

The Case for Dignity as the Governing Principle of Adult Guardianship

By Barbara Carter

The *Guardian and Administration Act 1986* (Victoria) aims to provide a framework for determining when adults with disabilities should be appointed a guardian. Here Barbara Carter identifies key problems with the Act and argues for an overarching principle guided by a theory of human dignity.

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1 Introduction
The Victorian Law Reform Commission is currently reviewing the *Guardianship and Administration Act 1986* (Vic), under which a guardian and administrator may be appointed for a person who, because of a disability, is not able to make informed decisions about important aspects of life, such as where they will live, their health care or their finances. Under the current Act, there are three fundamental legislative principles: (1) the means that is least restrictive of a person's freedom of decision and action in the circumstances should be adopted; (2) the best interests of the person with a disability are to be promoted; and (3) the wishes of the person with a disability are wherever possible to be given effect to.

These principles of guardianship legislation are generally in tension and so guardianship is often characterised as finding a balance between protection and autonomy, risk and rights, freedom and best interests. The legislation pays great attention to process but pays little attention to the desired outcomes. Yet, the only reasonable justification for guardianship is to make a meaningful, beneficial difference in the life of a person with a disability. In order to do this, the Act should identify an overarching value or principle to guide the guardianship intervention into a person's life.

This article argues that the focus of guardianship legislation should be on obtaining a just outcome for people with disabilities, a life worthy of human dignity. The concept of human dignity provides the most satisfactory governing principle to guide the work of guardians and the tribunals that appoint them. A complementary opera-

tional principle for the work of a guardian is the promotion of the personal and social well-being of the person with a disability.

Rather than trying to perform a kind of balancing act in the lives of people with disabilities, guardians and tribunals should be seeking the outcome that most fosters the human dignity and promotes the well-being or flourishing of the person with a disability. The paper is written from Australian experience, in particular the State of Victoria.

2. Background

The adult guardianship system in Australia derives from the English system of law and government. The key principle was *parens patriae* (father of the nation). Under this principle, it is the responsibility of the monarch, as head of state, to care for and protect those who cannot care for themselves, traditionally children and those with disabilities. This state responsibility to adults with a disability may now be fulfilled through a court or tribunal process with the appointment of a guardian or administrator. In 1986 the Victorian Parliament passed the *Guardianship and Administration Act* based on the values of rights, protection and the participation of people with disabilities in the community.

It has almost become a truism today to say that the civilisation of a nation will be judged by the way in which it treats its most vulnerable members, but questions of justice remain at the forefront of any discussion about guardianship. With the review by the Victorian Law Reform Commission of the *Guardianship and Administration Act 1986* (the Act) it is timely to re-consider the values and principles upon which the current guardianship legislation

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is based and how well they address the justice questions at the heart of the legislation.

3. Principles and values in the current Act

The principles and values of legislation are generally set out in the purpose, preamble and objects of the Act in question. The Act does not have a preamble and the purpose does not contain any principles or values.

The Objects of the Act are set down in s4 and include three principles upon which every action taken under the Act should be based (s4(2)). They can be summarised as adopting the means least restrictive of the person's freedom of decision and action, promoting the best interests of the person with a disability and giving effect to the wishes of the person with a disability wherever possible. These principles express contrary or competing values, requiring those working under the Act to balance the principles in each situation. It is rare that a situation arises in which action to promote one of these principles does not cut across the others.

Twenty-four years after the introduction of the Act, and with the benefit of insight from the many thousands of cases in which the Public Advocate has acted as guardian for persons with disabilities, it is important to look at how these three principles speak today to the needs and values of both people with disabilities and of the broader community.

To do this, some typical case studies may be helpful, with the caution that a few case studies cannot hope to capture the range or depth of guardianship experience. The case studies will be referred to as the paper proceeds.

Fred

Fred is 80 and lives in a retirement village. He has mild dementia and his wife died three years ago. He has four children who live nearby and are in conflict with each other. They disagree about what is best for Fred and each believes that the others are trying to exploit him financially and will persuade him to change his Will. His Will leaves his estate equally to his four children. One of his children wants her father to come and live with her and says she is able to care for him but the others are suspicious of her motives. Fred is happy where he is living and does not want to be dependent on his daughter. He loves his children and grandchildren but hates the fights. Attempts by the manager of the retirement village to broker agreement between the children have not been successful.

Jess

Jess is a woman of 36 who has a moderate intellectual disability and lives in a group home. She is one of four children and one of her sisters has cancer and requires a bone marrow transplant. The other

two siblings have been tested but are not a match. Jess is a match and says she would like to help her sister. Under the Act, the Tribunal must give permission for a Special Procedure, which includes the removal of tissue for the purpose of transplantation to another person. Before providing consent, the Tribunal must decide whether the special procedure is in Jess's best interests.

Julie

Julie is a young woman of 18 who has a mild intellectual disability and lives in a small town. She lacks confidence and dearly wishes to have a boyfriend and be accepted by other young people in the town. She develops a relationship with a man without a disability and begins her first sexual relationship. Over time, he isolates her from her family and other friends and prostitutes her to other men in group sex. She says that this is what she wants as having him as a boyfriend is very important to her. Her parents and other members of the community believe she is being degraded and exploited. They want it stopped.

Darren

Darren is a young man who has an intellectual disability. He has also been diagnosed with a depressive illness. He lives with his mother who has cared for him all her life. The relationship between them is generally warm and loving. Darren's mother does not allow him to go to Day Centre activities and his social interaction outside the home is minimal. He has a medical condition that severely limits his mobility but his mother refuses to consider medical treatment that would alleviate it. She also refuses to consider Darren having treatment for depression, saying that she is opposed to drugs.

3.1 The least restrictive means principle

Australian guardianship laws operate on the basis that, unless there is an unmanageable socio-legal crisis, a guardianship order is not necessary. Concerns about the adoption of this minimalist, last resort view of guardianship have been expressed since the 1980s. At the First National Guardianship Conference in 1992, Professor Terry Carney drew attention to the risk that the strictly 'legal', minimalist view of guardianship can become morally barren.

Because it removes a person's right to make his or her own decisions in an area of their life, the appointment of a guardian is identified in the Act as being the action most restrictive of a person's freedom of decision and action. However, by specifically valuing freedom of decision and action, the Act can effectively devalue other freedoms and rights. As Held has argued, real social freedom "must include for all citizens guarantees of

being able to acquire what they need to live, and not only rights to hold on to what they already have”.

Adoption of the ‘least restrictive means’ principle is common to social legislation of the past thirty years and is based on the concept of negative liberty. It is an expression of the view that the state should keep out of the lives of its citizens, except as a last resort. Unfortunately, it can become a justification for ‘the lazy state’, where government neglects its positive responsibility towards its citizens. Martha Nussbaum, who, with Amartya Sen, developed a theory of capabilities that reflects a person’s actual opportunities in life, considers that effective guardianship provides a way for people with disabilities to exercise their rights and develop their capabilities.

In Fred’s case, guardianship technically restricts his freedom of action and decision but has the effect of freeing him from the family arguments and their efforts to influence and persuade him to their view. In Fred’s situation, the intensity and anger of family members is usually transferred to the guardian. In Darren’s situation, his freedom of decision and action is arguably greater with a guardian than without one. For Julie, there are extremely difficult ethical issues about whether she is exercising freedom of action and decision in the choices she is making.

Under the Victorian Charter of Human Rights 2006, any limitations on a person’s Charter rights and freedoms must be reasonable, proportionate and justified. This requirement provides a suitably stringent test of any restrictive action taken under the Act and will adequately protect the rights of people with a disability. It avoids privileging freedom of decision and action over other rights and freedoms or indicating that freedom of action and decision may be ‘traded-off’ against values such as dignity and well-being.

It is the experience of the Public Advocate over the past ten to fifteen years that much of the focus of advocacy and guardianship has shifted away from civil freedoms towards helping people redress the deficiencies of the service system and to access the services, health care and other assistance that they need. In mental health, a similar shift in focus has been cautiously identified by Professor Bernadette McSherry as “a possible shift in focus at the international level away from the civil/political right to refuse treatment under an autonomy model to a focus on the social/economic right to treatment”.

3.2 The *best interests* principle

‘Best interests’ is a term used differently by different people in different contexts. Of greatest relevance to guardianship in Victoria, best interests is described in the Act in terms of the guidance provided to guardians in s28(2), where a broad interpretation is given to best interests.

