

Two Concepts of Sovereignty: From Westphalia to the Law of Peoples?

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Abstract. The idea of Westphalian sovereignty has been waning in the face of renewed support for individual human rights. One of the more audacious proposals for a new international order is offered by John Rawls, who calls for a *Society of Peoples* governed by public reason. I explore this new foundation for international relations by considering how much respect we owe to other *peoples* who, while hierarchical and illiberal, are not criminally responsible for the violation of fundamental human rights. The respect for intolerance and hierarchy demanded of liberal *peoples* exposes a flaw of Rawls' new world order. The remedy, I suggest, requires us to abandon the search for some overlapping political consensus of all the world's comprehensive doctrines. Liberals must defend basic rights to freedom and equality not because they are reasonable, which some *peoples* will never accept, but because they enhance human well being and are, therefore, just.

Introduction¹

Robert Frost once defined a liberal as someone who could not take his own side in an argument. This observation always seemed a bit hardhearted, although it is easy to see how he arrived at that view. Liberalism does not prevent people from believing in the value of autonomy or neutrality, but it does require them to put up with people who do not. Indeed, if we do live in a world of incommensurate and conflicting goods, how can we insist that people be even politically liberal where the burden of judgment may lead them to incompatible ideas of justice? Yet when neo-Nazis want to march through a town of concentration camp survivors or racists want to burn a cross in front of a black family's house, liberals constantly must reassess the demands of neutrality and ask how much intolerance need they tolerate?

Since the fall of the Berlin Wall, this perennial liberal conundrum has become a matter of relations among nations as well as within them. Intense ethnic and nationalist conflict have impelled foreign governments to intervene forcefully to protect minority populations against human rights violations. These interventions raised few concerns about neutrality. Liberalism does not require anyone to tolerate the slaughter of innocents.² Any reservations about the intervention in Kosovo were not so much a consequence of political concern about neutrality as legal apprehension about state sovereignty. What is the value of sovereignty that it would give anyone a moment's pause to stop mass murder? Are international lawyers also unable to take their own side in an argument?

The ethical, as opposed to legal, deference state sovereignty commands is somewhat of an enigma. To some communitarians, the state is often taken as a *prima facie*, if not actual, proxy for community.³ While that connection is hotly contested by many liberals,⁴ sovereignty's origins in the Treaty of Westphalia leads many of them to associate it with tolerance. We may associate the origins of liberalism with the end of the Thirty Years War, but sovereignty's genesis in a spirit of tolerance is as dubious as its equivalence with community. Few of the signatories to that treaty gave up their desire to suppress, or hatred for, one another. Peace was likely the result of exhaustion by the warring parties who were desperate to work out a *modus vivendi*, not some Lockean epiphany.⁵ Indeed, Westphalian Sovereignty, the idea of exclusive control over what goes on inside a political territory, is born of a paradox considering that the treaty itself reflects precisely the sort of external incursion into domestic policy it is said to prohibit.⁶

Some argue that Westphalian sovereignty's contradictory origins are reflected in its practice. Although this principle's status as international law has been unquestioned from 1648 to its pride of place in the United Nations Charter, it seems to have been honored only in the breach. History is replete with examples of more powerful nations controlling the domestic practice, if not identity, of lesser states.⁷ Moreover, the justifications for these incursions have been more or less the same from the Thirty Years War to Kosovo.⁸ Whether or not the fig leaf is too tattered to hide international practice, or simply thought unnecessary, the principle of Westphalian Sovereignty is going out of fashion. Indeed, the United States and Australia did not even bother to pay the idea lip service when it prevailed upon Indonesia to permit foreign military forces to enter in order to protect the East Timorese against an army supported rampage. Few protests were heard from anyone, including the Indonesian government, about violations of sovereignty.

While the Westphalian idea of sovereignty may be on its way out, it is not clear what will replace it. Many liberals hope that the balance will shift away from the nation-state towards the protection of human rights.⁹ It is premature to say that international relations will be governed by some Lockean notion of personal sovereignty but there certainly is much more talk of universal rights.¹⁰ Perhaps one of the more audacious proposals for a new international order is offered by John Rawls in *The Law of Peoples*.¹¹ This proposal calls for nothing less than a *Society of Peoples* governed by public reason. In this essay, I want to explore what this new foundation for international relations might look like and consider some of the conceptual and normative issues that arise from it. I will conduct this exploration by considering generally how much, and what sort of respect we owe to other *peoples* who, while hierarchical and illiberal, are not criminally responsible for the violation of fundamental human rights.

The *Law of Peoples* extrapolates some of the fundamental principles of political liberalism to a global scale. As in *Political Liberalism*, among the pressing issues that Rawls' addresses is the extent to which a liberal people must tolerate illiberal and intolerant societies. As one can imagine, this is even more difficult to sort out in the international arena. However much we may disagree with decent but hierarchical societies, Rawls tells us that they are a well ordered people who are equal members

in good standing of the *Society of Peoples*.¹² Hence, liberals may not coerce them into changing their comprehensive beliefs. Decent but hierarchical peoples share the same law of peoples and they deserve the same respect and civility that any individual would get in a politically liberal society guided by public reason. One could no more ask a society to abandon its hierarchical mores than one could ask an individual to abandon her decent but hierarchical faith.

