

Ethics and the Outsider

by Julian Burnside

Julian Burnside considers some of the human rights issues raised by our treatment of asylum seekers, and claims this treatment poses the ultimate ethical difficulty: a conflict between the laws of the state and the dictates of conscience.

Rights and Obligations: Their Political and Moral Sources

Until the Reformation, western societies proceeded on an assumption that a monarch had a right to rule which was derived from God. This was convenient for those who could trace their ancestry to Adam, or at least persuade others that they could. Their right to rule transcended doubt. The divine right of kings took the occasional knock when one ruler deposed another, and proved the superior lineage that comes with military conquest. The twilight of the idea can be seen in developments in England during the 17th century which dawned in an age of divine right and closed with parliamentary rule firmly established. James I of England, enthroned in 1603, was a fervent proponent of the divine right of kings. His son Charles I was beheaded in 1649. His autocratic rule sparked the civil war after which, in 1688, parliamentary rule in England was assured.

Events on the ground were mirrored by developments in philosophical thought: in 1652 Hobbes wrote *Leviathan* in which he postulated that the natural condition of man was fairly bleak ('solitary, poor, nasty, brutish and short'). This could be improved by collectively ceding power to the sovereign so that the sovereign would rule by the collective will of the governed. In 1689, John Locke wrote his *Second Treatise on Government*, in which he demolished the notion that sovereigns could trace their lineage to Adam, and proposed that the only true authority of the government came from the consent of the governed. More, he reasoned that the obligation to obey the laws of the state was conditional on the state protecting person and property, and that if the sovereign breached the terms of the Social Contract, he could be overthrown.

The American colonists expressly adopted Locke's reasoning in their preamble to the 1776 *Declaration of Independence*:

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another; and

to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty and the pursuit of Happiness; that, to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed; that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness...

From these developments, and parallel developments in France in the 18th century, the modern norm was established: government derives its power from the consent of the



governed; the power of the State is an expression of the collective will of the people; the laws of the State give expression to that will, and thereby mediate the reciprocal rights and duties of citizens and State.

From this arrangement it can be seen plainly that rights and obligations are owed by people in their capacity as members of the polity. Each person gives up some measure of autonomy in exchange for a reciprocal concession

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by other parties to the Social Contract. This theory works nicely for members of the polity. All are bound by the rules which range from basic laws propounded in the Constitution, to orthodox general laws of the legislature. It is not so clear that the same reasoning extends to rules of morality and ethics which do not spring directly from constitutional or parliamentary laws. To the contrary, morality and ethics spring from deeper philosophical sources, although they may be influenced by constitutional and parliamentary laws, and *vice versa*.

The Problem of the Outsider

The problem posed by the Outsider thus has two aspects:

1. Is the Outsider entitled to equal consideration under the laws of a polity to which she does not belong? and;
2. How do we respond to an Outsider when ethics point one way and parliamentary law points the other way?

The difficulty is acutely illustrated in our current response to asylum seekers, although historical analogies are available. It is notable that, until 1967, aborigines were excluded from the social Contract in Australia: they had no right to vote in a country which their ancestors had occupied since a time before the European cave paintings were made. The treatment afforded them—treatment for which our current Prime Minister cannot express regret—is unthinkable unless the sufferer is an Outsider, not part of the game. Likewise, the increasingly shocking treatment of the Jews in Nazi Germany was facilitated by laws which progressively excluded them from the Social Contract. The Nuremberg Laws very carefully identified those whose rights were abrogated as they were systematically expelled from the German polity.

The problem is not solved by saying that we owe equal duties to everyone, because that would have consequences destructive of most societies. For example, most people would not think that our system of social welfare benefits should be available to anyone in the world who applied; nor perhaps that unemployment benefits should be available to a foreign backpacker.

Sophocles dealt with this difficulty in *Antigone*, nearly two and a half thousand years ago:

Polynices is slain. King Creon has ordered that his body remain on the hillside where the dogs and vultures will devour it. Any person who removes the body to bury it will be put to death by stoning. Antigone is Polynices' sister. She proposes to bury his body, and captures simply the central moral point: 'He is still my brother'.

Her sister Ismene, while sympathetic, fears to do what she knows is right. The argument is captured in the following lines:

Antigone: I will not urge you, no nor, if you yet should have the mind, would you be welcome as a

worker with me. No: be what you will; but I will bury him: well for me to die in doing that.

I shall rest, a one loved with him I loved, sinless in my crime; for I owe a longer allegiance to the dead than to the living: in that world I dwell forever.

But if you will, be guilty of dishonouring laws which the gods have established in honour.

Ismene: I do them no dishonour; but to defy the State, I have no strength for that.

Antigone: Such be your plea: I will go to heap the earth above the brother whom I love.

We sympathise with Antigone's instinct, and with Ismene's weakness. But why do we owe anything to the dead? Why is Antigone's instinct so strong and so obviously right: it is clear that a corpse can no longer be party to the social contract.

Her crime is discovered, and Antigone is taken before King Creon. She explains her actions in a way familiar to those who know the natural law theory of jurisprudence.

Creon charges that she has broken the law he made:

Antigone: Yes; for it was not Zeus who made that edict; not such are the laws set among men by the justice who dwells with the gods below; nor deemed I that your decrees were of such force, that a mortal could override the unwritten and unfailing statutes of heaven. For their life is not of today or yesterday, but from all time, and no man knows when they were first put forth.

Not through dread of any human pride could I answer to the gods for breaking these. Die I must, I knew that well (how should I not?) even without your edicts. But if I am to die before my time, I count that a gain: for when any one lives, as I do, compassed about with evils, can there be anything but gain in death?

So for me to meet this doom is trifling grief; but if I had suffered my mother's son to lie in death an unburied corpse, that would have grieved me; for this, I am not grieved.

And if my present deeds are foolish in your sight, it may be that a foolish judge arraigns my folly.

Australia's Equivocal Attitude to Human Rights

Australia's attitude to human rights has been oddly equivocal. In the aftermath of war, and despite its remoteness and its small population, Australia took a leading role in the formulation of the great human rights conventions of the late 1940's. That process, inspired by events of the preceding decade which had 'shocked the

Is the Outsider entitled to equal consideration under the laws of a polity to which she does not belong?

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conscience of mankind' gave expression to a widely held view that the genocide of one group affected all members of the human family, that some rights are inherent in the condition of humanity, and that there are many in the world so vulnerable and powerless that the rest has to care for them without regard to national boundaries. It is an idea of great reach. Australia not only supported the adoption of the *Universal Declaration of Human Rights*, it advocated that the rights enshrined in the Declaration should be enforceable, not merely a statement of hope or principle.