In support of using best interests as the basis of guardianship, it can be argued that competent people make decisions in their own best interests so therefore those acting for them should do the same on their behalf. However, debates

then arise about just how wide the definition of best interests should be and whether it should be broad enough to include altruism and those critical interests of care, concern and commitment to the people and ideas that give meaning to a person’s life. If a narrow interpretation of maximum personal benefit is accepted, best interests is probably better termed self-interest. If the broader interpretation is accepted, it comes very close to the concept of substituted judgment.

Concepts can take on different meanings over time and common use interpretation may differ from the original intent of the legislation. As an example, the National Guardianship Association of America’s Standards of Practice takes a broad interpretation, stating that the best interests standard in American guardianship requires the guardian “to consider the least intrusive, most normalising and least restrictive course of action possible to provide for the needs of the ward”. In common usage, by contrast, best interests has come to be associated negatively with strict paternalism which itself is perceived negatively as being the antithesis of individual rights. Whilst this is clearly a misinterpretation of the Victorian Act when one considers the meaning given to best interests in s28(2), it creates a problem in community understanding and acceptance of the legislation.

In none of the case studies is there an obvious indication of where the best interests of the person lie. The possible exception is Darren, where it could be said that greater involvement in the life of the community and access to appropriate medical treatment would be in his best interests. However, what if changes were to be imposed at the expense of his relationship with his mother and the home they share together? It is not unknown for family members who have cared for someone for many years to be so hurt by even the most sensitive interventions of a guardian that they refuse to have anything further to do with the person for whom they have cared for many years.

3.3 The *wishes* principle

This principle expresses the perspective that the current views of the person are of particular importance and should prevail wherever possible, irrespective of whether

by specifically valuing freedom of decision and action, the Act can effectively devalue other freedoms and rights

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the person has capacity. The principle is particularly helpful when a person who previously had capacity made decisions that are contrary to the views they are currently expressing. In guardianship practice, it also operates to counterbalance the principle of best interests. Thus, the wishes of a person would not be given effect to only if they were not considered to be in the person's best interests.

In the case studies above, Fred is expressing a clear wish that can readily be implemented by the guardian. In Julie's case, it could be argued that she is making a pragmatic choice that sexual exploitation is the price to be paid for the relationship with her boyfriend—but is this really her wish and is it in her best interests? In Jess's case, her wishes to assist her sister are clear. Darren has little experience of deciding what he wants.

3.4 Limitations of competing principles

There are two main problems with framing the Act in terms of competing principles.

The first problem is that there is no overall purpose stated in the legislation of what guardianship is intended to achieve for a person with a disability. In the absence of a preamble and purpose, the Act risks simply becoming an instrumental legal mechanism, providing a substitute decision-maker to serve the needs of a system that requires legal consent in various situations.

The second, related, problem is that the Act provides no guidance as to how the three principles are to be balanced and its principles are process rather than outcome-based. The means least restrictive of the person's freedom of action and decision is to be adopted, but to what purpose? The person's wishes are to be given effect to wherever possible but where the bounds of possibility might lie is not indicated. Acting in a person's best interests is a process principle but apart from making it clear that the intention of the legislation is to protect the person under guardianship, it is not particularly helpful, especially when the confusion of common use understanding is added to the mix.

Guardianship legislation must be about more than providing a legal mechanism for substitute decision-making. The only ethical justification for guardianship is to make a meaningful, beneficial difference in the life of a person with a disability. In order to do this, the Act should identify a strong overarching value or principle to guide guardianship practice.

4. Governing principles for guardianship legislation

In this section, I argue that the governing philosophical principle for guardianship legislation should be the pro-

motion of the human dignity of the person with a disability. The operational principle that flows from this is the promotion of the personal and social well-being of the person with a disability.

4.1 Human dignity

The protection and promotion of human dignity as the overarching principle of guardianship seems to come closer than any other to articulating the nature of the responsibility for justice that society owes to people with disabilities.

Human dignity is a term used in moral, ethical, and political thinking to signify that a person has an innate right to respect and ethical treatment. The ideas and concepts of human dignity also provide the overarching principle from which human rights are derived as human rights are a concretisation of the more abstract values of human dignity that both pre-date and transcend them. There are prominent references to human dignity in human rights documents such as United Nations Conventions, charters of human rights and national constitutions.

Underpinning the idea of human dignity is that all people are born fully and equally human and remain equally human, no matter what they do or what is done to them during their lives. All have equal human inherent dignity and are deserving of equal respect for their humanity. Respect for human dignity therefore extends to a responsibility incumbent on all people to treat both themselves and others with respect and dignity. People are unequal in virtually all other respects—social standing, intellectual capacity, physical strength and economic circumstances. Human dignity is the one concept or quality that binds people together.

Thus, two aspects to human dignity need to be incorporated into a proper understanding of the concept. The first is the idea of inherent dignity; that whatever its basis, people have dignity by virtue of being human. The second is that dignity is interdependent and dialogical. It is imparted to others and exercised in relationship with others, expressed by the philosopher Martin Buber as the 'I/Thou' relationship.

Current thinking about human dignity has increasingly focused on its expression in the relationship between one person and another. Mary Wollstonecraft, Viktor Frankl, Martin Buber, Charles Taylor and Martha Nussbaum are just two of the thinkers who consider that the essence of our humanity is to be found not only in the inherent worth and dignity of human beings but the respect that has been accorded between persons in civilised societies throughout history.

People are unequal in virtually all other respects... Human dignity is the one concept or quality that binds people together

Philosophers have struggled to understand and explain the various manifestations of human dignity. Our respect for human life, giving people names rather than numbers, our inexplicable need for relationship with others, and the care we provide for others possibly at extreme cost to ourselves have all been suggested as expressions of human dignity. Care for others, particularly those who are unable to reciprocate that care, is emerging in current thought as a key element of human dignity and a direct challenge to the classic social contract understanding of how society operates. There is thus a strong social and community dimension to the understanding of human dignity in current discourse.

Human dignity accommodates the idea of protection and safety that is traditionally the basis of guardianship legislation. Few would regard a society characterised by danger and insecurity as a 'good' society. Citizens happily accept limitations on their absolute liberty in order to live in safety and security. Sadly, however, people with disabilities are more often subject to violence, abuse, neglect and exploitation in our society than others and may also be less able to make self-protective decisions. In disability discourse, the question of protection generates strong negative views and can be seen as unwarranted discrimination against people with disabilities. Surely, though, we have lost our way when we interpret dangerous behaviour and exposure to abuse and violence as acceptable expressions of autonomy.

In considering the case studies, the goal of promoting the human dignity of the person with a disability provides a valid governing principle for guardianship. For Fred, squabbles amongst his children are about power and control and do little to respect him as a person of worth and dignity. With Jess, the possible ability to save her sister's life is something that she is very proud of as an expression that she is a person of equal worth with others. For Darren, respect for his dignity requires that he be treated as a full member of the community, not merely as a subject of care. For Julie, it is important to remember that respect for her dignity must include her developing respect for herself. In each situation, if the promotion of the person's human dignity is the goal, a clearer direction begins to emerge than when we attempt to weigh competing principles without the guidance of an overarching principle.

4.2 Personal and social well-being

As an operational principle to guide the actions taken by a guardian under the Act, the principle of promoting the

personal and social well-being of the person complements the overarching principle of promoting human dignity. It is closely associated with the older philosophical idea of human flourishing and is thus preferable to the best interests principle that currently guides the actions of a guardian appointed under the legislation.

Well-being can be seen as a parallel concept to the concept of best interests in many respects. However, the idea of well-being provides a clearer goal to which actions and decisions should be directed and places the emphasis on the person rather than on the guardian, on the outcome to be sought rather than the process. The goal of social and personal well-being is found frequently in health policy and legislation. It articulates the understanding that well-being has social as well as personal and medical dimensions and that true well-being cannot be achieved in isolation from others.

It is important to recognise that the idea of well-being must sit within a broadly accepted agreement within society of the 'good'. Personal and social well-being is not morally neutral. Seeking to maximise personal satisfaction in a way that is harmful and disrespectful of oneself or others does not constitute true well-being. Instead, it is about having the capabilities, to use Martha Nussbaum's framework, for a flourishing life. In this sense the role of a guardian in promoting personal and social well-being is like that of a gardener where the environment needed for the person to have a full life is provided and the impediments to growth and flourishing are removed as far as possible.