Rawls takes this duty of civility one step further. Not only is it wrong for international organs of the society of peoples to offer a hierarchical society incentives to liberalize, it is also inappropriate for a liberal people in the society of peoples to attempt to induce change through its foreign policy. So for example, the practice by The World Bank and the United States Agency For International Development of requiring legal or political reform as a condition of international assistance is prohibited.¹³ In Rawls' view, conditionality shows an inappropriate disrespect for the comprehensive beliefs of these hierarchical peoples and their right to self determination.¹⁴

This prohibition goes too far. By examining Rawls' position on the conditionality of foreign aid, I will suggest that the respect for intolerance and hierarchy that Rawls demands of liberal peoples in the society of peoples exposes a flaw of public reason that makes a law of the peoples unlikely to be realized. This flaw can be remedied only by abandoning the idea of public reason as the result of an overlapping political consensus of comprehensive doctrines, and accepting it as a perfectionist liberal goal to enhance human well being.

Perfectionism is an idea that certain states or activities are inherently good and that each person should strive to achieve those states or perform those actions. Because these goods are rooted in our essential human nature, pursuing them helps us to achieve human excellence. A perfectionist believes that certain acts or states of being are *objectively* good. A liberal perfectionist believes that personal autonomy, tolerance, or some other actions that respect freedom and equality in a morally plural world, are objectively good.

Many liberals find this foundation troubling partly because the perfectionist idea comes to us through Aristotle, who suggested that there is a single criterion of the good life that the legislator must uphold.¹⁵ Aristotle did not appear concerned with diversity but perfectionism need not entail a belief in a single moral truth. Moral pluralism can coexist with an idea of human excellence, but perfectionism does assume that people ought to strive towards whatever human excellence consists in. Indeed, perfectionism instructs the legislator to take into account what is excellent and what is ignoble when enacting laws and setting the conditions for human interaction.¹⁶

Perfectionism can certainly support a robust liberal society of peoples. The role of the legislator it envisions, however, does diverge from Rawls' utopian ideal and indeed, from the Westphalian conception of sovereignty. Perfectionism instructs the legislator to strive towards an idea of the good life because it recognizes that no one can achieve that state of well being outside of a social context that supports it. This idea of liberalism not only recognizes negative freedoms related to autonomy

and tolerance, but also certain positive freedoms that create the conditions in which autonomy or tolerance are possible options. Joseph Raz called these conditions the “social forms” of a community. They are not to be confused with conventional agreements within a society about the correct way to behave. Rather, as he puts it, they are more akin to the, “...shared beliefs, folklore, high culture, collectively shared metaphors and imagination...[of a community].”¹⁷ These social forms, which are reinforced by a wide range of social institutions both public and private, provide the foundation for pursuing a life of excellence. One cannot aspire to be a lawyer or religious leader in a society that does not have the rule of law or organized religion.

A perfectionist liberal would take a drastically different attitude towards conditionality on foreign assistance. Rawls regards such conditionality as disrespectful towards the dignity of other illiberally decent, albeit hierarchical, peoples. Even worse, in his view, such conditionality breaches the neutrality that political liberalism aims to show among different comprehensive views of the way people ought to live their lives. The perfectionist liberal, though, cares about human well being not neutrality. To the extent that the self determination of peoples encapsulated in Westphalian sovereignty conflicts with the personal sovereignty of an individual, perfectionist liberalism opts for the latter value. Perfectionist liberalism does not aim to prevent individuals from choosing to live voluntarily in hierarchical societies. Yet, it takes as a principal element of liberalism that one cannot waive the ability of any person to make this choice for his or her self.

The Theory and Practice of the Law of Peoples

In fairness to Rawls he does not believe we live in the time of the *Law of Peoples*. Rather he presents this idea as a realistically utopian concept. That is to say, it takes people as they now are and constitutional laws and norms of justice as they might be in a reasonably just and well ordered democratic society.¹⁸ Rawls’ mission is to show that such a society is possible and desirable. Can such a society ever reasonably be expected to develop – even in theory – and would it be desirable? Like a lot of interesting political questions, the answer is buried behind a few tiresome legal ones.

Who has Standing in the Law of Peoples?

In order to judge the reasonableness of Rawls’ plan it would be useful to consider what idea of law he is talking about. Whose law is the Law of Peoples and why does Rawls choose this unfamiliar, somewhat awkward, subject over more traditional sovereign entities under public international law? Why not the Law of the People, the Law of Nations or the Law of States? This is not merely a semantic question because whose law it is denotes who has legal standing in the Society of Whatever. It tells us who are the citizens and rights holders of this new world.

International law currently gives standing primarily to states.¹⁹ Even UN human rights instruments that are designed to protect *individual* rights designate the state as the entity which can press the claim when a violation occurs. Whether a state is likely to press a claim against itself on behalf of its own persecuted citizens is an interesting question for another time. Suffice it to say that such procedures

were developed during a period of greater concern and respect for Westphalian sovereignty than exists today.