The Declaration and the Geneva and Genocide Conventions were monuments built over the wreckage of war and infamy. They were the products of a vision of a world made new: a grand vision of life and hope and the possibility of better things. Australia played an admirable role in those days of hope.

At the same time, the Australian government was taking aboriginal children from their parents in pursuit of a well intentioned, but deeply flawed, social theory. More recently, our treatment of asylum seekers has been impossible to reconcile with any genuine commitment to human rights.

visa and asked to be returned to the Gaza Strip. Although Mr al Masri was able to produce a passport, officers of the Department of Immigration were unable to return him, because they could not get permission for his entry to the Gaza Strip. The Palestinians, it seems, thought he was an Israeli spy. Israel, for its part, did not want him. Five months passed and Mr al Masri remained locked up in Woomera. Mr al Masri applied to the court for an order releasing him from detention. Not surprisingly, the government resisted that application.

Here, I need to say something about the constitutional basis for mandatory detention under the *Migration Act*. The Australian Constitution entrenches the separation of powers. The three powers of governments—legislative, executive and judicial—are vested in the three different arms of government. The powers of one arm of government may not be exercised by another arm of government. Accordingly, the Parliament, established under Chapter I, cannot exercise the powers of the executive government which is established under Chapter II. Courts established under Chapter III of the Constitution may not pass laws, while punishment is central to the judicial power. Only a Chapter III court can inflict punishment on a person. Locking a person up is generally regarded as punishment. However, the High Court has acknowledged that there are circumstances where detention is necessary for the discharge of an executive function. In those limited circumstances detention imposed directly and without the intervention of a Chapter III court will be constitutionally valid. This holds good only as long as the detention goes no further than can reasonably be seen as necessary to the executive purpose which it supports.

The *Migration Act* requires that all unlawful non-citizens should be detained and should be held in detention until granted a visa or removed from the country. Mr al Masri's case presented a conundrum: he had been refused a visa but he could not be removed. The question then was: should he remain in detention? For the sake of accuracy, it is worth quoting a portion of the Judgment in al Masri's case:

Theoretically at least, detention might continue for the rest of a person's life and the Solicitor-General did not shrink from that possibility, whilst contending that in the real world such a thing would not happen.

Put simply, the Solicitor-General, on behalf of the Minister for Immigration, had submitted to the court that, if it came to the point, Mr al Masri could be locked up for the rest of his life, although he is innocent of any offence.

To lock up an innocent person for the rest of their natural life is a terrible thing. For a government to contend for that result in all seriousness is so chilling that it is difficult to associate with in contemporary Australia. The Judgment from which I have just quoted was delivered on

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Asylum Seekers and Human Rights

Indefinite Detention of Asylum Seekers

The *Universal Declaration of Human Rights* is the most widely accepted international convention in human history. Most countries in the world are parties to it. Article 14 of the universal declaration of human rights provides that every person has a right to seek asylum in any territory to which they can gain access. Despite that universally accepted norm, when a person arrives in Australia without prior permission and seeks asylum, we lock them up. This is so notwithstanding that they have not committed any offence by arriving in Australia without prior permission.

The *Migration Act* 1958 (Cth) provides for the detention of such people until they are either given a visa or removed from Australia. In practice, this means that human beings—men, women and children, innocent of any crime—are locked up for months, and in many cases years.

Mr al Masri was a Palestinian from the Gaza Strip. He arrived in Australia in June 2001 and was placed in Woomera Detention Centre. He applied for a protection visa, claiming to be a refugee. He was refused a protection

the 15th April, 2003. The court rejected the government's argument, and said that the Minister could not hold a person in detention for the rest of his life. The government has challenged the decision in the High Court.

Conditions in Detention

There are other aspects of the mandatory detention system which bring into sharp relief the attitude of the current government to human rights issues.

Woomera opened for business in December 1999. It was closed in September 2002. At its peak, it accommodated nearly three times as many people as it was designed for. Conditions in Woomera—physically and psychologically—were shocking. Until public pressure forced some measure of improvement, a woman having her period would have to queue for sanitary products. Children held in Woomera typically developed enuresis: a colleague of mine described the haunting image of a 12 year old Afghan girl wandering around aimlessly in the dust at Woomera, wearing a nappy. On enquiry, it emerged that the child was incontinent from the stress of detention. Desperate acts of self-harm were common. The use of solitary confinement was common.

On several notorious occasions, detainees escaped from Woomera, only to be recaptured shortly afterwards. They were charged with escaping from immigration detention. The defence to those charges goes like this: detention under the *Migration Act* is only valid so long as it does not constitute punishment. It will constitute punishment if it goes beyond what is reasonably necessary for the administrative purpose of processing a visa application and (if necessary) removal from the country. Conditions in Woomera go beyond anything that could be reasonably necessary for the purpose of visa processing and removal from the country. Accordingly, detention in such harsh conditions is not detention of the sort authorised by the Act, with the result that what they escaped from was not 'immigration detention' but some other, unauthorised, condition.

In order to produce evidence of the conditions at Woomera, subpoenas were issued to the Department of Immigration and ACM – the private prison operators who run all of Australia's immigration detention centres. The Department and ACM sought to have the subpoenas set aside. First, they said that the subpoenas were oppressive in their operation. For example, they said that it was oppressive to have to produce all of the 'incident reports' which the subpoenas sought. The contract between the Department and ACM requires ACM to keep 'incident reports' in respect of 'incidents' in the camp.

The government argued that it was oppressive to require them to produce all the incident reports because, they said, in the two and a half years since Woomera had opened, there were more than 6,000 incident reports filed: roughly 7 incidents every day.

More importantly, the Department and ACM argued that the proposed defence could not succeed as a matter of law. This involved the proposition that no matter how harsh the conditions in Woomera might be, they were nevertheless lawful, and a court could not interfere.

Because of the way in which the question arose, the government had to argue, and did argue, that even the harshest conditions of detention imaginable would nevertheless be lawful.

It is interesting to stand back and reflect on the stance taken by the government in that case: innocent people may be held in the harshest conditions imaginable and nevertheless detention will be

lawful. Coupled with the argument in *al Masri's* case, those same innocent people might be held in unimaginably bad conditions for the rest of their lives and yet it will be lawful. These are arguments worthy of the legal positivists of the Nazi regime. It is difficult to understand what has happened to the Australian polity that our Federal government is prepared to advance these arguments. The only explanation that occurs to me is that the media are not sufficiently interested in the detail or meaning of what the government is doing under the guise of 'border protection'.