Looking at the case studies, the promotion of personal and social well-being provides the relevant operational principle for a guardian. Fred's well-being will be promoted by removing him from the focus of the conflict amongst his family. For Jess, being able to assist her sister will promote her personal and social well-being. For Julie, it is important to remember that what constitutes well-being must sit within a general societal agreement of what constitutes a good life. The same principles apply as Darren's guardian seeks to enable him to lead a full and flourishing life.

5. Conclusion

The limitations of framing guardianship legislation in terms of competing principles have been canvassed earlier in this paper. The advantages of identifying a governing principle under which sits an operational principle or principles have also been alluded to in arguing that the promotion of human dignity should be the governing principle for guardianship legislation and that the promotion of personal and social well-being should be the operational principle for guardianship.

Undoubtedly, guardianship will continue to involve the balancing of different factors in the life situation of the person under guardianship. Identifying the pros and cons

true well-being cannot be achieved in isolation from others

of a particular course of decision and action will always have a place in guardianship. However, considering each factor against the standard of how it promotes the dignity and well-being of the person concerned is a more fruitful way of proceeding than attempting to evaluate the factors against standards that pull in opposite directions.

The review of the *Guardianship and Administration Act 1986* (Vic) provides an opportunity for Parliament to enact strong legislation based on a clear vision of the kind of justice owed to people with disabilities and the outcomes the legislation seeks to achieve, both for the person and for the society to which they belong.

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Ecological Refugee States: Do They Have a Right to a New Territory?

By Cara Nine

Cara Nine considers the plight of ecological refugees: In the event of ecological disaster leading to loss of sovereign territory does a state maintain its right to self-determination—and if so, can it stake a claim to a new territory?

Ecological refugees are expected to make up an increasing percentage of overall refugees in the coming decades as predicted climate change related disasters will displace millions of people. Some ecological disasters are contained within small portions of large countries, such as the Katrina disaster in Louisiana or the recent floods in Pakistan. Other disasters cover larger portions of a country, even eliminating the state territory altogether. The latter are states where the entire geographical territory is predicted to be lost to rising sea levels. Tuvalu, the Maldives, Kiribati, and others are predicted to be ecological refugee states in the near future. In these cases, the collective body of the people will itself become an ecological refugee.

In this essay, I focus on what rights ecological refugees may claim to collective self-determination. To this end, I will focus on these specific cases of ‘ecological refugee states.’ As the title suggests, this essay discusses whether ecological refugee states have a claim to a new territory. My answer is a qualified, ‘yes’. The argument for this conclusion has three steps. If,

- (1) a people clearly is (or recently was) exercising a legitimate right to self-determination and has a legitimate claim to continue to be self-determining, and
- (2) the self-determination of the people is existentially threatened because the people lacks territorial rights through no fault of their own, then
- (3) the people becomes a candidate for sovereign over a new territory.

To generate these results on behalf of ecological refugee states, I examine the principles of the system of territorial states. The principles grounding the system of territorial states are centrally about the protection of the self-determination of peoples. The value of self-determination grounds exclusive group rights to territory. Successful state independence movements were founded on the principle of self-determination—including anti-colonial movements and the break-up of the Soviet Union.

Because the system of territorial states is a system of exclusive rights over goods, especially land, it is possible

that it is subject to the conditions of a Lockean proviso mechanism. A Lockean proviso mechanism is a useful tool that keeps the principles of a system of exclusive rights over goods in line with its practice. This paper is dedicated mainly to adapting a version of the Lockean proviso for use in territorial rights theory. Once applied, it points to a dilemma for proponents of state territorial rights. Since state territorial rights are founded on the basis of the protection of the self-determination of peoples, when the self-determination of a legitimate state is threatened because of this system of rights—because existing territorial rights prevent these peoples from being self-determining, then existing territorial rights should be modified to allow for these peoples to be self-determining. If territorial rights are not modifiable in this way, then the system of territorial rights must find another ground for its support or risk self-defeat.

Lockean Theory and the Lockean Proviso ‘Mechanism’

John Locke wrote about the rights of individuals and of governments in the 17th century. One of the things he is most known for is his theory of property rights. On Lockean theory, property rights are derived from a tripartite relationship between three things: interaction, value, and fit. Agents can acquire rights over goods by having certain interactions with those goods. But not just any interaction will do—you can’t acquire rights over an apple orchard by sneezing on the trees. The appropriate interaction is value-generating—*planting* the valuable crop-orchard gives rise to rights over the orchard. In addition, the interaction and the created value result in a



Image: Francesco Marino

right that has an appropriate fit regarding the interaction-value relationship. For example, planting apple trees gives rise to a claim to the orchard. Planting apple trees doesn't give rise to a claim to a share in Microsoft. A stockholder's share in Microsoft is generated by a different set of interactions and values. The purpose of the property right is to encourage the value-creating interaction with the land.

a system of private property rights is justified because of its ultimate benefit to humankind

For Locke, a system of private property rights is justified because of its ultimate benefit to humankind. Locke expresses the motivation behind private property rights to land through his articulation of the law of nature. The law of nature imposes on us a duty to undertake actions which tend to preserve humankind. Certain ways of using (or not using) the land will tend toward preservation. Certain ways of articulating rights to land will encourage or make possible this more beneficial use of the land. Therefore we should articulate rights to lands in ways that encourage and make possible its beneficial use towards the preservation of humankind. This is one reason why an institution of private property rights is justified. A necessary condition for the justification of the institution of private property is that it results in a pattern of land use that promotes the preservation of humankind.

The Lockean proviso, as it has come to be called, is a set of conditions that place restrictions on the way that property rights are acquired and on existing property rights. There are two versions of the proviso. One is referred to as the 'enough and as good' proviso. The other is the 'spoilage' proviso, and I will return to it later in the essay. According to the 'enough and as good' proviso, a person acquiring original title in land through her interactions may do so only as long as there is 'enough and as good' left over for others to use.

There is considerable debate on the correct interpretation of the 'enough and as good' proviso. In its statement, Locke seems to be completely naïve about the scarcity of natural resources. How can I take something out of the commons for myself and at the same time leave as much as was there before my taking? To make the proviso a useful tool, theorists have suggested that the phrase 'enough and as good' be interpreted as a threshold-establishing criterion for a system of property rights. Rather than thinking that we have to leave *the same* for everybody else, we think that we must leave something of *sufficient value* for everybody else.

How should we understand the content of the 'sufficient value' criterion? It can be found in the law of nature. We have a duty of natural law to preserve humankind. Locke uses this law as part of a justification for property rights—one of the values that generates rights to property. A basic and natural reading of the Lockean proviso, then, is that when the holding or acquisition of property rights unnecessarily threatens human life, we should change something about property dispositions to avoid the unnecessary death caused by these property dispositions.

The Lockean Proviso 'Mechanism' and Territory

Given what has been said so far, the Lockean proviso is a mechanism that works within theories of exclusive rights over goods to ensure that the rights do not leave agents who are excluded from the goods disadvantaged in a way relevant to the system of exclusive rights over goods. This makes the Lockean proviso an example of a more general rule regarding theoretical and practical consistency. Or, as Locke puts it: "The same law of nature, that does by this means give us property, does also bound that property too."

To summarise, the Lockean proviso mechanism, as I am developing it here as an adaptable theoretical/practical tool, can be articulated as the following rule:

When the exercise of an exclusive right over goods severely threatens the value(s) that are used to justify the right (or system of rights of which it is a part), then the right should be changed so that it no longer undermines those values.

The holder of a territorial right has independent moral and political authority to establish justice ... within a particular geographical region.

Adapting this understanding of the Lockean proviso to territorial rights requires that we identify the values upon which territorial rights are founded.

A territorial right describes a relationship between the right-holder and a geographic region. A territorial right is first and foremost a right of political authority. The holder of a territorial right has independent moral and political authority to establish justice—to establish a determinate jurisdiction—within a particular geographical region. A jurisdiction is a legal domain where a certain set of legal rules applies and a certain agency has the authority to make, adjudicate, and enforce those rules. Because the right of independent self-government captures the definition of self-determination, essentially, territorial rights

establish a practical foundation upon which a group can exercise its right of self-determination.

By analogy, if we understand ‘preservation of humankind’ as a foundational moral mandate for property rights, then ‘the establishment of justice through the preservation of self-determining groups’ is a foundational moral mandate for territorial rights.