Rawls appears to have very little concern or respect for states or their sovereignty. The root problem with states is that they have, or are accorded under international law, independent interests that are inconsistent with public reason. States, unlike a peoples, are guided by their own interests rather than any notion of justice. So, the most that a state can do is work out *modus vivendi* with other states. Moreover, because he envisions them as independent actors *vis-à-vis* the rest of the world, they will not reflect the morality of the community in their relations with others states. Rather than pursuing reasonable justice, states pursue their own rational interests to survive and expand. Rawls' seems to view states in a Hobbesian state of nature given their tendency to be belligerent. This tendency is sanctioned by the principle of *raison d'état* which effectively gives each state the right to make war to advance its interests. His second concern with states is their internal autonomy over what goes on within their borders. Human rights are not worth much if each state is free to violate them within their own territory.²⁰

Rawls' aversion to the internal autonomy of states is well taken. The protection of human rights has been less than universal because of a state's political power to do what it wants within its territory. One wonders though why this did not lead him to propose instead a *Law of The People* where everyone's fundamental rights would be ensured within the context of a single overarching constitutional democracy? Alternatively, a *Law of The State* would also ensure the universal protection of rights without the attendant belligerence of states because there would be no other states to fight. Either option would provide more effective protection of the rights Rawls is concerned with than his Law of Peoples because the individual would be the central subject of law rather than states or nations. There should be no concern about the capacity of such a legal system being able to accommodate diverse ways of life. Individuals citizens in a one world state should be able appeal to an overlapping consensus of comprehensive views in the same way they would do in highly diverse Westphalian states – by appealing to public reason. This is simply a difference of magnitude, not kind.

Why make *peoples* rather than individuals the citizens of a global legal framework? Individuals do not suffer from the sovereignty problem that states do. Moreover, it is unclear why *peoples* would not suffer from the same belligerence problem that states do. How is the state any different from the peoples (read nations, cultures, ethnic groups or communities) acting through their government? The suggestion that national groups would be more reasonable and less expansionist, chauvinistic or belligerent than states is not borne out by history. Indeed, in the first ten years since the fall of the Berlin Wall, most wars have resulted from national groups attempting to secede from or subdue rival nationalities.²¹

Rawls suggests that the only hope for his utopian vision rests on the existence of, "...reasonable liberal constitutional (and decent) regimes sufficiently established and effective to yield a viable Society of Peoples."²² The only apparent difference between a *regime* of peoples and a state is the former's lack of Westphalian sovereignty. This is a rather slim distinction given that this sort of sovereignty is

less than four hundred years old and has been systematically ignored whenever more powerful states thought it expedient to do so.²³ Indeed, some would say it has been dispensed with already.

Who Are the Peoples?

Rawls seems to choose the peoples as the citizens of his international system for pragmatic as well as conceptual reasons. Confronting the charge that his vision is unrealistically utopian, Rawls seems to offer a society of peoples as a more realistic alternative than one in which everyone is politically liberal. While no doubt correct, he also appears concerned about addressing the communitarian charge that his theory of justice is based on a false idea of human nature. Were he to envision a *Law of The People* he might be accused of suggesting an idea of justice that is completely devoid of context. Such a theory would regard individuals as atomistic and detached from the embedded meanings of their society able to change their identity at will.²⁴

Liberalism never stood for this proposition nor does it require it. Yet Rawls needs to explain how we start with one constitutional democracy and turn that into a society of liberal and decent countries that eventually encompasses a universal society of peoples. This will require quite a change of attitudes among individuals and they presumably will be more capable presumably of making this transition as part of their group rather than on their own. That many of these nationalities are not reasonable or decent does not prevent their transformation in Rawls' view if their national identity can be built on liberal values.²⁵

Without challenging that unconventional idea for the moment, we must ask ourselves how we can tell which peoples qualify for citizenship in this new society. For, if the communitarians are correct about human nature and Rawls is correct about the inability of states to reflect the common sympathies, nature, or morality of a community, then it is critical that no peoples be disenfranchised. If peoples divided themselves geographically into homogenous groups, this would be a straightforward and relatively noncontentious process. In the world you and I inhabit here and now, however, most every peoples is comprised of more than one peoples. How do we determine which peoples qualify for standing as citizens in this new global regime? There seem to be several options, none of which are entirely satisfactory.

Statehood

We can eliminate statehood as the criterion for citizenship because Rawls has already rejected states as morally unworthy institutions. Moreover, with the exception, perhaps, of Liechtenstein, every state contains multiple peoples and few of them distribute status or power equally. The Kurdish people, for example, are unlikely to feel very well represented by the Turkish state.

Dominant Peoples Geographically

Given the conglomeration of peoples in our world, a second option would be simply to recognize the most powerful peoples in any given territory. Rawls seems to endorse this option by requiring that a group have a government in order to

qualify as a peoples. While this solution has the advantage of clarity, it rewards power over legitimacy by granting recognition to those peoples who can wrest political control in any particular place. This would be the gunman situation writ very large indeed and cannot be what Rawls intended to encourage.

Eliminate All Territorial Demarcations

A third option might be to give citizenship to peoples without regard to territory. This option might work if the world were comprised entirely of liberal peoples, but it would not satisfy decent but hierarchical peoples. Such peoples premise their identity on the view that they are superior to other people in their midst. That is to say, in areas they control. Yet, under this option, they would have to agree to cede control over some of their territory to a regime of peoples they regard as inferior, some of whom may live on the opposite side of the world.

