

Legitimacy, Justice and Public International Law

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development of international public law towards a global public law and a just 'republican order' on the *global level* of the world as an upcoming 'cosmopolis'.²²

I admit that there are many other challenges to prevailing international public law which I have not even mentioned here. But if one may regard the description of these challenges caused by the threat of violence and of new military force as more or less appropriate or tentatively correct we finally have to look for reasonable answers to such challenging developments. That leads me to the following final four proposals. They presuppose to a large extent philosophical basic arguments which belong to the Kantian tradition – arguments for which I cannot give appropriate reasons here in detail:²³

- (1) For good philosophical arguments, that means for the normative reasons which are explained in Kant's political philosophy and in the Kantian tradition, we have to avoid the misleading conclusion to return to the old strategies of a strong 'national security' policy in the name of the so-called 'political realism' in foreign affairs. There is no reasonable way back to a legal international order like the one before 1945. Thus I reject not only the basic intuitions of 'political realism' but also Michael Walzer's arguments²⁴ since both neglect the necessity to construct the global political order of peace upon the claims of a just global public law. For the same reason we have to avoid moralising the political and procedural legal problems we are confronted with in the international arena today. We have to adhere to the sharp difference between 'the legal' and 'the moral' as explained in the liberal tradition of political philosophy, and in doing so we have to look out for solutions within the legal frame of the prevailing

²² See my article 'Kosmopolitische Verantwortung. Über Ethik und Recht in einer globalisierten Welt', in O. Decker and T. Grave, *Kritische Theorie der Zeit* (Springer: zu Klampen Verlag, 2008), 70–7.

²³ For further arguments cf. J. Bohman and M. Lutz-Bachmann, *Perpetual Peace. Essays on Kant's Cosmopolitan Ideal* (Cambridge: MIT Press, 1997); H. Brunkhorst, W. Köhler and M. Lutz-Bachmann, *Recht auf Menschenrechte. Menschenrechte, Demokratie und internationale Politik* (Frankfurt: Suhrkamp Verlag, 1999); M. Lutz-Bachmann and J. Bohman, *Weltstaat oder Staatenwelt? Für und wider die Idee einer Weltrepublik* (Frankfurt: Suhrkamp Verlag, 2002); M. Lutz-Bachmann and A. Niederberger, *Krieg und Frieden im Prozess der Globalisierung* (Weilerswist: Velbrück Verlag, 2009).

²⁴ See above and my article 'Die Idee der Menschenrechte angesichts der Realitäten der Weltpolitik: Eine Reflexion über das Verhältnis von Ethik und Politik', in J. Szaif and M. Lutz-Bachmann (eds.), *What is Good for a Human Being? Human Nature and Values* (Berlin/New York: De Gruyter Verlag, 2004), 276–92.

international public law and by the means of global legal procedures by which the differences of divergent geo-political and economic interests, cultures and religious identities may become reconciled.

- (2) On the other hand we have to overcome the specific inner legal inconsistencies and the institutional weaknesses of prevailing international public law. This postulate implies the necessity for a reform of the institutions of the UN which aims at the constitution of a global public law with reliable transnational rules and institutions as well as regional regimes which are able to execute, specify and apply the general norms of global law, if necessary with a certain degree of coercive power. Such a reform of the institutions of the UN should focus especially on the Security Council as the executive power of the UN which has often been unable in the past to act according to its global responsibility under the directions within the system of 'collective security'. A reform of the UN could *first* restrict the right to membership in the Security Council to democratic states only in the strictest sense, *second* substitute the right to veto by differently qualified majority decisions and *third* prepare mechanisms for a justification of the decisions of the Security Council and its responsibility towards the global public. Additionally a reform of the UN might strengthen the competence of other UN institutions over supposed national or other particular interests in all cases of peace and war. These reforms should bring together the international community of states to something like a new International Legal Order which some scholars in international law describe today as the concept of 'constitutionalism' of international law.²⁵
- (3) A reform of the institutions of prevailing international law should be embedded in additional efforts to build up something like a global democratic public in the civil societies of the world. That development should be supported by special commitments of the democratic states which may help to build up an 'open public space' of global communication and of the exchange of ideas, information and news in the fragmented world today. That might include an open space for free

²⁵ See J. Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?', in J. Habermas, *Der gespaltene Westen* (Frankfurt: Suhrkamp Verlag, 2004), 113–93; A. von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany', *Harvard International Law Journal* 47 (2006), 223–42; A. von Bogdandy and S. Dellavalle, 'Universalism and Particularism as Paradigms of International Law', *International Law and Justice Working Paper 2008/3* (New York University School of Law, 2008).

