought that farmers who favoured enclosure were ‘new men in point of knowledge and ideas’, while Young believed that enclosure itself quickened enterprise: it ‘changed the man as much as it improved the country’.

This strongly suggests that the problem is not merely that liberal theories regarding property and trade conflict with aboriginal thinking and practices, but rather that the liberal theories are contradictory and problematic. In this case, liberal concerns for the economic self-sufficiency and freedom of the poor have been overwhelmed by the desire for greater productivity and wealth, even at the price of violence, coercion and greater social inequality. From this perspective, the aboriginal peoples were dispossessed by a similar process of reasoning to that used to justify enclosures in England.

Alfred is critical of the Western model of conceptualising one’s relationship to land through resources and exploitation, comparing it unfavourably with traditional

138 Young was the author of *Annals of Agriculture*, and considered a contemporary authority on agricultural reform, see Briggs, *A Social History of England*, p.192
indigenous thinking where the concept of ‘possessing’ land is alien and unacceptable, and the exploitation of land at the cost of other living creatures is considered appalling. Alfred explains that aboriginal peoples have differing spiritual relationships with their specific areas of land, in contrast to the assumption of liberal thought that areas of land are interchangeable, or “as good” as one another. In addition, it is clear that conventional liberal definitions of ownership fit uneasily with the principle of stewardship in aboriginal philosophy, let alone the difficulties in fitting a model of private property to land held in common:

Indigenous philosophies are premised on the belief that earth was created by a power external to human beings, who have a responsibility to act as stewards; since humans had no hand in making the earth, they have no right to ‘possess’ it or dispose of it as they see fit – possession of land by man is unnatural and unjust. The stewardship principle, reflecting a spiritual connection with the land established by the Creator, gives human beings special responsibilities within the areas they occupy as indigenous peoples, linking them in a ‘natural’ way to their territories.  

Finally, Alfred notes the intractable difficulty in reconciling aboriginal philosophies of stewardship with contemporary capitalism, concluding that while using the land for participation in the economy is not in itself problematic, it is necessary that the purpose of such economic activities is the long-term good of the people and the land – “development for development’s sake, consumerism, and unrestrained growth are not justifiable”. Given this focus on the good of the land and other living creatures, it is particularly challenging to reconcile such indigenous philosophy with the use of indigenous lands for damaging and unsustainable resource extraction, such as mining, logging and fishing, all of which are common commercial uses of Canadian indigenous peoples’ lands. On the other hand, however, Alfred is aware of the risks to the long-term

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good of aboriginal peoples caused by financial dependence on Western states, and therefore of the desirability of being economically self-sufficient.

Alfred’s response to these tensions between indigenous philosophy and contemporary economic organisation is to recommend that decisions regarding land use be guided by the principles of respect and of primarily benefiting the land’s indigenous people:

The only position on development compatible with a traditional frame of mind is a balanced one, committed at once to using the land in ways that respect the spiritual and cultural connections indigenous peoples have with it and to managing the process so as to ensure a primary benefit for its natural indigenous stewards.142

In drawing this conclusion, Alfred’s intention is to respect traditional beliefs and approaches while modifying them where necessary to fit contemporary realities – an approach partially designed to resist his perception of the state’s tendencies to define aboriginality in terms of stagnation and thus argue that such peoples and ways of life are ‘doomed’. However, Alfred is also motivated by other ways of structuring the relationship between aboriginal peoples and their land, and the potentially destructive impact of Western thinking. The primary counter-example here seems to be the Alaska Native Claims Settlement Act in 1971, where indigenous peoples’ title and rights to 90% of their lands was supposedly extinguished to allow economic exploitation. In return for this the native peoples received a huge financial compensation package and proceeds from a corporation-based land management model, in which “community members are shareholders, and the primary responsibility of the government is to make profits, in order to provide the shareholders with returns on the investments made on their

142 Taiaike Alfred, Peace, Power, Righteousness: An Indigenous Manifesto, p.62
behalf'.\textsuperscript{143} It is a model that Alfred considers "sickening", completely contrary to indigenous philosophy and interests, and perhaps contrary to the maintenance of indigenous identity and being. The compliance of the native peoples in this case is attributed to cooptation, and he notes that the agreements have since been regretted by many of the Native communities involved.