Different theorists argue that the *unique* self-determination of peoples is important. In contrast, Allen Buchanan claims that the concept of self-determination, at least as it applies to territorial rights, is essentially about the establishment of objective standards of justice within a region. On this view, if as the result of a great ecological disaster, all of the Pacific Islanders had to immigrate to Australia, and Australia treated these immigrants justly, *nothing of value regarding self-determination* would be lost. That is, the notion of an ecological refugee state is a false one, in that the collective has any claims of self-determination as a *unique* unit.

In contrast, one can advance the position that the self-determination of a group is unique to that group and that this is important for the establishment of justice over that group. For a group to be self-determining, they must have some sense of internal identity that is uniquely advanced by the self-determining powers of the group. I mean this in a very broad sense, in a way that doesn’t presuppose nationalist or cultural homogeneity within the group itself. There are many senses with which we could explain the uniqueness of a group that is advanced by their self-determining status; the concepts of public reason and of democratic association are two options that are not reliant on cultural homogeneity of the group. What I mean to capture in this ‘uniqueness’ assertion is the notion that is more natural for us to say that the Pacific Islanders have lost something of political value in the loss of their unique self-determining status, even if they are granted immigration into a state that treats them justly. This is more natural than to adopt a concept of self-determination related to territorial rights (like Buchanan’s) under which nothing of political value is lost in this case. Arguably this is an important motivation behind the successful anti-colonisation and secession movements over the past three centuries.

Territorial rights are justified because they protect and promote the self-determination of peoples and the people’s capacities to establish justice through their territorial rights. Territorial rights are also instrumentally and (possibly) intrinsically necessary for the practice of self-determination. If a group is to be self-determining, it must rule itself. In order for it to rule itself, it must have the authority to establish justice for its members. A group with a right to self-determination often requires territorial rights in order to be self-determining. Without territorial rights, the self-determining group may cease to exist

as a self-determining group. We can use this understanding of territorial rights to understand how the Lockean proviso mechanism should be applied to territorial rights. The sufficient conditions for a triggering of the proviso should be understood as those conditions created by the system of territorial rights which existentially threaten the self-determination of peoples. The proviso is triggered when the self-determination of a group is threatened because of the territorial dispositions of other groups.

Without territorial rights, the self-determining group may cease to exist as a self-determining group

The application of the Lockean proviso mechanism to the case of ecological refugee states is straightforward. Because the value of creating justice through unique self-determining groups is undermined because of (a) the current territorial holdings of states, and (b) rising sea levels, then the territorial rights dispositions must change. Ecological refugee states become candidates for sovereign over territory.

‘Downsizing’ Current Holdings

Generally speaking, there are two ways that the Lockean ‘enough and as good’ proviso has been interpreted to apply to rights over goods. On the one hand, it may apply as a limitation on the acquisition of goods. That is, one may acquire an unowned good as long as there are enough and as good resources left over for others to acquire after my acquisition. On the other hand, the proviso may apply as a restraint on current holdings. That is, one may have acquired something justly and hold it for a while only to have the terms of that holding changed as a result of the proviso.

Understanding the proviso as applied to the original acquisition of territory has significant problems. Latecomers in the game of territorial acquisition are excruciatingly dependant on the largesse of existing territorial sovereigns in order to begin to pursue their collective self-determination—all of the viable territory is already claimed. If the Lockean proviso applies to the *acquisition* of territorial rights, then, each state must leave viable lands for other groups to acquire for the purpose of being self-determining. Because land is scarce, this makes the acquisition of territory impossible. If latecomers are at the mercy of lucky first-come territorial powers, then the Lockean proviso *becomes the rule rather than the exception*. In a situation of scarce resources, peoples would not be allowed to acquire anything according to the system of historical

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entitlement—instead goods would be distributed according to the dictates of the proviso.

The Lockean proviso as a restriction on the acquisition of territorial rights has the effect of making the system of territorial rights unworkable. So, I conclude that the best way to apply the Lockean proviso in the context of territorial rights is as a restraint on current holdings rather than as a constraint on the acquisition of territorial rights in the first place.

So far I have argued that the problem of ecological refugee states invokes a Lockean proviso mechanism applied to territorial rights. The proviso mechanism is triggered to protect the value of unique self-determining groups in their capacity to establish justice. I have also argued that this conception of the Lockean proviso mechanism should be applied to current holdings of territory and not to original acquisitions of territory.

Now let me say a little more about how this all might work—still theoretically speaking. Specifically, we can employ the notion of ‘downsizing’, used by A.J. Simmons. Legitimate downsizing happens when: “Property claims that were once perfectly legitimate may cease to be so with decreases in the pool of resources or increases in the number of persons needing to draw on those resources.”

Regarding how to identify where the borders should be redrawn, and what the conditions of the ‘downsizing’ should be, we can draw on Simmons again. Simmons illustrates using the conditions of the Nozickean islander case, where castaways divide an island equally upon arrival. But with the passage of generations, the population of the island increases without any corresponding increase in goods. The original castaways must then ‘downsize’ their “previously legitimate holdings, giving the new population fair access to their shares of the island.”

How so? Given that the place is inhabited by persons with established rights and expectations over those goods, Simmons suggests that:

... But the original islanders have the right to choose which portions of their holdings to relinquish, and they retain their rights over even the relinquished portions so long as the newcomers opt not to make property in them. The original islanders may choose to keep the fair share of their original holdings to which they feel most attached, for instance, or in which they have invested the most labor. And they are entitled to compensation from the newcomers for improvements they have made in the portions of their

holdings they are obliged to surrender. The newcomers, on the other hand, are entitled to take in their purposive activities their fair shares of the original islanders’ previously legitimate holdings. But they may take only from the relinquished portions.

In territory-terms, what this strategy would mean for ecological refugee states is that existing, landed states would have the power to designate over which particular lands the ecological refugee state would have a possible claim.

One may object that, historically, when existing, landed states have been given this power, the grantee has been awarded virtually useless land, land that nobody wants. The ecological refugee state could be given an *unfair* share of land under these conditions.

*Latecomers
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on the largesse
of existing
territorial
sovereigns*

This objection can be met, I believe, if we establish criteria regarding the size and suitability of the land for the purpose of meeting the conditions of keeping a self-determining people from ceasing to be self-determining. It is not that just any land granted to the authority of the ecological refugee state will satisfy the conditions of the Lockean proviso. For example, if the ecological refugee state were granted a land of only 30 square meters, and the ecological refugee state had a population of 40,000 people, then the size of the land would not meet the needs of the people. There are criteria that must be met regarding the appropriate size of the land; it must allow them to be minimally self-determining. Additionally, there are criteria regard-

ing the suitability of the land for the people. A people will have certain traditions and ways of life that they will carry with them to their new land. In order to be self-determining in their new land, they will need to be able to carry on, in some respects, the ways of life that they had before. Climate conditions and economic activities are important factors here. A Pacific island nation that depends heavily on fishing and other oceanic activity for their economic base will have an extremely difficult time adjusting to life in order to be self-determining in rural Siberia, for example.

I have not gone into much detail regarding the specific criteria for appropriate lands for ecological refugee states. However, it seems clear that there are criteria regarding the size and suitability of the specific geographical domain and that these criteria must be met if the conditions of the Lockean proviso are to be met—if the people are to be self-determining. With these criteria in place, the existing states of the world are not at liberty to decide to put the ecological refugee states *just anywhere*. They are bound by the criteria to provide lands where the people can be self-determining.

Concluding Remarks

There are several issues that I haven't had space to discuss here, such as responsibility for climate change, alternative interpretations of the proviso, issues of regional stability and peace, and other aspects of territorial entitlement. It is clear that any claim that a people may lay against other states will be subject to strict scrutiny and balancing of interests. The point of this paper is to highlight the fact that there is something compelling about the plight of landless groups, such as ecological refugee states, to whom it seems arbitrary to not assign the right of collective self-determination over territory. And to point out that the consistency of state territorial rights depends on their ability to account for the plight of landless groups. Given that the system of state territorial rights is grounded in the value of self-determination, to ignore the claims of ecological refugee states to a new territory would render the system of state territorial rights hypocritical.

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Laissez-Faire vs. Regulated Capitalism Revisited

By Ned Dobos

The global financial crisis has shed new light on an old debate between neoliberal advocates of the free-market and those who support market regulation. Here Dr Ned Dobos revisits the debate and suggests a contractualist account of risk imposition leaves the laissez-faire position wanting.