Apart from the unlikelihood of this scenario ever transpiring without force, it also appears to violate public reason. Hierarchical peoples are being asked to cede complete control over the other peoples within their peoples and not just that control which is publicly reasonable. This would require them to abandon their identity as hierarchical, something which political, as opposed to comprehensive liberalism, prohibits. So, if Saudi women decided that they identified more closely with the peoples of women rather than as Saudis, the remaining Saudi men would be forced to live among woman in a manner that their hierarchical society forbids.²⁶

Moreover, this option would also be impossibly difficult to administer. Someone has to fix the street lamps and repair sidewalks. Those public goods are fixed to territory. Any typical cosmopolitan city would have tens if not hundreds of peoples overlapping with each other making responsibility for the supply of public goods and services next to impossible.

Most Abstract Affiliation

Assuming we solve all the logistical issues related to option three, we would still not avoid the problem of identifying overlapping peoples. The problem in Israel, for example, is not just that it is populated by Moslems, Christians and Jews. It is also populated by Shi'ite and Sunni Moslems, Roman Catholic and Orthodox Christians, and Orthodox and secular Jews. These same six groups also break down 12 other ways (gender, language, etc.). The task of identifying who is a people requires procedures for categorization about which there is unlikely to be any consensus. How might we establish those categories? We could lump all Moslems, Christians and Jews in three abstract categories but a reform Jew from Newton, Massachusetts is unlikely to feel properly represented by the chief Satmar orthodox Rabbi of Beer-Sheva.

Self Determination

The only non arbitrary method for identifying the Peoples who qualify for citizenship in the *Society of Peoples* is to let people decide for themselves what peoples they

are. The problem with this method is that it would lead to perpetual secessionist movements that would likely result in a *Society of Families* or possibly even, a *Society of People (or Individuals)*. The first option runs counter to the entire Western legal tradition while the second option is simply universal individual human rights by a different name.

What Are the Peoples Owed?

Liberals, or at least comprehensive liberals, could tolerate this last solution but it violates the spirit, if not the letter, of the law of peoples. Rawls chose peoples over individuals as citizens of his utopian vision in acknowledgment of the communitarian principle that our identities are constituted at least in part by the community. Liberalism's commitment to equal universal rights will sit uneasily with the idea that peoples owe special rights to themselves over the rest of humanity. Rawls appears to endorse Tamir's vision of national values and liberal beliefs as a way of squaring the circle. Yet every attempt to identify the membership of the society seemed flawed either by liberal or communitarian standards or both.²⁷ What would be lost by aiming for a law of the people and letting the society of individuals constitute themselves into their own bowling leagues, churches and cultural groupings as political liberalism would leave them free to do? While this option responds to the communitarian epistemological critique,²⁸ our attempt to define citizenship suggests that there are also some epistemological problems associated with specifying community, quite apart from the political and moral problems of coercion.

Notwithstanding these hurdles, Rawls contends that peoples have a moral status that liberals must respect and tolerate even when they are illiberal and hierarchical.²⁹ This argument seems grounded in Michael Walzer's moral, not epistemological, defense of community. For Walzer, the community has moral standing that is derived from the right of individuals to have a community that reflects their history, language and culture. Because individuals need a community in which their identities can be embedded they have a moral claim to protect the community that constitutes that identity.³⁰

Walzer's, and now Rawls', defense of the independent moral status of communities begs the important question of which communities have this status. Which is the community that a peoples have a right to represent them? As Walzer observes, even people can have divided identities. *A fortiori*, communities will have those multiple identities at a higher order of magnitude. People who comprise the peoples are members of numerous different communities each of which has a history. Some of these histories are antagonistic. So it is not obvious whose moral claim to community should be honored.³¹ Walzer seems to believe that because the most local communities have the thickest common meanings they form the moral culture and so have priority over global minimalist communities where the shared meanings are quite thin.³² While this seems perfectly sensible it does not resolve the problem of antagonistic overlapping cultures.

The Demands of Toleration and Respect in the Society of Peoples

Given that there is no answer to this conundrum Rawls and Walzer both seem intent to create the conditions of tolerance and respect that would obviate the need for these different interlocking cultures to hive off from each other.³³ This is a reasonable (albeit non-neutral) solution, but a lot depends on what we mean by toleration and how much of it the peoples are owed. Toleration is usually taken to mean liberal toleration but the concept is much more expansive than liberalism. Communitarians of all varieties favor toleration, although they are more likely to be concerned with opportunities for groups to live according to particular values than preserving individual autonomy. Borrowing Walzer's wide, although not necessarily exhaustive, framework for tolerance we might break down the idea into five ideal types:³⁴

- *Accommodation*: Here the parties do not give up their hatred for each other but out of exhaustion or for other prudential reasons decide to work out a *modus vivendi*. This is the toleration that emerged out of the Treaty of Westphalia.
- *Indifference*: The parties to this sort of toleration do not hate one another. Rather they are indifferent to each other. This entails a sort of moral skepticism that is hard for many groups to sustain over time or with everyone.
- *Respect for Personal Autonomy*: In this sort of toleration the parties do not respect each other's ends but respect the right of the individual to act autonomously to pursue those ends. This sort of toleration is most closely associated with liberalism although it could be extrapolated to other groups. This requires a sort of moral stoicism concerning the ends of others.
- *Openness to Difference*: Here there is a respect for the idea of difference although not necessarily a respect for each individual difference.
- *Multi-culturalism*: This approach endorses the very idea of difference for its own sake. While this view implies that diversity is good for society, it does not necessarily endorse each specific difference.