Alfred also criticizes the way that relationships to land have been handled through the modern treaty process, which incorporates liberal political thought’s views on property ownership while also defining aboriginal ‘title’ as a far weaker claim than ownership. Thus, courts embody Lockean presumptions about use and enclosure in their position that "in order to have their title recognized, indigenous peoples must prove to the government of Canada their exclusive and consistent occupation of the territory ever since European sovereignty was first asserted\textsuperscript{144}" while simultaneously limiting the uses to which an aboriginal group may put their land. Furthermore, it is clear that the process retains more of the flavour of colonialism than recognition, considering the extraordinary proviso in the Delgamuukw decision that Canada may "infringe upon Aboriginal title for valid legislative objectives including, but not limited to, settling foreign populations and instituting economic development projects".\textsuperscript{145} Here, Alfred highlights the inconsistencies within liberal theory and the ways these have been exploited to disadvantage indigenous peoples, as courts have employed the restrictive conditions of ownership and enclosure while not acknowledging the corresponding rights. The implication is that the logic of disposessing land for the sake of greater productivity is alive and well.

\textsuperscript{143} Taiaiake Alfred, \textit{Peace, Power, Righteousness: An Indigenous Manifesto}, p.117
\textsuperscript{144} \textit{Ibid.}, p.120
\textsuperscript{145} \textit{Ibid.}, p.121
The Royal Commission Report on the subject of aboriginal land rights, *Treaty Making in the Spirit of Coexistence: An Alternative to Extinguishment* quickly identifies the difficulties in making sense of aboriginal land claims in terms of Western liberal thought:

Our hearings and research on the subject of extinguishment have borne at least one fundamental insight. Disagreement between Aboriginal peoples and the federal government over the merits of federal extinguishments policy is the tip of a much deeper disagreement concerning the nature of the relationship between human beings and their natural and social environments...As our hearings and research studies have consistently revealed, Aboriginal systems of land tenure and governance do not find easy expression within traditional Canadian legal terminology.\(^{146}\)

The introduction of this report provides a brief outline of the perceived differences between aboriginal thinking regarding the spiritual relationship between people and land, and the Canadian legal system’s approach in terms of ‘property entitlements’, before going on to discuss the role and purpose of treaties. However, the entire first chapter of the report is devoted to analysing aboriginal perspectives on land and observing the difficulty of expressing and comprehending such perspectives within the Canadian legal tradition. Here, the Commission generalizes that “many Aboriginal nations have relationships with land in which concepts akin to ownership merge with a concept of stewardship foreign to Canadian property law”,\(^{147}\) but notes that aboriginal nations differ in their beliefs and land practices despite sharing a respect for land. Additionally, the Report identifies spirituality or religion as a common and important feature of aboriginal relationships to land that cannot be understood within the dominant Western philosophical and legal tradition. While the aboriginal tradition of respect for the land and care for its long-term conservation and care are regarded as more common and

\(^{147}\) *Ibid.*, p.4
comprehensible within contemporary Western thought, the Commission notes that such features have yet to permeate legal thinking on land and property rights:

The responsibilities of stewardship and conservation for future generations are now being advanced increasingly as a moral and legal value to be adopted by non-Aboriginal governments and by the international community. Although this value is embraced by the environmental movement and is reflected in particular pieces of federal and provincial legislation, particularly those relating to environmental protection, it cannot be said that thus far it has affected the concept of fee simple. Put another way, it cannot be said that fee simple owners of land in Canada are under a legal obligation to conserve their land and its resources for future generations.\textsuperscript{148}

Despite acknowledging these difficulties, the Commission differs significantly from Alfred by opining that the treaty process is a promising means for the empowerment of aboriginal peoples. As with the Commission’s recommendations regarding sovereignty, this conclusion reflects the committee’s stated remit – that of reaching accommodation between aboriginal peoples and the state within the context of the Canadian legal and political system. Nevertheless, the Commission’s recommendations include an implicit call for an alteration in the way Canadian law regards aboriginal people’s relationships to their land, in order to expand the notion beyond exclusive use and exploitation rights:

Treaties should serve as solemn acts of mutual recognition of aspects of Aboriginal and Canadian ways of structuring relationships with the land. Aboriginal peoples understand that complete recognition of Aboriginal understandings of Aboriginal title is not possible in many circumstances, given countervailing Crown and third party interests. In such circumstances, treaty recognition of only some aboriginal rights with respect to land and governance is appropriate. A treaty ought to be a vehicle whereby certain Aboriginal rights with respect to land and governance are recognised by Canadian society and certain Crown rights with respect to land and governance are recognized by Aboriginal society.\textsuperscript{149}

\textsuperscript{148} Royal Commission on Aboriginal Peoples, \textit{Treaty Making in the Spirit of Coexistence}, p.6
\textsuperscript{149}ibid., p.17
Aboriginal Peoples & Justification

While they are a compelling example, aboriginal peoples are only one example of a people or group that has been, and continues to be, poorly served by liberal states and philosophical frameworks. Other examples may include other non-liberal cultural and religious groups, and even women, according to the analysis of some cultural feminists. For such people, the problem is not merely that liberal states have not treated, and still do not treat, them fairly, but that treating them fairly may be impossible under theoretical and discursive conditions that preclude the fair articulation and recognition of their claims. Given this, the achievement of justice for aboriginal peoples and other affected groups may require fundamental alterations in traditional liberal thought, compromise and negotiation between liberal and different non-liberal philosophies, or even the abandonment of some liberal claim and concepts. In any case, the example of aboriginal peoples suggests that there is cause to doubt that liberal states are necessarily "reasonably just", even aside from appalling historical injustices, since it is not apparent that contemporary liberalism itself is 'reasonably just', as Parekh observes:

Liberals cannot consistently be dogmatic about their own beliefs and sceptical about all others, or talk about an open-minded dialogue yet both exclude some and conduct the dialogue on their own terms. They need to take a sustained critical look at their basic assumptions that both generate, and prevent them from noticing and restraining, their illiberal and inegalitarian impulses.150

These injustices are not merely a problem in terms of the moral and prudential judgements and hence the consent of members of the groups affected. In fact, in the case of aboriginal peoples, fair expression and recognition of their claims might remove the need for them to 'consent' to the state, by either employing an alternative philosophical framework for determining the legitimacy of authority, establishing substantive self-

150 Bhikhu Parekh, "Liberalism and Colonialism: A Critique of Locke and Mill", p.97-8
government rather than enforcing a model of Canadian citizenship, or both. Instead, the crux of the problem of these injustices is the effect on the moral and prudential judgements, and hence the consent, of the entire body of residents. Such injustices are a problem for all the residents of liberal societies because if their philosophies and states inevitably treat many people so unjustly, the state’s claims to moral justification have been significantly undermined. As a result, it seems that the moral justification for the current organisational, philosophical and legal framework of many (if not all) liberal states is tenuous, if not actually lacking. Such concerns worry many members of liberal states, and would likely worry many more if serious, critical reflection involved in processes of political evaluation and consent were more common. This lack of moral justification, the pre-requisite for people to choose to consent, may be resolved only by the introduction of serious and widespread reforms designed to resolve the serious inequities and injustices in liberal states and philosophy. In the absence of such reforms, many citizens might quite reasonably conclude that they would prefer to live in other, non-liberal states, where their and others’ claims might be expressed, heard, discussed and evaluated more fairly, or where these citizens might withhold their consent in protest or disgust.
Conclusion