The debate between laissez-faire free-marketeers and advocates of regulated or 'leashed' capitalism has reached something of an intellectual stalemate in recent decades. In the public consciousness at least, this stalemate was broken by the recent global financial crisis. There have been intense calls for tighter government control over banks, mortgage originators, rating agencies, accounting, insurance, and brokerage firms, and the financial services industry more generally. And there is a growing consensus that the alternatives to government regulation—'market discipline', civil litigation, voluntary self-regulation by firms and industry associations—cannot be relied upon to deter unethical conduct and to protect us from the adverse consequences that free-market activity sometimes produces. Commenting on the crisis in September of 2008, French President Nicholas Sarkozy proclaimed that 'self-regulation as a way of solving all problems is finished. Laissez-faire is finished'. Martin Wolf, chief economics writer at the *Financial Times* in London, declared that 'another ideological god has failed. The assumptions that ruled policy and politics over three decades suddenly look as outdated as revolutionary socialism.' Even Francis Fukuyama, who not so long ago proclaimed *The End of History* with the triumph of free-market liberal democracy, has admitted that the crisis represents the end of Reaganism in the financial sector.

Former Australian Prime Minister Kevin Rudd recently joined the chorus: 'The time has come, off the back of the current crisis, to proclaim that the great neoliberal experiment of the past 30 years has failed, that the emperor has no clothes'. Two unassailable truths have been vindicated by the crisis according to Rudd:

...that financial markets are not always self-correcting or self-regulating, and that government (nationally and international-

ly) can never abdicate responsibility for maintaining economic stability. These two truths in themselves destroy neoliberalism's claim to any continuing ideological legitimacy, because they remove the foundations on which the entire neoliberal system is constructed

It is a mistake to think that neoliberalism stands or falls with free-market infallibility and the self-correcting hypothesis. The ideology is also underpinned by the judgment that government regulation of business is morally objectionable. Importantly, the argument which supports this position draws upon the resources of all three major theories of normative ethics, and does not depend on the premise that the 'hidden hand' consistently prevents all market failures and economic calamities. But just as recent events in financial markets have mounted considerable pressure on the self-correcting hypothesis, they have also given us reason to re-appraise the moral argument for de-regulation.

What's Wrong with Regulation?

The idea that government regulation is immoral—and not simply a threat to economic efficiency and political integrity—is a central tenet of neoliberal ideology. For some, regulation is objectionable because it stunts the growth of virtue, or because its costs are excessive relative to its benefits. For others the wrongness of regulation is independent of such contingencies; it unjustly infringes the rights and liberties of market actors, specifically their property rights, commercial autonomy, and freedom of association.

Let us begin with the consequentialist prong of the argument. The fundamental premise is that all things considered, regulation does considerably more harm than good. As a cure for market failure, state intervention is said to be worse than the disease. The point is perhaps best illus-

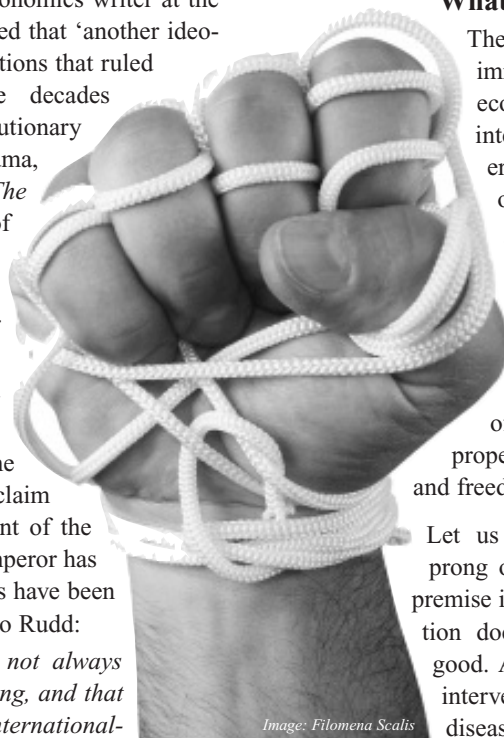


Image: Filomena Scalisi

trated by way of examples. Consider mandatory safety tests for pharmaceuticals. We tend to focus on the intended beneficiaries of such restrictions—those spared the suffering associated with taking defective drugs. But what about those who suffer needlessly while waiting (sometimes many years) for a safe and effective drug to be approved by a government agency, even though there is not so much as *prima facie* evidence of dangerous side effects? What about those who die in the meantime? Or take minimum wage laws. The beneficiaries are easily identified; they are the ones taking home a fatter pay cheque. Those who fail to gain employment or lose their jobs—either because the minimum wage has made it unprofitable for anyone to hire them, or because the minimum wage has encouraged businesses to adjust their production techniques so as to become more reliant on technology and less on labour, or because the minimum wage has forced marginally profitable firms out of business—remain anonymous.

Not least of the invisible victims are the taxpayers. Across the developed world hundreds of regulatory agencies employ hundreds of thousands of workers at a cost of hundreds of billions in public funds. More generally productivity declines, innovation stalls, and the costs of compliance are distributed in a way that allows companies to continue to operate without loss of profit—prices are increased, workers are laid off, wages are frozen, fewer new jobs are created, and so on. Some customers are priced out of the market, and some companies—particularly smaller companies—are forced to close their doors. To add insult to injury, the taxpayer foots the bill. These various costs are said to dwarf whatever social or economic harms regulation is supposed to prevent or remedy. The only winners, according to free market ideologue Milton Friedman:

are the do-gooders responsible for this type of legislation and for these effects. They have the high-minded satisfaction of promoting a noble cause. The good intention is emblazoned forth for all to see. The harm is far less visible, much more indirect, much harder to connect with the good-hearted action.

To make matters worse there are said to be viable alternatives to regulation which achieve its objectives—the protection of consumers, investors, employees, and the public—without the costs and constraints. A coercive regulatory regime might therefore be ruled out simply in virtue of being unnecessary. These alternatives come in the form of civil litigation, self-regulation, government certification, and of course ‘market discipline’.

A fast food restaurant that allows customers to use the drive-thru on foot is tempting a collision between motorist and pedestrian. A restaurant that has a strict policy against serving pedestrians at the drive-thru window is for this reason likely to be offered more

favourable insurance rates than its competitors. In this way the market can reward businesses that act responsibly and prudently, and punish those that do not. Moreover with ethical and responsible conduct eventually comes a *reputation* for it, which confers its own competitive advantage. Alan Greenspan, former chairman of the US Federal Reserve, made the point forcefully:

Reputation, in an unregulated economy, is a major competitive tool. It requires years of consistently excellent performance to acquire a reputation and to establish it as a financial asset... Thus the incentive to scrupulous performance operates on all levels. It is a built-in safeguard of the free-enterprise system.

At this point one might interject that certification, civil law, and market discipline may very well contribute to regulatory objectives, but this does not in itself give us any reason to oppose the government’s efforts to coerce compliance with ethical and prudential standards. One might say that everything possible should be done to protect the public from harm, and that regulation should therefore be used in conjunction with the aforementioned methods to give consumers, investors, and other stakeholders the greatest possible protection. Since market discipline doesn’t always work like it should, and deserving litigants sometimes lose their cases or are under-compensated, why not introduce regulations to supplement the courts and market forces?

There is an incentive to out-perform one’s competitors ethically

According to advocates of the laissez-faire model, however, using regulation to make up for the deficiencies of market discipline, civil litigation and the like is wrong-headed since regulation is among the chief causes of these shortcomings. The effectiveness of regulation’s alternatives, in other words, is said to be undermined by regulation. Greenspan describes it as a case of Gresham’s Law: “Bad ‘protection’ drives out good. The attempt to protect the consumer by force undercuts the protection he gets from incentive”.

This feeds into the virtue-based prong of the argument. It is only a matter of time before a company that defrauds its investors and neglects its customers goes out of business. Reliability, punctuality, integrity, trustworthiness and honesty, fairness and diligence all confer a competitive advantage. The greater the degree to which a business exhibits these traits, the more attractive it is to customers and investors. Thus there is an incentive to out-perform one’s competitors *ethically*—to be more diligent, more trustworthy, more reliable. An unregulated

market, the argument goes, provides fertile ground for the cultivation of virtue, and introducing regulation deposits salt into the soil. In a heavily regulated economy businessmen and businesswomen become obsessed with ‘compliance’. Former head of Britain’s FSA Howard Davies acknowledged that “the existence of a regulator and a rulebook leads in some cases to the laundering of conscience”. Conformity with the rules becomes mechanical or ritualistic, and sight is lost of the ends to which the rules are geared. There is little incentive to go beyond the bare minimum. In fact this comes to be seen as dangerous insofar as such behaviour might inadvertently breach regulations.