Solitary Confinement

Officially, solitary confinement is not used in Australia's detention system. Officially, recalcitrant detainees are placed in the Management Unit. The truth is that the Management Unit at Baxter is solitary confinement bordering on total sensory deprivation. I have viewed a video tape of one of the Management Unit cells. It shows a cell about three and a half metres square, with a mattress on the floor. There is no other furniture; the walls are bare. A doorway, with no door, leads into a tiny bathroom. The cell has no view outside; it is never dark. The occupant has nothing to read, no writing materials, no TV or radio; no company yet no privacy because a video camera observes and records everything, twenty-four hours a day. The detainee is kept in the cell twenty-three and a half hours a day. For half an hour a day he is allowed into a small exercise area where he can see the sky.

No court has found him guilty of any offence; no court has ordered that he be held this way. The government insists that no court has power to interfere in the manner of detention.

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International Condemnation of Australia's Detention Regime

The United Nations Human Rights Commission has described conditions in Australia's detention centres as 'offensive to human dignity'. The United Nations Working Group on Arbitrary Detention has described Australia's detention centres as 'worse than prisons' and observed 'alarming levels of self-harm'. Furthermore, they have found that the detention of asylum seekers in Australia contravenes Article 9 of the *International Covenant on Civil and Political Rights*, which forbids arbitrary detention.

The Delegate of the United Nations Human Rights Commissioner who visited Woomera in 2002 described it as 'a great human tragedy'. Human Rights Watch and Amnesty International have repeatedly criticised Australia's policy of mandatory detention and the conditions in which people are held in detention.

In short, every responsible human rights organisation in the world has condemned Australia's treatment of asylum seekers. Only the Australian government and the Australian public are untroubled by our treatment of innocent, traumatised people who seek our help.

Mr Ruddock and Mr Howard have made it clear that the mandatory detention system, and the iniquitous Pacific Solution, are designed to 'send a message'. This decodes as: we treat innocent people harshly to deter others. The punishment of innocent people to shape the behaviour of others is impossible to justify. It is the philosophy of hostage-takers.

Deportations

Let me mention a final case. When a person has ultimately failed in their claim for a protection visa, the *Migration Act* requires that they be 'removed from Australia'. In practice, that often means that they will be returned to their country of origin. At the present time there are approximately 200 Iranian asylum seekers in Australia's detention centres who have been refused protection visas. A number of those people live in genuine terror of the prospect of being returned to Iran. The reason for their terror is not difficult to find. Many of them have embraced Christianity, and apostasy is a very serious offence in Iran; others of them belong to minor religious groups whose members are regularly subjected to terrible treatment in Iran. Recent reports on conditions in Iranian prisons make it clear that prisoners in Iran are treated with unrivalled cruelty: torture is standard, disappearances and murders are common.

I have in my possession a video tape, smuggled out of Iran, which illustrates these things, and incidentally reminds us that most Australians simply cannot imagine the conditions which cause people to flee their country and seek asylum elsewhere. The video is shot in a

medium size room. On one side of the room are two men who look like officials. They are reading in a flat, bureaucratic manner from a lengthy document. Keeping apart from them, and some distance away, is a group of five or six people who look as though they may be friends, or members of a family. On the opposite side of the room a man lies on a table, facing the ceiling. For the most part, the camera—handheld and grainy, but with the official Iranian watermark in the bottom right-hand corner—concentrates on the officials and their reading. At one point the camera swings to the family group, who look increasingly distressed and agitated. It swings to the man on the table who also looks distressed and sits up, only to be pulled down again by two large men standing beside him. The camera then concentrates on the officials and their reading until eventually the camera swings around to the man on the table as his eyes are removed with forceps.

I cannot adequately convey the horror of this tape. Its dull bureaucratic banality, coupled with the fact that it is real and not just a Hollywood special effect, combine to make it the most shocking thing I've ever witnessed. Apart from this tape, we know that prisoners in Iran are beaten, tortured, mistreated and killed.

An Iranian, whose claim for asylum had been rejected, lives in fear of return to these conditions. He applied to the court for orders preventing the Government from returning him to Iran. The case theory was simple: the power to remove a person from Australia does not go so far as allowing the Government to send him to a place where he faces torture or death. The Government sought to strike out the claim without a trial on the facts. When a party to litigation seeks to strike out the claim on that basis, they assume all the alleged facts to be true, and argue that those facts have no legal consequences. So, as in the Woomera escapees' case, the Government argued on the basis of facts which were to be assumed. Their argument was this: it does not matter that he will be killed when he is returned; it does not matter that he will be tortured when he is returned, nevertheless the Government has the power and the obligation to return him to the place where that will happen.

The government's view has prevailed. Thus Australia will become a murderer at one remove, a torturer's accomplice.

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The Obligations of Citizens in a Diseased State

We are all citizens of this country. We are governed by its laws. Its laws are now being used to damage and destroy innocent human beings. Those human beings are Outsiders: they are not members of this polity, and they come without invitation. Yet it is impossible not to be revolted by the government's willingness to inflict suffering on them. How do we reconcile valid laws with the cries of wounded people?

It is the ultimate ethical difficulty, when the laws of a corrupt or diseased State defy the dictates of conscience.

I think there are many answers, but they all spring from a single premise: at a deep level, no one is an Outsider, for we are all human beings. Martin Luther King, Jr. said: 'All men are caught in an inescapable network of mutuality'. It is the next logical step from John Locke. The sentiment reaches beyond the bounds which limit political and legal thought. It is the foundation of human rights thinking which has its origins in the 18th century: Emanuel Kant, Tom Paine, the US Declaration of Independence, the

French Revolution. My existence as a human being depends in an important way on your existence as another human being. This nation is locked in a struggle of meanness and fear, encouraged by a government with limited vision but boundless cynicism. Our leaders claim Christian virtue while traducing Christian values.

Our place in the community of decent nations is at great peril.

This article is a slightly modified transcript of a lecture given by Julian Burnside at the University of Melbourne on 20 August 2003 as part of CAPPE's public lecture program.

Sources used in the preparation of this lecture include:

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Locke, John, *The Second Treatise of Government*, N.J.: Prentice-Hall, Inc., 1952.

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Please Consider

by Emma Larking

Do members of liberal states have an obligation to ensure human rights are accorded to people everywhere? Emma Larking argues they do, and also considers the implications of depriving non-citizens such as asylum seekers of basic rights.



*You who live safe
In your warm houses,
You who find, returning in the evening,
Hot food and friendly faces:
Consider if this is a man
Who works in the mud
Who does not know peace
Who fights for a scrap of bread
Who dies because of a yes or a no...*

If *This is a Man*, Primo Levi's account of the twenty months he spent in Auschwitz, is at its heart an attempt to discover both what makes us human, and how we hold on to this humanity in conditions specifically designed to divorce us from it. Levi's conclusion can be simply stated: what makes us human is our ability to recognise and to treat others as human. Levi's demand, 'consider if this is a man...' is addressed to us all. It requires us to look over the barbed wire fences, through the masks of mud and poverty and deprivation, beyond the claims of those in power, and to see ourselves in the people who stand most in need of our help. Our ability to focus on the individual in the nameless and faceless masses; our ability to see that individual as a human being in every important respect like ourselves, calls our own humanity into question.