Walzer thinks that nations in international society deserve liberal toleration. That is, a respect for the right of the nation to choose autonomously even if one does not respect the choices it makes. Indeed, this sort of toleration is what makes sovereignty desirable in his view.³⁵ Can we really extrapolate from individual to group autonomy in this way? Liberals respect individual autonomy because they value the right of each person to decide on the appropriate ends of life for him or her self. But communities can stifle this individual autonomy given the autonomy (read Westphalian sovereignty) to do so. Moreover, given the overlapping communities among international states, the autonomy of smaller communities can be constrained in the same way.

It is for this reason that Rawls takes such a dim view of Westphalian sovereignty and the autonomy it gives states to deny their own citizens basic individual rights.³⁶ Yet having condemned sovereignty on this basis, he then insists on more deference to peoples than Walzer gave to states in international society. Given Rawls' lack

of esteem for states, it would seem that the most we owe them, or peoples, in international society is accommodation. One peoples need not particularly respect another peoples' values or the way it treats its citizens, but it does not intervene for fear of triggering another thirty years war (or in this day and age, a nuclear holocaust). Yet this *modus vivendi* is anathema to Rawls because it is stability for the wrong reason. We must remember that the *Law of Peoples* is the extrapolation of the principles of political liberalism to international society. Relations among peoples must be based on what is reasonable in the sense of public reason rather than what is rational given the current balance of power. Rawls' idea of global justice requires the sort of tolerance that is based on a reasonable reciprocity among peoples with different comprehensive doctrines, not mutually assured destruction.

Toleration and Foreign Policy

Rawls' society of peoples demands rigorous tolerance. One peoples must not merely accommodate another well ordered people or even respect their autonomy. They must go so far as to show respect for the actual choices they make even if they find them repugnant. That is because decent but hierarchical peoples are "well ordered," and hence, free and equal members of the society of peoples.³⁷ In order to find a reasonable basis for political co-existence, that is, an overlapping consensus, all peoples must treat each other's comprehensive doctrines with respect and refrain from even the appearance of coercing reform. This means, in Rawls' view, that it is unreasonable not only for multilateral organizations like the World Bank to impose conditions on foreign aid but also for a liberal people to conduct its foreign policy in any way that suggests a conflict between liberal and hierarchical peoples.³⁸ Rawls' prohibition seems to confuse the status of peoples within the society of peoples, that he originally assigned to them, from one of citizen into one of international public institution.

This constraint on liberal peoples seems far from necessary, if not unreasonable. It might be unreasonable to expect a hierarchical government to tolerate such partiality from the governmental institutions of its own society of peoples (e.g. the UN or World Bank). But, if peoples are the citizens of the society of peoples, then what one peoples' government thinks of another is no different than what one individual thinks of another person within a country governed by political liberalism. With the exception perhaps of George Bernard Shaw (who was no liberal), few people think it is inappropriately coercive for charitable organization like the Salvation Army to proselytize. While some liberals might disagree with the message of the Salvation Army, political liberalism does not require the charity to suppress its message.

Reasonable Respect

In addition to being unnecessary, Rawls' restriction on the foreign policies of liberal peoples seems unreasonable to them. For if liberalism's comprehensive doctrine instructs its peoples to treat everyone equally and to protect free speech rights, then it would be unfair to ask them to betray their comprehensive doctrine inside the private sphere. The government of a liberal peoples in the society of peoples stands in the same relationship to a hierarchical society as the ACLU does to the Southern

Baptist Church. Both the ACLU and the Church are well ordered incompatible comprehensive societies which have the right to criticize the other so long as they do not aim to impose their comprehensive views on the political sphere.

Rawls' prohibition on a liberal peoples imposing conditions of reform in foreign aid to hierarchical societies also seems to violate political liberalism and the rule of law. Political liberalism requires that those principles agreed upon as part of the overlapping consensus apply to everyone. For example, while a liberal person must tolerate comprehensive doctrines that are hierarchical, sexist, racist, and anti-Semitic, she can still demand that each individual within such an organization retain the right to exit the hierarchical group even if the illiberal group objects and even if the individual had consented to her treatment.

Is this requirement extinguished in the society of peoples? It appears so if it is peoples and not individuals who are citizens. Political liberalism, however, does not permit this distinction. The only overlapping consensus that a liberal reasonably could agree to would be one that allocated rights to everyone whether or not they were part of a liberal or hierarchical society. This is not simply a reasonable requirement – it is the *core* requirement of comprehensive liberalism that no liberal can reasonably be expected to disavow in the name of overlapping consensus. In deference to the contrary comprehensive doctrines of others, political liberalism can restrict the imposition of liberal rights to the public sphere but it can never agree to take away those rights in the political sphere and still be liberal. While people might be able to waive their own rights, liberalism does not permit anyone to waive someone else's rights. No liberal society, for example, could ever reach an overlapping consensus that withdrew due process or free speech rights from members born into a hierarchical sect that rejected those values. Liberalism, and indeed the rule of law, imposes an obligation on each individual to respect those rights in everyone else.