A series of voluntary exchanges can also impose significant risks upon unsuspecting third parties

Not all neoliberals base their opposition to regulation on such contingencies. Some insist that regulation is wrong in principle, on the grounds that it unjustly infringes the rights and liberties of market actors.

The promulgation and enforcement of law requires moral justification insofar as it restricts individual liberty. In the case of criminal laws that prohibit murder, theft, assault and the like the justification is that the restrictions are necessary to protect people from harm or to defend their rights. Attempts to justify the regulation of business typically take on a similar form; the state may compel a pharmaceutical firm to put a new drug through rigorous safety tests, for instance, in order to protect consumers from harmful side-effects. But opponents of regulation are right to point out that there are important differences between the two cases. Assault by its very nature causes harm. Selling a drug without the state’s seal of approval does not. In the latter case, harm to the consumer is not certain, and in most cases it is not even probable; it is merely *possible*. This complicates matters a great deal since restricting the liberties of some citizens and imposing significant burdens upon them in order to protect others from harms that are merely possible looks a lot like preventive punishment. Since this is clearly unacceptable, except perhaps for in special circumstances, then so too is regulation.

But although releasing a new drug without meticulous testing may turn out to have no harmful consequences, it nevertheless puts consumer safety at *risk*. Is this not enough to justify regulation? For the committed neoliberal, as long as there is no coercion or deception involved—that is, as long as we are talking about a genuinely free and informed market exchange—the answer

is an emphatic ‘no’. As long as there is a clear warning label, a risk is merely being *offered*. Should you decide to take the drug despite the warning, the risk of harm is not foisted upon you; you accept it. Or take a company that decides to issue shares of stock to the public in order to raise capital for its operations. The company in question, for whatever reason, does not wish to make public the nature of its business model or to reveal any other details that are generally of interest to investors. Despite this I decide to purchase the company’s securities. I happen to trust the management, and just have a good gut feeling. Again, a risk is merely being offered, not imposed.

In light of this, for a government to deny market entry to untested pharmaceuticals or to compel periodic disclosure statements seems paternalistic. It involves prohibiting and punishing free and voluntary exchanges between competent adults, where no party has coerced, defrauded or attempted to mislead the other. If we agree that paternalism transgresses against the rights and liberties of its objects, then indeed regulation starts to look deeply problematic.

The Ethics of Imposing Risks

All three prongs of the moral argument for deregulation have come under considerable pressure in the wake of the recent financial crisis. It has become more apparent than ever that the market does not reliably cultivate honesty, integrity, and diligence. Executives often have a personal incentive to prioritise the short term over long term performance of their companies. This neutralises the desire for reputation, which might otherwise foster virtue. Moreover the claim that the costs of regulation are excessive has become more difficult to sustain in light of the severity and the scope of the damage. As for the rights-based argument, its standard formulation rests on the premise that regulation interferes with consensual transactions between competent adults. More specifically, it prohibits or constrains the offering and voluntary acceptance of risks. But if the meltdown and ensuing recession have made anything abundantly clear, it is that a series of voluntary exchanges can also impose significant risks upon unsuspecting third parties.

While some of the people affected by the crisis were neck-deep in exotic financial instruments, others had steered well clear of them and did nothing that could plausibly be interpreted as consent to the risks that catastrophically materialised. Investment banks and other financial institutions that were trading heavily in mortgages and derivatives were the first to feel the brunt of the sub-prime collapse, but this was just the beginning. Within a year millions of people worldwide had lost their jobs, their homes, and their savings. Retiree pension funds lost much of their value. Taxpayers were forced to bail out troubled financial institutions to the tune of hundreds of billions of dollars. The plight of

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many of the world's poor was exacerbated, and many more were pushed into poverty. The standard anti-paternalist position has no purchase here. It is hopelessly ill-equipped to deal with the undeniable prevalence of risk-imposition in financial markets.

This, however, still does not settle matters. The neoliberal might rejoin that, although there may be a *prima facie* right against risk-imposition, once it is properly circumscribed or its content properly specified we see that the risk-impositions of free market activity do not infringe it. On this view just as the state has no business interfering with the offering and acceptance of risk it also has no business interfering with the kinds of risk-impositions under consideration, insofar as the only justification for the restriction of individual liberty is the defence of rights (a conviction shared widely beyond neoliberal circles).

Admittedly to say that there is a right to X is not to say that any and every denial of X constitutes an infringement of that right. When the state prohibits one person from making a religious sacrifice of his neighbour we do not say that his right of religious expression has been infringed. Rather, we say that the right simply does not extend that far; there is only one right 'in play' here, and that is the neighbour's right not to be set alight. The same goes for the right against risk-imposition. Even sensible driving within the speed limit invariably involves imposing risks on pedestrians and other motorists, since accidents happen. Using a gas cooker involves imposing risks on one's neighbours, since gas leaks and explosions are always a remote possibility. Yet we don't feel that either of these activities is even *prima facie* impermissible. The fact of the matter is that many of the things we do from day to day carry risks for people that do not consent to them. A moral code which posits a boundless, absolute right against risk-imposition is simply paralysing. Like all rights, this one needs to be carefully circumscribed.

Using a gas cooker involves imposing risks on one's neighbours

But how is the scope of this right to be determined? Thomas Scanlon's contractualism might be usefully deployed here: An acceptable risk is one that conforms to a principle which cannot be 'reasonably rejected' from the point of view of anyone whose interests are at stake. If all concerned would endorse the principle given the opportunity to do so with access to the relevant information and unimpaired reasoning, then the risk imposition permitted by the principle cannot be said to infringe

anybody's rights; it can be justified to each and every person affected.

This can account for our intuition that driving and using a gas cooker are perfectly legitimate activities. A principle that prohibits me from imposing a negligible risk of harm on my neighbours in the preparation of my meals must also, as a matter of consistency, prohibit everyone else from imposing risks with relevantly similar features (comparable probability and seriousness of injury etc). Clearly this would severely limit the scope of freely chosen individual activity. The same risks and benefits that attend my cookery are also components of an infinitely wide range of other activities. Thus from the point of view of all concerned a world governed by a principle that allows me to impose this risk is preferable to a world governed by a principle that denies me this freedom.

Now if all risky commercial activities live up to this standard, then all such risk-impositions are of the morally innocent kind and do not justify coercive prohibition or regulation. But this premise is rather difficult to swallow. Take but one example: the selling of credit default swaps (CDS) to speculators. The first thing to note is that the potential harms are significant: unemployment, pension fund depletion, financial ruin. CDS trading is what multiplied and spread the losses caused by the recent sub-prime collapse. Secondly the financial heavyweights imposing the risks were not tending to their basic needs, but amassing vast fortunes. AIG CEO Joe Cassano earned \$280 million orchestrating the creation of \$80 billion worth of CDS contracts over a 5 year period. Other executives from AIG's Financial Products Unit also pocketed 30 percent of the profits from the operation, which steered the firm to an \$11.5 billion quarterly loss in March 2008; a \$61.7 billion quarterly loss a year later—the largest in US corporate history—and a 95 percent drop in the share price, from \$70 to just \$1.25. Finally, the majority of those exposed to the risk did not stand to benefit from it.

Rejecting a principle that allows risk-impositions with this combination of features seems perfectly reasonable. The state of affairs that would obtain if all risks with similar properties were prohibited or restricted would be acceptable and indeed preferable from the point of view of some, if not most ordinary people.

The prognosis does not look good for the laissez-faire model. While there are conceivable circumstances under which the mere offering of a risk is objectionable, the presumption, admittedly, must be that any voluntary transaction between competent adults is morally permissible. On the other hand in relation to the imposition of risk the presumption is always against. This shifts the burden of argument. It now falls squarely on the neoliberal to make the case that the risk impositions created by market exchanges are the morally innocent

kind that do not warrant coercive interference by the state. I have not gone so far as to suggest that the case cannot be made, but the neoliberal has it all to do.

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Rethinking Marriage: What Role Should the State Play?