But partly because we live in a wealthy liberal state in which the freedom and equality of citizens seems to be well safeguarded through the recognition of certain fundamental rights, we are inclined to remain unmoved in the face of Levi's demand. While we don't openly question the universality of human rights and the 'inalienable dignity' of the human being which they are designed to protect, we often assume it is beyond our ability, or simply not our responsibility, to ensure such rights are accorded to people everywhere. I want to challenge this belief, and will do so here by criticising four common ways of justifying the claim that members of liberal states do not have global justice obligations. My criticisms are fairly sketchy, but I hope my conclusions are at least suggestive. More forcefully, however, I also want to argue it is at our own peril that we allow non-citizens to be deprived of basic rights by the state in which we live. Our current treat-

ment of asylum seekers provides a disturbing case in point, and I will begin this article by considering the implications of that treatment for our own rights protection.

Levi's insight that our humanity resides most importantly in our recognition of others' humanity provides a moral parallel for the political principle of equality as it is enshrined in the legal and constitutional structures of liberal democracies. While we debase our own humanity by ignoring the human reality of other peoples' suffering, we debase our constitutional and legal institutions when we allow distinctions between different classes of people, including citizens and non-citizens, to affect the presumption of equality on which these institutions are founded, and the basic rights-protections which they afford. The result is an undermining of the protections provided by our constitutional and legal system to the citizens whose interests that system was originally devised to protect.

Asylum Seekers and Rights Protection

It is not uncommon, in a liberal state, to accord differential treatment to different classes of people. We recognise, for example, that some groups of people may require particularly favourable treatment if they are to access those opportunities which are already accessible to other people. On the other hand, there may be some groups of people—children, for example—whom we think it is right to deny the full freedoms to which other citizens are entitled. We also believe we are entitled to

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accord differential treatment to non-citizens—so tourists and citizens of other countries who are resident here do not have a right to vote, or to access the full range of welfare services offered to citizens. In each of these cases, though, the differential treatment of a particular group is justified only insofar as it leaves intact our recognition of the inalienable dignity of the human person, and the basic presumption of equality which operates institutionally to entrench that recognition.

So particularly favourable treatment may be necessary to redress past injustices, and to ensure a group of people has access on equal terms to the opportunities afforded to other citizens. Differential treatment of minors recognises that in some respects their judgement and capacities are limited, but assumes they will one day be citizens in full standing, and remains respectful of those rights which can be characterised as basic or fundamental. Differential treatment of non-citizens may be justified on the basis they are not required to make the same contributions to our society as those we require of citizens, and because they have political affiliations with another state within which they are entitled to exercise the full range of citizenship rights. We assume, though, that any person who has lived for a certain amount of time in our society, who is willing to affirm its values and contribute to its flourishing, and who is not a positive danger to it, is entitled to be naturalised, and thus to access the full range of opportunities—but also to accept the full range of responsibilities—which are commensurate with citizenship. Residency requirements for naturalisation eligibility vary from country to country, but the opportunity to be naturalised operates in liberal societies as recognition of the fact that permanently excluding a person who lives within a particular society, and is willing to contribute to it, from the full range of benefits it offers, may amount to a repudiation of the basic equality thesis on which that society is founded.

But while some cases of differential treatment do not undermine the state's commitment to the principle of equality, there are certain basic or fundamental rights which are widely agreed to be so significant that our political institutions cannot deny their application to a person without calling the basic equality of human beings, and their inalienable dignity, into question. These rights include at least the right to life, the right to liberty, the right to security from physical harm, the right to equal protection under the law, and to be treated as an equal before the law. They are usually assumed in liberal societies to include a right to equality of opportunity—although what exactly this entails is open to debate. The Universal Declaration of Human Rights includes additional rights which are arguably fundamental, or which can be derived from fundamental rights. These include a right not to be subjected to cruel, inhuman or degrading treatment or punishment, and a right not to be subject to arbitrary arrest or detention.

In this issue of *Res Publica*, Julian Burnside documents some of the ways in which Australia's treatment of asylum seekers breaches their most basic human rights. Findings of the United Nations Human Rights Committee, the Commonwealth Ombudsman, bi-partisan parliamentary committees, and NGO's—as well as testimony from employees of Australian Correctional Management and a wide range of health professionals, now provide over-

whelming support for Burnside's characterisation of our treatment of asylum seekers as being in breach of their human rights. Yet we seem increasingly inured to the fact we are imprisoning people who have not been accused of any crime for years at a time—and that we claim a right to imprison them indefinitely. We are apparently little troubled by the fact we deny people thus imprisoned access to full judicial review of the circumstances in which they are detained, and of the executive decision which led to their detention. We do not question the forcible repatriation of people to countries in which we know gross human rights abuses occur as a matter of course. And we have accepted the creation of a group of people within our community, the holders of 'temporary protection visas', whose lives are characterised by enforced insecurity and isolation. (Despite the fact they have been found to be genuine refugees, the right of these people to remain in Australia is reviewed every three years, and they will never be entitled to permanent residency, or to be naturalised. They are permanently denied access to most welfare services, may not leave the country and assume they will be allowed to return, and may not apply to bring their family to this country.)

Our breach of asylum seekers' basic rights has two significant implications for the prospects of our own rights-protection. Firstly, it suggests that basic rights are not 'inalienable', but a privilege which one may or may not merit. The second implication follows from the first. When legal and political institutions are no longer required to accord basic rights-recognition as a matter of course, but must ask whether the person who comes before them is a legitimate rights-holder, their operations become increasingly indeterminate and arbitrary. This indeterminacy and arbitrariness is different in kind to that which naturally arises when a decision must be made in cases in which a person's capacity to exercise a basic right (and to do so without imposing on other peoples' equal ability to exercise their basic rights), is genuinely in question.

Every legal and political system must deal with a degree of indeterminacy, and can be accused of arbitrariness when decisions are made in areas in which there is strong evidence to support opposing points of view. But when the person that comes before the system is automatically distinguished from other people not on the basis of her capacity to exercise rights, but on the basis of her membership of a particular class of people, the denial to her of basic rights means the attribution of rights in apparently non-contentious cases can no longer be automatically assumed. This is so even where the category of legitimate rights-holders is supposedly quite easily demarcated, for example, by virtue of their citizenship. (We know this because we know that Europe's democracies between World Wars I and II stripped thousands of citizens of their citizenship rights, while the Nazis

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treated even racial classifications as mutable and permanently revisable). Indeterminacy and arbitrariness of this sort destroys the rule of law, and the impartiality of the legal system, leaving those in power to decide who will—and who will not—be entitled to rights-recognition.