The same principle must hold true for illiberal hierarchical societies. No peoples who thought they had a positive moral obligation to save people from their own self destructive, immoral or otherwise prohibited behavior could ever be reasonably asked to abandon that ideal in the name of reciprocity. Rawls argues that public reason would prevent such a people from pursuing their comprehensive views in the public sphere. This would no more be reasonable to someone who believed he had such positive obligations than it would be for a liberal to agree to waive the negative rights of children born into hierarchical sects.

Rawls concedes that there can be no overlapping consensus between liberals and fundamentalists whose dogma requires everyone to convert to their beliefs.³⁹ Such people, he argues, do not believe in reasonable pluralism. This suggests that everyone who opposes compromise on the basis of moral pluralism is unreasonable because they will not compromise with liberals in the way that liberals are willing to compromise with them. Yet one need not be fundamentalist to object to this; one need only have a perfectionist or communitarian conception of the world that denies that values are incommensurable or plural.

Liberals and communitarians have difficulty understanding each other on this issue precisely because there is no overlapping consensus. Hence, whereas Ronald

Dworkin denied that anyone had a positive moral obligation to go out to vindicate their own or someone else's rights,⁴⁰ Martin Luther King, Jr. thought he had precisely that moral duty as a Christian.⁴¹ It is hard to think of Martin Luther King as a fundamentalist in the pejorative way that term is presently employed. By labeling those who do not believe in reasonable pluralism as fundamentalists, Rawls treats this idea of reasonable as if it were a neutral standard when indeed it depends completely on judgments about justice.

What does Reciprocity Require?

What is it that would make such opposing comprehensive doctrines abandon their core beliefs in spheres where they felt morally obligated to pursue them? Rawls suggests that the idea of reciprocity will bridge the gap between liberalism and illiberalism. The golden rule has such deep roots in Western culture that it does seem unreasonable and unfair for anyone to deny it: Do unto others as you would have them do unto you. The idea of reciprocity of respect implicit in this rule does seem to bridge the gap until we recall that the Jewish version of the golden rule goes somewhat differently: Do *not* do unto others as you would *not* have them do unto you. These two different golden rules impose different moral obligations and ultimately conflicting ideas of respect. While the Jewish doctrine implies that reciprocal respect entails the protection of negative rights, the Christian doctrine implies that reciprocity entails the protection of other peoples' positive rights.

It is hard to imagine how one could determine the most reasonable version of respect and reciprocity in a neutral way. Conservatives and liberals could believe fervently in the idea of public reason while having incompatible, indeed, incommensurable, notions of what that consists in. While a liberal may believe that she is treating a conservative communitarian with respect and toleration by protecting his privacy and freedom of speech, the conservative might feel more respected in a community that protected those values he cared more about even while understanding that the liberal would not feel the same way.

Rehabilitating Public Reason: Perfectionist Political Liberalism

How do we know when someone is engaging in public reason and not simply trying to foist their comprehensive doctrines on others? Rawls tries to employ a non-evaluative criterion of sincerity but this only begs the question.⁴² Both liberals and conservatives can sincerely believe that they are engaging in public reason without there being any area of consensus. The only way to obviate that outcome is to abandon any pretense of neutrality and ground public reason in the *comprehensive* liberal ideal of moral pluralism. Rawls goes part way towards this solution but does not appear to regard his definition of public reason as a comprehensive liberal principle but rather simply a reasonable political principle *given* a morally plural world.⁴³ How can we require that people agree to be governed even in the political sphere by this notion of reason unless they believe that this is the correct understanding of it?⁴⁴ Moreover, why would anyone believe that this was the correct standard of reason unless they already believed in some comprehensive doctrine rooted in Locke, Kant or Mill instead of Plato, Burke or Rousseau. Nietzsche thought

we lived in a world of incommensurable ends; but it is hard to see where his concept of human relations would overlap with Rawls' notion of public reason.

The bias implicit in public reason imposes an insurmountable hurdle for the law of the peoples. For if there is no inner core of reasonableness that everyone shares, then there would be no reason for other peoples to join us in the society of peoples. Indeed, doing so would be irrational given the sacrifice in basic comprehensive beliefs that such a choice would entail. This is a significant drawback to Rawls' idea of public reason, but it is unfair to pin the blame entirely on him. Grounding public reason in an overlapping consensus is part of liberalism's perennial attempt to find neutral ground. Neutrality is part of the liberal agenda because it is the only way to preserve autonomy without coercion in a morally plural world. Yet, arguing that everyone shares this inner core of reasonableness as a matter of human nature seems to violate neutrality because it assumes that at heart, everyone is essentially motivated by liberal concerns. Moreover, suggesting that everyone *actually* shares this inner core seems empirically suspect.