By Elizabeth Brake

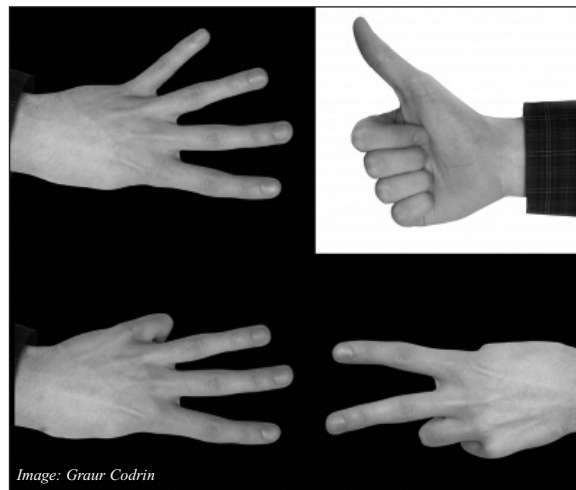
The state's role in marriage has come under recent fire from different directions—from those who seek the expansion of existing legislation to include same-sex couples, to those who see no need for the state's involvement in private relationships. Here Elizabeth Brake rethinks the very idea of marriage and argues for comprehensive reform to legal marriage in a liberal state.

In the past decade, same-sex marriage has been recognised in law in the Netherlands, Spain, Belgium, South Africa, Canada, South Africa, and, just recently, Mexico. A bitter court battle is ongoing in California over 'Proposition 8', a measure banning same-sex marriage in a state which had previously recognised it. While debates over same-sex marriage continue, proponents of other unrecognised—and, in some jurisdictions, criminalised—forms of marriage such as polygamy and group marriage have begun demanding equality for their relationships, too. Conservatives charge that licensing same-sex marriage is the first step on a slippery slope to allowing incestuous and bestial marriages; if we move away from the 'traditional' definition of marriage, where will we stop? And others are asking why the state should be involved in what is essentially a private relationship between two adults in the first place. Why not leave marriage to the churches and private chapels?

In a recent article, "Minimal Marriage," I argued that the state should indeed recognise and support a form of marriage, one with minimal entry restrictions: it should support adult caring relationships *of all kinds*, without regard to sex or number of parties—a case I develop in a forthcoming book. Here I recapitulate some of the main arguments made in the marriage debate so far before summarising my case for the sweeping reform of marriage.

I. Why does marriage matter?

Marriage law is a controversial topic, but at first glance the issue may appear to be less serious than, for example, war, welfare, or health-care reform. But legal marriage typically brings significant entitlements—and some grave liabilities. In the U.S., for example, spouses have rights to be on one another's health insurance and to receive pensions and Social Security payments; they enjoy special tax status (though this sometimes brings a penalty for dual-income couples) and possess entitlements to hospital and prison visiting rights, special consideration for immigration, and bereavement and care-taking leave. Such allocations make tremendous differences in the everyday lives of ordinary people—for example, the difference between having, or not having,



healthcare, or being able to afford university due to spousal eligibility for in-state tuition, or being able to see one's seriously ill partner in the hospital. Marriage involves a network of entitlements in various areas of law—it is implicated in 1,138 provisions in the U.S. Federal Code—and so rather than being of less importance than welfare, health-care reform, soldiers' benefits and veterans' affairs, it is a category which is used to determine distribution and eligibility within all these areas, and more.

Legal marriage can also impose vulnerabilities. In many jurisdictions, marital rape was not recognised as a crime until recently; marital rape was seen as a legal impossibility. While this injustice has been widely rectified, echoes of it linger in some criminal law—for example, as of 1996, 23 U.S. states maintained exemptions or mitigations for sexual assault or battery within marriage. In a ground-breaking article, "Against Marriage and Motherhood," Claudia Card argued that where marriage gives legal access rights to spouses it makes victims of spousal abuse vulnerable. Given high rates of domestic violence, this is a serious concern. While partner abuse

*Legal marriage can also
impose vulnerabilities*

occurs between unmarried partners as well as spouses, when marriage law deprives women (or men) of protection from their abuser, it may make the difference between life and death.

Marriage law also has profound effects on children. For one thing, where married couples are entitled to greater benefits, children indirectly benefit. But such benefits, obviously, do not extend to children outside marriage, who may thus be relatively disadvantaged. The U.S. has, since 1996, undertaken aggressive marriage promotion, under the Personal Responsibility and Work Opportunity Reconciliation Act, on the theory that marriage promotes family stability, optimal child-rearing conditions, and economic gains. But, as I will discuss in more detail below, the interpretation of the relevant data has been debated, and the effects of marriage on children are quite complex; for instance, a recent survey of the literature concludes that while children in low-conflict marriages appear to benefit from their parents' marriage, children in high-conflict marriages benefit from *divorce*.

II. The case for same-sex marriage

The most straightforward argument for same-sex marriage is in terms of equality. The state offers significant benefits to married people, from which one group is systematically excluded. But a widely accepted principle of equal opportunity requires that publically funded benefits and legal entitlements should be made available to all, unless there is a good reason for excluding a certain group of people. For example, in the case of driver's licenses, the state denies the privilege of driving to incompetent drivers on grounds of public safety. And in cases where benefits are targeted at historically oppressed groups, a reason can be given in terms of justice in rectification. But failing to recognise, or prohibiting, same-sex marriage deprives a certain group of access to benefits which are available to others who are relevantly similar. The main function of marriage, the argument goes, is to recognise committed love relationships. In the absence of a reason for depriving same-sex committed love relationships of the benefits available to committed opposite-sex love relationships, this exclusion violates equal opportunity.

Now, this argument faces some objections. First, the point is sometimes made that gays and lesbians can participate in marriage—if they marry members of the opposite sex. But it could have been similarly said that persons racially classified as 'black' under U.S. law could still marry under anti-miscegenation law, so long as they restricted their choice to another 'black' person. Such restricted access to the benefits of marriage is not equivalent to an entitlement to marry a person of one's choosing.

Second, it is sometimes said that same-sex sexual activity is simply immoral. But—a point I will pursue below—

the state should not be in the business of making moral judgments regarding the choice of sexual partners among competent consenting adults (children, obviously, cannot give consent to sex and can be harmed by it, so the state should protect them by prohibiting adult-child sex). To borrow a slogan from former Canadian Prime Minister Pierre Trudeau, "the state has no business in the bedrooms of the nation".

Marital equality can only be achieved by extending recognition to same-sex couples—or else by ending the state's recognition of marriage altogether

Third, it is sometimes said that marriage is traditionally defined as monogamous and opposite-sex, and that to recognise other forms would change the definition of marriage. However, if the relevant tradition is (for instance) American law, this tradition includes the interracial marriage bar, the Marital Rape Exemption Act, and the laws of coverture, under which married women lost all legal rights. If we look more broadly at history, the dominant marital form has been polygamy, and there are some instances of same-sex marriage traditions. Moreover, it's not clear why tradition (like moral judgments about sex) should determine legislation. After all, the traditional definition of a voting citizen excluded women, but that was no reason for prohibiting women's suffrage. Claims of justice should override tradition.

Finally, procreation is sometimes given as a reason for privileging opposite-sex relationships; but fertility and the intention to bear and rear children are not conditions for marriage. A related claim sometimes adduced against same-sex marriage is that it would harm children. But the psychological literature does not show significant differences between children of same-sex and opposite-sex parents. On the other hand, the marriage bar for same-sex couples may actually harm children: a recent article reports a "growing consensus among researchers that in terms of psychological adjustment there are no differences between children in planned lesbian families ... and those raised in heterosexual families" but finds that children of lesbian parents exposed to stigmatisation, such as playground bullying, due to their parents' sexual orientation have lowered self-esteem. Recognising same-sex marriage would be one way to counteract stigmatisation and protect such children.

This last point suggests a response to those who would allow same-sex couples the economic and legal benefits

of marriage, but not the title of ‘marriage’ itself, under a scheme of civil unions or domestic partnerships. Because marriage is typically viewed as a status deserving respect, this approach relegates same-sex relationships to second-class status. One of the intangible, but powerful, benefits of marriage is social recognition of relationships so designated, and denying this recognition perpetuates harmful discrimination against people in same-sex relationships. Marital equality can only be achieved by extending recognition to same-sex couples—or else by ending the state’s recognition of marriage altogether.