This process, by which our legal and political institutions are debased, does not usually happen immediately, but by increments. We do not need to look far, though, to see that it is currently happening in Australia. Our executive government lies to us, and withholds significant information from us. It also seems increasingly disrespectful of parliamentary processes—for example, it was recently quite open about its attempt to achieve by executive regulation what it knew could not be achieved by the usual parliamentary processes (the excision of even more Australian territory from our migration zones). Disrespect for constitutionality and the rule of law becomes pervasive when the ultimate insurance of individual rights—the assumption they are inalienable—has been destroyed. In continuing to deprive asylum seekers of fundamental rights, we are active participants in this process of destruction—but ironically, if we allow it to continue we are at risk of becoming its victims.

Both the universalist and the sovereign accounts of political community are accepted by international law, which treats the principle of sovereignty as axiomatic while at the same time affirming ‘the equal and inalienable rights of all members of the human family’. If states were insular and self-sufficient communities, and each was able to pursue and protect the interests of its own citizens free from outside interference, tension between the two accounts might—at least at the political and institutional level—be avoided. In the world in which we live, though, the universalist and the sovereign accounts of political community inevitably conflict. I believe we are morally compelled to resolve this conflict in favour of universalism, and my argument concerning asylum seekers was intended to show it is also in our own interests to ensure our political institutions promote this principle, at the very least insofar as it is enshrined in the recognition of certain basic rights. In the next section I challenge four ways of attempting to resolve the conflict between universalism and sovereign partiality in the opposite direction—and in doing so, to justify the belief that members of states such as ours do not have global justice obligations.

Reconciling universalist and sovereign accounts of political community: four (flawed) arguments

1. The ‘Assigned Responsibility Model’

One way of reconciling the universalism of liberal political theory and the partiality that sovereign states enshrine is to think of states as apparatus for the efficient and equitable discharge of universal duties. On this account, the primary duties assumed by liberal states in respect of their citizens are simply special instances of duties which would otherwise be owed to individuals universally. The account assumes it makes more sense to divide responsibility for meeting such duties among sovereign states, who each then act to promote and protect the interests of their own citizens (and within which citizens acknowledge special duties to each other), rather than to hope that universal obligations will be assumed and effectively discharged either by humanity generally, or by one central government agency.

There is a certain plausibility to the idea that general duties will be most effectively discharged in the form of special duties recognised by specific agents, in this case sovereign states and their members, in respect of particular subsets of rights holders. A system of ‘special pleading’ or ‘assigned responsibility’ (to adopt expressions used by Robert Goodin), may work very well if everyone with an entitlement is assigned a responsible advocate, and if every advocate is equipped to advance the interests of its subjects. Clearly, though, our sovereign state system does not function in this way. The

Disrespect for constitutionality and the rule of law becomes pervasive when the ultimate insurance of individual rights—the assumption they are inalienable—has been destroyed.

Foundational Principles: Sovereignty and the Limits of Justice

The assumptions we often make about our rights as members of a sovereign state help to explain our unwillingness to recognise the dangers inherent in denying basic rights to non-citizens such as asylum seekers.

We all recognise the claim made by the French *Declaration of the Rights of Man and of the Citizen*:

Men are born and remain free and equal in rights...The aim of all political association is the preservation of the natural and imprescriptible rights of man...

The *Declaration* expresses principles fundamental to justifying the coercive power of government in any liberal democracy. Pivotal among these is that the purpose of government is to protect the rights of indi-

viduals who are born free and equal. In this sense, the moral and political foundations of societies like ours are egalitarian and universalist, and assume individuals should be treated impartially. But according to the principle of sovereignty, which has also had a foundational influence on all liberal democracies, social justice relations are internal to states, and the role of the state is to advance the interests of its members, and to protect their rights, without particular regard for outsiders.

power wielded by wealthy states gives them a significant advantage in advancing the interests of their members, while the majority of the world's states are massively disadvantaged in their attempts to act in their citizens' interests. And in neither case is it self-evident that states—even the minority of democratic states—operate in an internally impartial manner to advance the interests of every one of their members.

While counter-factual, the idea that sovereignty functions to ensure general duties are effectively discharged may nevertheless seem attractive when considered in the light of the available alternatives. If every person has obligations to every other person, it is likely to be very difficult, even for well motivated people, to consistently meet their obligations in the absence of some sort of institutional framework. This does not, however, leave highly centralised global government as the only remaining mechanism (and alternative to state sovereignty) for ensuring the effective discharge of universal duties.

It is open to us both to challenge some of the traditional powers associated with sovereignty, and to redistribute others. It is possible to conceive of a range of different governance models based ultimately on the recognition of universal freedom and equality, and the protection of individual rights, within which decision-making and other powers are widely dispersed. If we are bound to ensure global distributive justice, at least some agencies with global authority will be necessary and will have a degree of control over decisions made within more localised polities. We might worry about the consequences of investing such power in global bodies. But such agencies exist already—what justice requires is that their operations be made transparent, accountable, and subject to the rule of law. Furthermore, achieving universal distributive justice will surely provide the most sturdy protection available to us against the tyranny of concentrated power. The result need not be the destruction of smaller polities, but the creation of an environment within which a genuine diversity of communities is able to flourish.

2. Justice and Mutuality

Another universalist justification of sovereign partiality can be found in the tradition of social liberalism. Social liberals such as John Rawls affirm the apparently universalist principle that 'each person possesses an inviolability founded on justice', but nevertheless consider our most significant justice relations to be internal to states (or 'peoples'—still conceived as sovereign political communities—in Rawls' more recent conception). On this account the state represents 'a cooperative venture for mutual advantage', and it is the cooperative relationships that the state enshrines which give rise to social justice obligations. The idea is that while social cooperation leads to significant benefits overall, these benefits are

usually unevenly distributed. Principles of justice are thus required to ensure people are compensated for the relative disadvantage which their social cooperation sometimes entails.

There is no reason to think, however, that the domain of social justice should be limited to ensuring a fair distribution of the benefits produced by mutually advantageous cooperative arrangements. Individuals may not have a choice about the political institutions which impact upon them, and their cooperation may be unnecessary to the functioning of those institutions, and the broader social arrangements which they support. Rawls acknowledges as much when he describes the basic structure of society as the primary subject of justice because:

...its effects are so profound and present from the start...men born into different positions have different expectations determined, in part, by the political system as well as by economic and social circumstances. In this way the institutions of society favor certain starting places over others. These are especially deep inequalities...they cannot possibly be justified by an appeal to notions of merit or desert.