This conundrum by no means dooms the liberal project. Rawls' political liberalism seems more reasonable once we acknowledge its roots in comprehensive liberalism. Liberalism must, by its own lights, acknowledge that there are other comprehensive doctrines. What liberalism cannot pretend to do is show equal respect for every comprehensive doctrine to the same degree that it respects its own conception of the world. Liberalism cannot be neutral about itself. At some point liberalism must be willing to take its own side in the argument and assert that this is the most just way to live given the constraints of human nature as it understands it.

The justification for neutrality implicit in public reason must ultimately rest on some ideal conception of human nature and the way people ought to be. The right to equality or neutrality that the *Law of the Peoples* envisions cannot be prior to this idea of human good because we could not justify giving these rights pride of place unless we thought that doing so advanced human well being in some way. This idea embeds liberalism in the perfectionist tradition.

This suggests where perfectionism would diverge from Rawls' politically liberal law of the peoples. Both approaches would argue for a public arena where different peoples would be required to treat other peoples with tolerance and respect. The difference is that perfectionist liberalism would not believe that this requirement either was, or needed to be, neutral between different comprehensive visions of the good life. Perfectionist liberalism would understand and accept that certain hierarchical but decent peoples do not want to accord this respect to other peoples within their own communities or elsewhere in the society of peoples.

Perfectionist liberalism seems a more straightforward defense of the type of reasonable tolerance envisioned by political liberalism. It is also more aggressive. Once the justification of neutrality is replaced by human well being, then the policies liberalism supports would be quite different. Westphalian sovereignty is rooted in a principle of neutrality. It instructs states to ignore the internal behavior of other states out of respect for their autonomy. For all Rawls' criticism of Westphalian sovereignty, his opposition to conditionality on foreign assistance stems from that same principle. He tells us that interfering in the internal affairs of

non-belligerent hierarchical peoples shows a lack of respect for their right to self determination.⁴⁵

Perfectionist liberalism admittedly is less concerned with a *peoples'* right to self determination to the extent it conflicts with an *individual's* right to self determination. It sees no particular value in respecting a peoples' right to suppress this individual claim because the perfectionist is concerned with human well being not neutrality. Any people in a perfectionist society of peoples would still be free to form voluntary hierarchical peoples if that suited them individually. Yet a perfectionist law of the peoples would be more concerned with personal sovereignty than Westphalian national sovereignty, and would strive to advance this element of well being. Because liberal perfectionism requires the legislator to create conditions for the realization of human well being, it would sanction, if not require, foreign policies that impose liberal conditionality upon the receipt of some development assistance. Whether a perfectionist liberal people ought to coerce another people to respect individual claims to well being is a question for another essay. Yet, just as it would be unreasonable to expect an illiberal people to abide by public reason, it would be unreasonable to expect a liberal people not to do so. If there can be no overlapping consensus of liberal respect among peoples, then liberalism must take its own side in the argument.

NOTES

1. I would like to thank Don Moon, Robby George, Judy Failer and Alan Levine for their helpful comments on versions of this essay.
2. Such divergent representatives as Rawls and Walzer agree on the right, if not the obligation, to violate national boundaries to protect the human rights of innocents. Michael Walzer, *Just And Unjust Wars* (New York: Basic Books, 1977), pp. 339-342. Indeed, Rawls goes so far as to label these sorts of regimes as criminal states, implying that they ought to be brought to justice rather than have their sovereignty respected. John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), pp. 91-93.
3. For example, Michael Walzer, "The Moral Standing of States," in C. Beitz, *et al*, eds., *International Ethics* (Princeton, NJ: Princeton University Press, 1985), p. 220.
4. Brian Barry, "Self-Government Revisited," pp. 133-141 in D. Miller and L. Siedentop, eds., *The Nature of Political Theory* (Oxford: Oxford University Press, 1983).
5. For a discussion of how this exhaustion led to political accommodation see Quentin Skinner, *The Foundations of Modern Political Thought, Vol. 2: The Age of Reformation* (Cambridge: Cambridge University Press, 1978), pp. 249-254.
6. The signatories agreed not to persecute religious minorities within their own states thereby giving up the sort of internal autonomy that the Treaty had professed to distribute.
7. For a skeptical account of this principle see Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999), esp. chaps. 4-6.
8. *Ibid.*
9. Henry Shue, *Basic Rights*, 2nd ed. (Princeton, NJ: Princeton University Press, 1996), pp. 13-34.
10. In fairness, it should be noted that no small amount of this talk is negative. Two groups in particular find the idea of human rights fantastical or even pernicious. Legal positivists often deny the existence of any universal rights, human or otherwise. The basis of this complaint is that without any posited rights that officials everywhere take to count as a rule to be followed, the notion of law is impossible. The international community, a positivist would point out, does not even have a sovereign, so there can be no habit of obedience because there is no one to whom one can be habitually obedient. The second criticism comes from communitarians of both the conservative and progressive variety. They argue that

rights derive from the moral norms of a community which are based on common social practices and meanings. This critique is the crux of the Asian critique of human rights policies. The claim is that they are inapplicable to Asian societies because they are grounded in Western values. These objections raise complicated and contentious issues that are beyond the scope of this paper to settle. Suffice it to say that in response to the first objection, H.L.A. Hart pointed out that the existence of law as opposed to legal systems, does not depend upon enforcement. So the current state of nature, as it were, does not preclude the existence of legal claims. The second objection seems to prove too much. If there are really no universal norms than why should anyone defer to local moral practices one considered detestable. The crux of the Asian objection to universal rights is that the norm of Westphalian sovereignty should trump every other norm. This claim is special pleading unless there is a universal norm dictating that result, something that communitarian critics explicitly deny.