III. The case for state withdrawal

In a *New York Times* editorial, marriage historian Stephanie Coontz writes that, throughout history, states have generally not regulated marriages, and she suggests that state marriage licensing is not fulfilling its intended purpose of assigning rights and responsibilities where needed. No doubt, marriage serves many governmental functions: most notably, it makes spouses responsible for one another’s support, thereby reducing—in theory—welfare claims, and it serves as a convenient shorthand to designate parties as entitled to a range of benefits (according to legal scholar Mary Anne Case, this is its primary legal role). But (setting aside the issue of how well marriage serves these purposes) should the state use marriage law to serve such ends?

the state’s redistribution of funds through marriage appears to some to be an injustice

One problem is that state regulation of marriage can be construed as a form of illegitimate interference in relationships which should be private. In one sense, marriage does protect privacy between spouses, shielding them, for example, from testifying against one another in court. But on the other hand, state recognition of one form of marriage shapes people’s private choices, giving incentives for some, and disincentives for others—as well as, of course, restricting eligibility for benefits, including privacy.

Moreover, the state’s redistribution of funds through marriage appears to some to be an injustice, taking resources from some to subsidise others *for no good reason*. Why should marriage bring an entitlement to join a spouse’s health insurance plan, into which unmarried as well as married people pay? Card, for one, identifies an injustice in entitlements to health insurance arising from marriage: whether or not one is married seems irrelevant to whether or not one should be entitled to health care. Similarly, when widowed and divorced persons are entitled to governmental pension benefits solely by virtue of marriage, and not through having contributed to

the economy, there appears to be an unfairness in thus redistributing funds from the taxes of workers to those who have not worked outside the home for pay. Of course, spouses might deserve such benefits because they have contributed to the economy through work within the home, but marriage does not accurately track this. As Coontz points out, in the U.S., a spouse is entitled to Social Security benefits after nine months, while a 19-year unmarried cohabitant would not be eligible for such benefits. To address these concerns about distributive justice, reasons need to be given for the allocation of entitlements to married persons.

For political liberals, there appears to be a further problem with marriage law. According to political liberalism, as developed by John Rawls, reasons for law and policy should not depend on a controversial conception of the good. For example, within political liberalism, laws concerning abortion and birth control should not depend on accepting the doctrines of a particular religious faith. The fundamental idea is that reasons for legislation affecting everyone should be of a kind which could be reasonably addressed to all citizens and thus should not depend on a particular religious or ethical view—given that many faiths and ethical doctrines compete in the modern liberal state. A political liberal can appeal to ‘public reasons’ such as women’s health, or child welfare—but not to a particular, controversial, conception of the good.

However, this leads to an argument against state involvement in marriage. According to political liberalism, legislation should not depend on a contested conception of the good; it should be defensible in terms of public reasons accessible to all. But marriage, it has been claimed, is an essentially contested concept. It is defined differently—and exclusively—by different religious and social groups, as, for example, *only* applying to opposite-sex couples, or as extending to polygamous or same-sex relationships. Moreover, some groups oppose marriage altogether—for instance, due to its historical role in maintaining men’s power over women, as when married women lost all legal rights under the doctrine of coverture, and the concern that inequality still influences marriage law, as in mitigations for sexual battery within marriage. Given the divisive nature of marriage, and its roots in religious worldviews, isn’t the state, by favoring one form or another, taking a stand on a contested conception of the good? Can any public reason be given for legislation which recognises and supports marriage?

In Part V, I will give my own answer to this question. But first, I will briefly consider another answer.

IV. One case for marriage—and its weaknesses

As political liberal John Rawls notes, on his view, acceptable arguments for a particular form of marriage cannot be given in terms of religious or moral doctrines, but they

can be made in terms of public reasons such as child welfare. The reproduction of society is a value which can be endorsed from within the various religious and ethical views in the liberal state. In the U.S., marriage promotion policies enacted under Clinton and continued under the Healthy Marriage Initiative have been defended (in part) in such terms, by appeal to data which appears to show economic benefits to married couples and psychological benefits to children of married parents. However, this line of argument faces several problems.

Some concerns centre around the effectiveness of marriage promotion as a means of furthering children's healthy development. First, correlation is not causation, and the data showing benefits accruing from marriage may reflect other causes. For example, apparent economic benefits of marriage could be explained by the fact that middle-class people are more likely to marry than those in a lower socio-economic bracket, or by the direct and indirect economic benefits disbursed on the basis of marriage itself. Second, as noted above, high-conflict marriage harms children, meaning that incentives to remain married will actually, perversely, harm such children. Finally, many children are reared outside of marriage; funds directly targeting children—rather than their parents—would be more likely to promote the welfare of all children.

Other concerns centre on underlying injustices of marriage promotion. If children outside marriage are, by hypothesis, worse off (as children of single mothers, economically, are), is it fair to benefit the already relatively-privileged children within marriages by giving more benefits to their parents, as incentives to stay married? For another, if the poverty of single mothers is caused by economic injustices such as the failure of workplaces to accommodate flexible working hours or the state to ensure the provision of affordable quality daycare, then addressing these underlying causes of single mothers' poverty would be more just (as well as potentially more efficient). If marriage does not effectively promote child welfare, and if attempts to promote child welfare by promoting marriage are unjust, child welfare cannot provide a good public reason for marriage law. So what can?

V. Minimal marriage

I argue that there is a good public reason for recognising a—reformed—form of marriage. In my view, the only form of marriage consistent with justice is 'minimal marriage'. I accept that the equality arguments for same-sex marriage are generally sound, and the constraints of public reason exclude many reasons for discriminatory legislation. But equality arguments have not been taken to their far-reaching conclusions. First, they should be

extended to polygamous or polyamorous groups. It is sometimes objected that polygamy harms women; however, group relationships can be consistent with women's equality, and the kinds of communities which are troubling from the perspective of women's equality generally have other failings than polygamy, which should be addressed independently. Second, equality arguments also suggest that the recognition of significant

relationships, those deserving governmental support and legal entitlements, should not be restricted to sexual or romantic love relationships.

In recent years, there have been increasing reports of friends who cohabit, or act as family, for a variety of reasons. Young people postpone marriage; older single people seek communal living with friends; single parents band

together to share costs and child-rearing. Spokespeople for self-styled 'urban tribes' and 'quirkyalones' have argued cogently that their friends play the role in their lives, providing security and mutual care-taking, that spouses do for married people, and that discrimination against their friendships has painful costs. In the absence of compelling reasons to treat such friends differently, the benefits of marriage ought to be extended to them. Imagine, for instance, a pair of long-cohabiting friends who co-own a house and plan to stay together indefinitely; why should they be denied hospital and prison visiting rights, eligibility for special consideration for immigration, bereavement leave, rights to be on one another's pension and health insurance, and so on? The arguments for same-sex marriage, in my view, also entail that such friendships should receive 'marital' rights, if anyone does.

But, to return to the challenge set by political liberalism, why should the state provide any such benefits to relationships? I argue that there is a public reason for providing some benefits, namely, the value of caring relationships. Within the constraints of political liberalism, Rawls tried to identify goods useful for any plan of life, goods which allow citizens to develop and exercise their moral powers. Justice concerns the distribution of such goods. In my view, caring relationships fit this description as much as any goods on Rawls' list do. Consider money. While it is useful for almost all plans of life, it is not useful for communists or peripatetic monks. Similarly, caring relationships feature almost universally in people's plans of life, and these relationships offer psychological benefits (self-esteem) and material aid (someone to help with tasks) which help us pursue almost all life plans. Of course, some hermits or solitudinous people might not need such relationships to pursue their plans of life, but similar counter-examples can be levelled at the other goods on Rawls' list.

discrimination against their friendships has painful costs

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If caring relationships are indeed the kind of goods with the distribution of which the state is concerned, how can it do so? No-one is suggesting state-sponsored dating agencies! The state cannot directly distribute caring relationships, but it can distribute various rights and entitlements which support them by allowing partners access to one another and—rights to hospital and prison visitation, special consideration for immigration, care-taking and bereavement leave, and so on. These rights, of course, are a subset of the rights typically attaching to marriage. So the answer as to why a politically liberal state can consistently support marriage—i.e., that caring relationships are goods—also shows that the state should support all caring relationships (and not just romantic or sexual ones), as such goods. This dovetails with the equality arguments given before.

Finally, it might be asked why relationships need state support. The answer is simple: such relationships are often under threat from the powerful institutions which shape our lives—when people are in hospital, when companies relocate employees, when people join the army, and so on. Marital rights are instrumental in protecting those relationships and designating them for third parties—and those protective rights, made available to all caring relationships, are what the state should legislate.

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