Where Rawls goes wrong is in his refusal to accept the justice implications of the fact a global basic structure now influences individuals' life chances in ways which, like the influence of basic structures within states, 'cannot possibly be justified by an appeal to notions of merit or desert', and are similarly pervasive. For this reason, we must now demand that states accord justice to non-citizens, as well as requiring justice of transnational and global institutions.

3. Defending Political Self-Determination

Many social liberals also see sovereign autonomy as a fundamental good that can be justified in universalist terms. For instance, Rawls does not attempt to grapple with what he calls 'the deep question of whether some forms of culture and ways of life are good in themselves', though he does say as an aside that he believes they are. Instead, he emphasises the significance to individuals of their cultural attachments and their ability to engage in a 'common public and civic life'. 'In this way', he says, 'political society is expressed and fulfilled'. The ability to live within and contribute to the character of an independent polity is, in Rawls' view, of such significance that it warrants 'preserving significant room for the idea of a people's self-determination'. It is a good, he thinks, which the tolerance prescribed by liberalism as a theory of domestic governance compels liberal states to accord to other states (though Rawls does impose substantial qualifications here, in the form of his

It is open to us to challenge some of the traditional powers associated with sovereignty.

requirement that all ‘decent’ societies respect certain fundamental human rights, and in his identification of a duty of assistance to ‘burdened’ societies).

While political self-determination may be a good, is it a good ‘in itself’, and one which is incompatible with the recognition of universal justice obligations? The value of a political or cultural community doesn’t seem to be independent of humans in the sense in which we might argue the value of the natural environment or non-human animals does not depend on humans. Cultural practices are the creation of human actions and endeavours, and obtain their meaning in human contexts. A way of life is a good, if it is a good at all, only in respect of human beings. While this good may not be reducible to the particular individuals who inhabit a society at any one time (it has historical depth), it must still be assessed in human terms. To the extent that a culture or way of life sacrifices the interests of some individual human beings, it necessarily offends the liberal affirmation of the basic freedom and equality of all people. This does not mean that liberal societies must forcibly intervene in non-liberal states in an attempt to impose political systems based, through rights recognition, on freedom and equality. It does mean, though, that liberal states are not entitled to treat political self-determination as a good in itself—either as a way of defending their own sovereign interests, or as a basis for denying they have justice obligations to outsiders.

4. Legitimizing Democracy

Yet another means of attempting to justify sovereignty, while at the same time affirming the fundamental freedom and equality of all people, is by relying on the concept of democratic legitimacy.

In democratic theory the coercive power of the law is justified on the basis of the implied consent of all citizens to submit to that power, in so far as it is exercised legitimately. The legitimacy of the law depends on its impartiality, and on the

equal right of all those whom it coerces, and whose rights it is said to protect and promote, to contribute to its formation. It follows that only those people who have a right to participate in making the law (even if only indirectly through their eligibility to be elected to public office, and their right to elect representatives in government), are subject to the full corpus of obligations which it imposes, and are entitled to have their interests taken into account in its development.

The idea that the primary subjects and beneficiaries of laws should have a say in their construction seems laudably democratic, but does not provide an argument for excluding people willing to abide by those laws and to

participate in their development. Historically speaking, the demarcation of liberal and other polities does not reflect the outcome of a consensus forged by free and equal individuals. Rather, the borders of states represent the outcome of violent struggles, and most states continue to be haunted by histories of brutal dispossession.

Furthermore, while the language of liberalism, and its theoretical foundations, are universalist and a-historical, constitutional protection of freedom and equality, and the recognition of all citizens as free and equal, has occurred only gradually. The fact that women and people of all races and classes are now treated as equals by most of the official institutions of liberal societies is to be applauded, and demonstrates fidelity to the basic principles of liberalism. In relation to non-citizens, however, we now need to recognise the contingency of borders, and the degree to which the demarcation of the liberal polity is arbitrary from a moral point of view. The subjects of laws framed within the liberal political tradition are, in practise, all those affected by liberal laws and by the system of government they enshrine. Given the world we live in, this now means humans everywhere.

But while we must honour the universalism at the heart of liberalism, we are not bound to immediately treat the entire body of domestic legislation and jurisprudence within liberal states as comprehending individuals globally. Many local laws do not impact on outsiders. Furthermore, while we need to consider and develop alternatives to the current sovereign system, and while we have a duty to begin immediately to meet global distributive justice obligations (in the first instance by massively increasing our foreign aid commitments), we must be careful to promote institutional change sensitively, and to establish firm foundations for global political as well as distributive justice. The most immediate and urgent challenge we face in this regard is in confronting threats—such as that posed by our treatment of asylum seekers—to the institutional protection of freedom and equality within liberal societies.

Conclusion

I have been arguing that we have an obligation to establish the foundations for greater global equality, and I have discussed the threat posed within our own society by our treatment of asylum seekers to political protections of equality. I began this article, though, by recalling Primo Levi’s attempt to understand not only what makes us human, but how we retain our sense of that humanity when all around us it is being denied. The answer in his own case was that one man—the civilian Lorenzo—saw Levi not as an abject creature, fighting in the mud with his fellow prisoners for a scrap of bread, but as a fellow human being. Lorenzo would regularly risk his own life to smuggle a piece of bread to Levi. This act, Levi says, was responsible for his survival—not so much because

The borders of states represent the outcome of violent struggles.

of the material aid it provided, but because it represented a refusal to accept the negation of humanity which the camp enforced. 'Lorenzo was a man; his humanity was pure and uncontaminated...Thanks to Lorenzo', says Levi, 'I managed not to forget that I myself was a man.'

Very many people saw the Jews and stateless people of Europe being progressively stripped of their rights but assumed it was not their responsibility, or was beyond their capacity, to effectively object. But because one man looked at another man and saw in him a human being, we have the writing of Primo Levi to remind us not only of what indifference, mendacity, and violence we are capable, but also of what strength and compassion. As Australians, and as members of wealthy liberal states, it is for each of us now to consider if this asylum seeker/illegal immigrant/unlawful non-citizen, is a man/a woman/a child.

In doing so, and in seeking to strengthen and extend institutional protections of freedom and equality to all people, we need to challenge the convenient idea that justice obligations are internal to sovereign political communities.

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Gambling and Harm

by Will Barrett

Has the creation of more opportunities for legal gambling been for the good, and can it be justified? Will Barrett uses John Stuart Mill's Harm Principle to consider the public policy issues raised by legal gaming machines.

Over recent years in Victoria there has been a massive increase in money spent on gambling. This largely results from the legalisation of gaming machines. Has the creation of more opportunities for legal gambling been for the good? Can it be justified?