11. *Ibid.*
12. *Ibid.*, pp 59-62.
13. More accurately, it *would* be prohibited under the *Law of Peoples*. It is less clear whether this prohibition is meant to apply during our present un-utopian era.
14. *Ibid.*, pp. 84-85.
15. Aristotle, *The Politics*, Stephen Everson, ed. (New York: Cambridge University Press, 1996).
16. Thomas Hurka, *Perfectionism* (New York: Oxford University Press, 1993), Chapter 2.
17. Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), p. 311.
18. *Ibid.*, pp 12-13.
19. One of the few exceptions to this principle occurs under the European Convention of Human Rights. Under this charter individual citizens have standing to press claims in the European Court of Justice. This exception proves the rule because after the Single European Act, European states are trying to develop an identity as one state rather than a community of states.
20. *Ibid.*, pp. 25-30.
21. Rawls does say it is *liberal* peoples who will be limited more by reason but this still does not explain why liberal states or a society of politically liberal people would not accomplish this more effectively.
22. *Ibid.*, pp. 29-30.
23. Krasner, *op. cit.*, pp. 20-25.
24. Perhaps Hobbes stood for this view but he was, at best, only a proto liberal.
25. Rawls cites Yael Tamir, *Liberal Nationalism* (Princeton, NJ: Princeton University Press, 1993) for the proposition that this is possible.
26. Rawls does not get to this level of specificity when identifying who can be a peoples. Given, however, that peoples is supposed to be a generic proxy for community, it seems every bit as reasonable to identify with all those of common gender as with those of common language or skin color.
27. Tamir, *op. cit.*, Chapter 6. For alternative approaches of reconciling group loyalty and individual autonomy see George Fletcher, *Loyalty: An Essay on the Morality of Relationships* (New York: Oxford University Press, 1993); David Miller, *On Nationality* (Oxford: Oxford University Press, 1995); and Maurizio Viroli, *For Love of Country: An Essay on Patriotism And Nationalism* (Oxford: Clarendon Press, 1997).
28. See Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982) for one of the more prominent examples of this critique.
29. Rawls, *op. cit.*, pp. 60-61.
30. Walzer, "The Moral Standing of States," *op. cit.*, p. 219.
31. Michael Walzer, *Thick And Thin: Moral Argument at Home and Abroad* (Notre Dame, IN: University of Notre Dame Press, 1994), pp. 65-67.
32. Michael Walzer, *Interpretation and Social Criticism* (Cambridge: Cambridge University Press, 1987), pp. 24-25.
33. Walzer, *Thick And Thin*, *op. cit.*, pp. 77-81; and Rawls, *op. cit.*, pp. 59-62.
34. Michael Walzer, *Toleration* (New Haven, CT: Yale University Press, 1997), pp. 10-11.
35. *Ibid.*, p. 19.
36. *Ibid.*, pp. 25-26.
37. Whether or not there are or can be any "decent hierarchical societies" is an interesting question beyond the scope of this paper. Notwithstanding the allusion to Central Asia, Rawls' fictional society of

Kazakhstan sounds like no country in that region or anywhere else. On the one hand, some groups there are given fewer liberties than others but no one is deprived of all liberties. He tells us that there will be a court system that scrupulously ensures the protection of everyone's basic human rights and a consultative body, which, if not exactly democratic, will have a mechanism to hear the views of everyone and at least explain to people the basis for its decisions. Whether or not there can be such an independent judiciary in a society where not even the legislative organs are independent from the executive is doubtful. Even if this were possible, the requirement that judges sincerely and not unreasonably believe that their laws are for the good of everyone is neither objective nor a very strict constraint. Many judges during the civil rights era sincerely believed that segregation was best for everyone, including blacks. Whether this belief was unreasonable depends entirely on the normative content of one's views about race and justice. If the people of a decent hierarchical society hold similar views to segregationist judges then their beliefs will be totally sincere while not being for the common good of everyone in the sense Rawls surely meant it.

38. Rawls, *op. cit.*, p. 85. Rawls does say that private charities could condition such foreign aid on reform.
39. *Ibid.*, pp. 126-127.
40. Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), p. 107.
41. Martin Luther King, "Letter From a Birmingham Jail," in M. Cohen and N. Fermon, eds., *Princeton Readings in Political Thought* (Princeton, NJ: Princeton University Press, 1996), p. 624.
42. *Ibid.*, pp. 136-137.
43. *Ibid.*, pp. 132-133.
44. Indeed, given their incommensurate concepts of fairness and reciprocity, they might not discover that they did have different understandings of what was reasonable until they were a fair way down the road to conflict.
45. Rawls, *op. cit.*, pp. 84-85.

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