Over the course of this thesis I have used conventional liberal premises regarding the importance of consent in reconciling freedom with state authority to move from the consent models of classical liberal theory to a very different model that employs a more sophisticated understanding of individual freedom, the process of consenting, and the impediments encountered. I have argued that consent must be expressed and thus that there are no contemporary states where more than a tiny proportion of citizens have consented to membership. Perhaps more importantly, I have also challenged the implicit assumptions of most liberal theorists\textsuperscript{151} that substantive consent would be given by residents of contemporary liberal states if a suitable process for explicitly consenting were introduced. This challenge rests on two separate grounds: firstly, that many, perhaps a majority, of residents of contemporary liberal states are not in a position to consent freely, since they face substantial material, socio-psychological and discursive restrictions on their ability to dissent; and secondly, that the residents of such states have good reasons not to consent due to the fact that their states are not morally justified. These issues of freedom and justification are the two central requirements for the achievement of substantive consent outlined by contemporary liberal consent theorists Beran and Simmons who agree that the achievement of widespread consent depends on the state being adequately just and thus morally a good thing, and on citizens being in a position to freely consent to it. While accepting Beran’s and Simmons’ general framework regarding legitimacy and justification, I have argued that both freedom and justification are highly problematic in the context of contemporary liberal states. Given this, the only plausible conclusion is that contemporary liberal states are not currently

\textsuperscript{151} The exception being some philosophical anarchists, such as Simmons.
capable of achieving widespread consent from their residents, nor is it evident that they deserve such consent, and as such, by the criteria of traditional liberal theory, their authority may be regarded as illegitimate.

At first, these arguments may seem disheartening: if we are not free to consent and have good reasons not to want to, and consent is currently impractical and unobtainable, perhaps we should find another way of justifying our societies. Although I acknowledge the seriousness of the difficulties in obtaining free consent in the existing environment of liberal states, I believe such a defeatist conclusion about the process is unwarranted. The existence of widespread, free consent to membership in the state and political society by very large numbers of citizens is one of the most normatively appealing modes of legitimation a state can achieve, for the good reason that consent signifies that one has judged one's state to a good thing, all in all, after a process of critical evaluation. Thus, part of the normative weight of consent theory derives from the fact that a state must meet high standards of critical evaluation if large numbers citizens are to consent to membership in it, and hence consent signifies that a state is justified - i.e. consent is normatively significant partly because it is difficult to achieve. Other benefits of a consent model include the fact that processes of consent may be a way in which citizens can suggest and pursue reforms in state or social practice, perhaps even threatening to withhold consent and leave if the desired changes are not made. It should be clear that such a process of substantive consent is very different from the 'rubber stamp' consent traditionally assumed by liberals, whereby the function is to legitimize the powers of the state. As such, it is unsurprising that a substantive model of consent will be much harder to achieve than weaker models, such as the de facto consent implied in residence according to Lockeān theory.
In fact, the difficulties involved in achieving substantive consent should be neither surprising nor discouraging – consent will almost inevitably become more difficult to achieve as it becomes more substantive. Additionally, it is clear that many of the most normatively important and worthwhile political processes require considerable time and effort; consider the difference between ‘deliberative democracy’ and representative democracy. Consent should be regarded as a process that is valuable in itself, as it encourages evaluation, debate and reform, and perhaps most importantly, as a mode of empowers disadvantaged peoples. When the role of consent in empowering and protecting the disadvantaged and oppressed is considered, the difficulties with freedom and justification encountered in contemporary states provide all the more cause to believe that consent is a necessary process. Indeed, many of the injustices and impediments that make consent so difficult to achieve exist precisely because the consent of the citizens concerned was not considered in forming previous state and social frameworks: that women’s consent was not considered, that Queer peoples’ consent was not considered, that aboriginal peoples consent was not considered, and so on. There is much work that needs to be done to analyse the restrictions on freedom that different people are subject to, including study of how material, socio-psychological and discursive restrictions can best be addressed, and the justice of states’ and societies’ treatment of many people and groups. Part of the importance of conducting such analysis lies in its value for amending and reforming the problematic features of liberal (and perhaps also non-liberal) states in order to make them more just and the residents more free. Achieving consent is likely to be more challenging, difficult and discomforting than liberals ever imagined, but both concerns about ‘justice’ and the precepts of liberal theory regarding the value of freedom compel the process to begin. Properly conceived, consent should never result from a lack
of freedom to exit, and the option of exit should never be a 'palliative for oppression'; instead, the importance of consent is in identifying, amending and preventing such oppression. It is difficult to think of a process that is more important or more urgently required.
Bibliography