To the extent that what I say here helps to answer these questions, it applies to legal gaming machine gambling. It may also apply to other forms of gambling, but the waters are murkier there. Restricting the topic to gaming machines allows for a more precise discussion. In any case this form of gambling, largely because of its social and economic effects, dominates current concern about gambling, and has generated extensive research and wide public debate.

Much of the public debate about the ethics of gambling is focussed on the consequences of gambling, and attends to individual and social benefits and damages, mainly economic and psychological, claimed to come with increased opportunities for legal gambling. Consequences are important. Gambling can harm people: individual gamblers, their families, their employers and employees, and a widening circle, to the point where, it is sometimes asserted, the community is damaged.

Autonomy

Public policy on gambling ought to be concerned about the consequences of gambling. But it should also respect personal autonomy. Autonomy has been understood in various ways, but I take it to have four defining features. First, when presented with alternative courses of action,



an autonomous agent has the psychological capacity to choose which course she will take. Second, she is capable of rational deliberation, and of acting on that basis. Third, others recognise that she is capable of choosing between actions and of acting on the basis of her rational deliberation. Lastly, others permit or enable her to act on the basis of her rational deliberation: she freely chooses what she wants to choose; her will is free. Respect for autonomy is not just a matter of non-interference, of letting people act on their choices; it also has a positive element and emphasises the need to create an environment that encourages autonomy.

This definition characterises autonomy as going beyond liberty of action, to rational self-determination as a character ideal. We should respect autonomy not just so people can be free from unjustified coercion, but so they can develop their capacity for making rational choices, and for enacting those choices. An autonomous agent does not unreflectively accept or act on externally given norms or attitudes.

Autonomy and harm

Concern for consequences and respect for autonomy are not antithetical. In his *On Liberty*, John Stuart Mill derived what has come to be known as the Harm Principle (or Principle of Liberty), which restricts actions in virtue of their consequences, from a concern for autonomy:

(T)he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection....(T)he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will is to prevent harm to others.

Mill conceived of the Harm Principle as governing the proper limits of social coercion. It restricts the imposition of legal penalties and the pressure of public opinion. I can properly be prevented from acting only if my action causes harm to others. Mill asserts that this principle is 'entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion.'

A major challenge for the argument of *On Liberty* is whether it can be interpreted or supported in a way that

Public policy on gambling ought to be concerned about the consequences of gambling. But it should also respect personal autonomy.

makes the Harm Principle systematically cohere with Mill's commitment to the Principle of Utility, according to which we should aim to achieve the greatest happiness of the greatest number. Discussion has tended to focus on the level of application of the Principle of Utility—does it guide action directly or indirectly?—and the bearing of different views on this on how we should understand 'happiness'. If an indirect guide, the Principle of Utility might be compatible with the idea that happiness can be realised in an individual's life taken as a whole. Linking happiness and individuality motivates respect for freedom. Only if free can someone discover and follow the path that constitutes a happy life for her. The pursuit of happiness is thus linked with an interest in making free choices, and so with exercising autonomy. To complete the picture, developing a capacity for making rational choices, and for enacting those choices—tending towards fulfilling the character ideal of rational self-determination—can be part of the content of happiness, and part of the justification of the limits on legal and social coercion that the Harm Principle demands.

Philosophers have tried to resolve the apparent conflict between respect for freedom and the maximisation of utility by establishing conceptual connections between happiness and individual liberty. One at least plausible view is that Mill holds that damaging someone's capacity for self-realisation prevents her from achieving the form of happiness most expressive of human nature. It prevents her becoming a fully autonomous agent. It follows that legal and social coercion is unjustified because it prevents individuals from achieving fully human happiness. Freedom as constituted by autonomous agency requires freedom from coercion. The Harm Principle links liberty and utility by protecting the development of autonomy, which is a necessary condition of the most valuable form of human happiness.

On this interpretation, the Principle of Utility entails the Harm Principle: the former says we should aim to achieve the greatest happiness of the greatest number, and the latter is necessary for the achievement of happiness. But this interpretation faces problems. Does it ignore a range of forms of happiness? Does it restrict utility to a specific form of happiness? Does identifying happiness with the development and achievement of autonomy make the Principle of Utility unacceptably exclusive? We need an account of the relationship between happiness and utility that recognises the role of autonomy in happiness; otherwise respect for liberty of action does not cohere with the aggregative maximisation of happiness demanded by the Principle of Utility. We could give greater weighting to the form of happiness that comes with autonomy in calculating utility. But then the relationship between the two

principles becomes a contingent matter; happiness does not presuppose liberty. How can we sustain the claim the Principle of Utility entails the Harm Principle? We might revise the concept of utility. More radically, but perhaps more consistently, the Principle of Utility could apply to lives as wholes, and function as an evaluation of a society and its institutions, not just a principle of action.

The character ideal of autonomy can be understood as motivating the Harm Principle: reflectively developing one's own wants and being able to act on them requires freedom from coercion. Liberty is justified because it enables the development and exercise of autonomy. Even so, the Harm Principle is morally prior to the promotion of this ideal of autonomy. We can make sense of freedom of action without referring to autonomy. Individuals can act freely without being fully autonomous. But autonomy presupposes liberty of action. In this sense, linking autonomy and liberty extends the Harm Principle, giving it a degree of ethical complexity that goes beyond its content. As stated by Mill, the principle applies to actions, and is satisfied as long as legal penalties or the pressure of public opinion are only used to interfere with someone's freedom of action in order to prevent harm to others.

How does the Harm Principle apply to gambling? It suggests that people ought not to be prevented from gambling unless their actions harm others. But what about compulsive gamblers? If the compulsion meant someone were not capable of rational deliberation and acting on that basis, or of freely choosing which action to make, then preventing her from gambling would not violate the Harm Principle. She lacks full autonomy, but that's not the issue; as long as she lacks the relevant constituents of autonomy, the principle does not apply to her actions. Conversely, someone only needs to be able to act on her own free choice, not full autonomy, for the principle to apply to her actions.

Gambling Problems

The concept of a 'problem gambler' dominates debate about gambling policy. But what exactly does the term mean? For a start, not all 'problem gamblers' are in the grip of an uncontrollable compulsion. Someone who gambles more than she can afford, and continues to gamble in a desperate, but almost inevitably hopeless attempt to retrieve her losses, has a serious problem, but does not necessarily act under a compulsion.

The term 'problem gambler' can also suggest some sort of prior personality disorder, rather than a condition that

The concept of a 'problem gambler' dominates debate about gambling policy.

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might well result from regular gambling. If gambling-related problems really result from prior personality disorders, the gaming industry appears much less to blame. We should note in this context that so-called ‘problem gamblers’ provide a disproportionate amount of the income of the gambling industry, with an estimated 25 per cent of gambling revenue coming from the 1 per cent of gamblers identified as having a problem.