speech for everybody, for easy access to education and exchange programmes for students, free access to mass media, print media, the Internet and other sources of human communication. That might support the emergence and development of something like a well-informed, 'enlightened' global civil society beyond the narrow limits of nations, languages, ethnicities, religions and social classes. Education and a free flow of ideas are the best protection against those ideologies which lead to conflicts, to war and terror like the variety of fundamentalisms, religious or non-religious ones, we are confronted with today. Precisely speaking one should not exclude but permit religious doctrines within the political arena of the secular societies, however they should be admitted within the rules of public reasoning alone which have been explained recently, for example by John Rawls or Jürgen Habermas.²⁶

- (4) That will help to undermine totalitarian regimes and violent cultures in the long run everywhere in the world since the free flow of ideas and the formation of a global public sphere for deliberative political reasoning will undermine the ideologies and particularities from which most of the aforementioned dangerous challenges to the international public order today emerge. In the long run this might lead to developments of democratisation worldwide and step by step to a general recognition of basic human rights as well as of those principles which we can call philosophically 'reasonable' according to the tradition of Kantian philosophy. I here refer especially to Kant's postulate: 'There is to be no war!'²⁷ in his 'Theory of Law', and we can add today the following obligations: 'There is to be no threat of violence or of military action in the global, in the international, in the regional and in the national political arena!' These versions of a new categorical imperative of political reason are not only addressing the *general* topic of the normative character of the *fundamental legal principles* we should follow in the international and more and more cosmopolitan or global arena, they are additionally offering single practical solutions for the many often delicate and controversial *particular problems* and decisions concerning the question of peace and war in the international arena. In light of these Kantian imperatives we can namely realise that even in cases of imminent state aggressions or of terrorist

²⁶ See my recent discussion of the arguments of Rawls and Habermas in 'Demokratie, öffentliche Vernunft und Religion', in *Philosophisches Jahrbuch* 114 (2007), 3–21.

²⁷ See I. Kant, 'The Metaphysics of Morals', in Kant, *Akademie Textausgabe* VI, 354.

attacks we should never decide in favour of those means which imply a violation or abolition of the basic legal norms on which prevailing international law is built as a whole, such as the prohibition to use military force in international relations apart from the case of self-defence under the well-defined conditions of the system of 'collective security' in Chapter VII of the UN Charter.

The challenges to international public law and the international political order we are confronted with today have to and can be overcome not by the self-contradictory legal admission and self-empowerment to the use of military force in the hands of single states but only by the democratic constitution of a strong global public law and the building of more efficient global political institutions under the rule of law and controlled by the international public through appropriate procedures and global mechanisms.

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Forcing a people to be free

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Is forcing a people to be free possible, and if so, is it ever morally permissible? The question cries out for clarification: what is it to be a *people*? What is it for a people to be *forced*? And what is it for a people to be *free*? As with so many questions in political philosophy, the hardest task here is to ask the right one, so I will spend most of my time specifying and clarifying what I am asking. When the question is well posed, it will almost answer itself, or so I hope.

I

The question in some form is very much on our minds, provoked by the war in Iraq and one of its stated justifications: freeing the Iraqi people from tyranny. When ‘Operation Iraqi Freedom’, as the war was called, began, President George W. Bush announced, ‘Our mission is clear: to disarm Iraq of weapons of mass destruction, to end Saddam Hussein’s support for terrorism, and to free the Iraqi people’.¹

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¹ ‘President Discusses Beginning of Operation Iraqi Freedom: President’s Radio Address’, Office of the Press Secretary, 22 March 2003, www.whitehouse.gov/news/releases/2003/03/20030322.html.

Now that it has been established beyond doubt that Iraq had no weapons of mass destruction at the time of the invasion, and now that the White House has acknowledged that there is no evidence at all of a connection between the 11 September terrorist attacks and Saddam Hussein's regime, the freedom argument must bear all the weight of justification for both the invasion and the extended occupation that has followed. The Bush administration's case for war initially had three legs. Can it stand on one alone? And if 'to free the Iraqi people' is a good enough reason to permit the forceful occupation of Iraq, in what way does the Iraqi people have to be free before such permission runs out?

To be clear, I am not asking about the motives or intentions of politicians and generals, but about right reasons. There are sound theoretical grounds for holding that the rightness and wrongness of actions (in contrast with the goodness and badness of actors) does not ordinarily turn on motives. But even if this is not so, the project of political ethics in the first instance is forward-looking and first-personal: the primary question is what we as political actors should do, and only secondarily how we should evaluate the actions of others. Insofar as we are asking the first-personal question, we are asking what reasons rightly govern our actions, not what motives cause our behaviour. To put it another way: what should we, who in asking this question already are moved (or want to be moved) to do what is right, do next time the opportunity to force a people to be free arises?