Given the various groups already mentioned—compulsive gamblers, indebted gamblers, gamblers with prior personality disorders—and the possible overlaps between them, how can we give anything close to a precise definition of ‘problem gambler’? Without simply stipulating a definition, we are left with something like this: a problem gambler is someone whose gambling behaviour constitutes problems such as insolvency and loss of control, and causes or aggravates such problems. But who falls under the concept? Is the concept sufficiently precise to determine the relevant empirical data? Is loss of control intrinsically or instrumentally bad, or both?

Because ‘problem gambler’ has a wide and rather imprecise range of application its use as the basis for a cohesive set of policies with clear aims is questionable. But perhaps this criticism makes too much of conceptual issues, and imposes unreasonable standards on policy development. Some people do have gambling problems, and these need to be addressed. Even so, should ‘problem gambling’ be the basis of gambling policy? What about aiming to prevent problems developing?

Mark Dickerson, a clinical psychologist, argues that the term ‘at risk’ is preferable to ‘problem gambler’ because all regular gamblers are faced by the difficulty of avoiding becoming pathological gamblers: ‘it is quite difficult to gamble regularly on continuous forms of gambling *without* losing control.’ Dickerson advocates the development of a code of conduct governing the marketing techniques used by gambling operators. These techniques include free drinks and meals for regular gamblers, and conceivably involve using computer software that tracks the playing patterns of individual gamblers. The purpose of the code would be to help prevent ‘at risk’ gamblers from falling over the edge, and developing gambling-related problems.

Dickerson’s approach aims at creating strategies that restrict possible future harm to ‘at risk’ gamblers. He sees it as preferable to prevailing strategies based on identifying ‘problem gamblers’, such as banning people from gambling environments. By emphasising the dynamic connection between psychological and financial aspects of gambling, Dickerson undermines the idea that

gambling-related problems only arise for people who suffer personality disorders.

The concept of ‘at risk’ gamblers provides an effective basis for gambling policy. Clearly we need a range of policies aimed at helping people with gambling-related problems. These policies should discriminate between different types of problems, and between different degrees of severity. But we should at least consider devising and implement policies aimed at preventing people developing gambling-related problems. As well as being simpler and easier to implement, strategies aimed at those at risk are less intrusive, because they apply prior to problems developing. They protect rather than salvage gamblers.

The ‘at risk’ approach can better accommodate the Harm Principle.

Gambling and harm

Mill continued his statement of the Harm Principle by saying that:

His own good, either physical or moral, is not sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right.

On Mill’s view, preventing someone from gambling, for example by banning, would only be justified if her actions were causing harm to others, not for her ‘own good’, as perceived by others. But if others are not being harmed, she should remain free to act as she deliberately chooses.

On the ‘problem gambler’ approach, the Harm Principle would force a gap between different strategies. A compulsive gambler would be dealt with differently from someone freely choosing to gamble, even though both were suffering harm as a result of gambling. Someone whose gambling was causing harm to others would be dealt with differently from someone who was only harming herself.

The ‘at risk’ approach can better accommodate the Harm Principle. First, policies based on the ‘at risk’ approach aim to prevent gamblers being subject to specific marketing practices. That hardly constitutes a restriction on liberty. Secondly, where techniques are used on gamblers in order to keep their patronage, with gambling-related problems likely to result, the Harm Principle might well apply to the actions of those using such techniques. Grounds plausibly exist for restricting the use of certain marketing techniques, in particular those based on the playing patterns of individual gamblers.

We enter the muddy waters of paternalism once we consider justifying violations of the Harm Principle. Paternalism involves restricting a person’s liberty for her

own good; that is, to prevent her from being harmed or enabling her to receive a benefit. There is an obvious conflict between paternalistic justification and the Harm Principle. If a person's gambling is damaging her life, then we have a clear-cut reason to encourage her not to gamble, or at least to seek help. If she persists, does concern for her well-being justify preventing her from gambling? Our concern about her well-being remains. But if she wants to continue gambling, and her actions are not presently harming or in future likely to harm others, we find ourselves in a dilemma. On the one hand, we want to stop her harming herself, and on the other we want to respect her liberty of action. Even if we interpret the Harm Principle as instantiating the value of autonomy, and believe that her gambling threatens her autonomy, as long as her actions don't harm others, and she isn't acting under an uncontrollable compulsion, we should not interfere with her liberty of action. By aiming to prevent a gambler arriving at the point where her autonomy might be undermined the 'at risk' approach lessens the likelihood of this dilemma arising, although it doesn't dissolve it.

The gambling industry and its defenders sometimes argue that legal gambling is a matter of freedom of choice. However, if a significant proportion of the industry's revenue comes from people who have serious gambling-related problems as a result of the operation of the industry, then that argument starts to look dangerously self-serving. Furthermore, gambling can undermine the capacity for freedom of choice, and the actions of some members of the gambling industry, at least arguably, exacerbate that process. Given the necessity of a capacity for freedom of choice for autonomy, gambling could threaten autonomy itself.

Lastly, does gambling damage or benefit our society and culture? A range of social costs comes with increased legal gambling, along with claimed financial benefits to the community. Some economists deny that the financial benefits are real, mainly because gambling has an impact on spending in other sectors of the economy, on crime, and on welfare provision. In Victoria it has been associated with a change in the aims and role of government, and the funding of public amenities, including hospitals and schools. It is also associated with a reorientation of public culture. The Crown Casino occupies a major site in Melbourne, and gaming machine locations loudly announce their presence in the suburbs. Ultimately, these factors do not tell us the appropriate moral response to gambling. The question remains open even if increased legal gambling on the scale that has occurred in Victoria has great economic benefits. Is the maximisation of economic benefits the primary responsi-

bility of a government? Should we allow increased gambling and then attempt to deal with the predictable associated harm?

Conclusion

Attending to the consequences of gambling is obviously important. The Harm Principle embodies both respect for autonomy and a concern for the consequences of actions, and has a role to play in determining policy. Thinking about how the Harm Principle should bear on policy on gambling takes us past the immediate consequences of gambling, to the value of autonomy. Respect for autonomy, however, is not a pre-condition for satisfaction of the Harm Principle. It outstrips the consequentialist demands of the principle. The value of autonomy shows that ethical and policy issues surrounding gambling go beyond gambling-related problems, even potential ones, and how to deal with them.

Public policy concerns particular practices and institutions, and those are not just sets of outcomes, but have characteristics which can be understood, and which suggest the relevant moral principles which should be applied in formulating policy. To argue that public policy should be based solely on outcomes is either to have a crude and inadequate grasp of those principles, or to deny that they express values that are relevant to the aims of public policy. I have tried to show that the principle of respect for autonomy, which is at most only indirectly related to the value of outcomes, has a central role in good public policy on gambling.

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