Nor am I asking about the means that might be employed to depose a tyrant and suppress his supporters. From the negligent failure to prevent the looting of Baghdad to the sickening abuses of detainees in Abu Ghraib prison, the United States has much to answer for. The overall conduct of and any particular incident in a war and its aftermath may fail the appropriate criteria for *jus in bello*, justice *in* war. Although crucial to an overall moral assessment of the war in Iraq or any war, I set them aside in this discussion. My sole concern is the claim that forcing a people to be free can, under some conditions, satisfy the criteria for *jus ad bellum*, justice *of* war.

To make a related but different distinction, there are first-order moral considerations that matter to the justification of any war, what might be called the substantive merits of the case: how much death, destruction and misery will be inflicted on their soldiers and ours, their civilians and ours, for what reasons and for whose benefit, for how long and at what cost and with what prospects of success? Then there are second-order moral considerations concerning who is to decide upon the first-order judgments: is the target government morally immune from intervention in this way for these reasons by virtue of the moral legitimacy of its rule?

Does this candidate intervener or some other candidate intervener have the legitimacy to intervene in this way for these reasons? I will focus primarily on the first of these second-order questions, the legitimacy and consequent moral immunity of targets, rather than the legitimacy and the consequent moral powers, privileges and duties of interveners.

So I set aside as well the important question of who, if anyone, can and may force a people to be free. There may be good reason to conclude that an ad hoc coalition of the United States, Britain and thirty-two other countries (from Italy's 3,000 troops to the no doubt brave twenty-four man Moldovan fighting force) does not have legitimate authority to topple a regime and establish democracy, but some other actor – the United Nations, or a regional treaty organisation – does have such authority. My students often adamantly object to military intervention on the grounds that the usual interveners are too arrogant or too hypocritical to be entrusted with such a mission, but they soften when I propose intervention by the CSSSC – the Coalition of Small Scandinavian States and Canada. My question is whether it is possible and permissible for *any* external actor to force a people to be free, not whether the United States is such an actor.

Nor will I consider here whether there are any circumstances under which forcing a people to be free is or ought to be lawful under international law. Moral principles are discoveries or constructions of reason, not enactments or conventions of political bodies, and sometimes there ought to be a gap between the prescriptions of morality and the prescriptions of institutional rules. Every rule, even when properly followed, will sometimes be either over-inclusive or under-inclusive with respect to its underlying purpose.² Also, because rules are not always properly followed, the formulation of the best rule takes into account the consequences of mistaken or manipulative misuse of the rule.

Finally, although the use of lethal force ordinarily is unavoidable in military interventions, force understood as violence is not my central concern. Even if Saddam Hussein's regime could have been toppled without a single shot or drop of blood, our question about forced freedom would still stand. Our main concern is about coercion, whether or not violence is employed.³ Is it possible to *coerce* a people to be free, to free a people against its will?

² F. Schauer, *Playing by the Rules* (Oxford: Clarendon Press, 1991), 31–4.

³ To be more precise, violence is a presumptive wrong in need of justification for two reasons. First, violence physically harms its target. Second, violent force overwhelms the will of its target, either by physically preventing one from exercising one's will or by threatening severe harm if one does not submit to the will of the threatener. I am concerned here with violence insofar as it is employed to overwhelm the will of its target.

This investigation, then, isolates one claim that has been made in defence of the war in Iraq in order to explore general questions about the possibility and permissibility of forcing a people to be free. If freeing the Iraqi people is indeed the only remaining ground for the war, then establishing the possibility and permissibility of such forced freedom by some actor under some conditions is necessary to justify the war. Clearly, however, the success of this claim is not sufficient.

One might be tempted to complain about both the formality and narrowness of this exploration in light of the messier and wider moral and political issues that the US invasion and occupation have raised, and criticise philosophical fiddling while Fallujah burns. Following Montaigne, however, I make no apologies for making distinctions. ‘Should we not dare say of a thief that he has a fine leg? And if she is a whore, must she also necessarily have bad breath?’⁴ If the current (mis)adventure in Iraq either is or turns out to be a moral disaster, we will not know if this is a necessary or contingent conclusion without such distinctions. The stakes are high: unwarranted generalisations about failures in Somalia played a part in the shameful neglect of Rwanda. When errors of both omission and commission might be catastrophic, we need more fine-grained distinctions, not fewer.

One response to the objection that an intervention aimed at freeing a people is impermissibly coercive is that, under the appropriate counterfactual, the people would have welcomed the intervention, and so were not coerced after all. Before the invasion of Iraq, Deputy Secretary of Defense Paul Wolfowitz was sure that, had there been some mechanism for showing support, the attack would have been supported:

If the Iraqi people were free to demonstrate they would be on the streets in the millions now saying, ‘Why didn’t you come sooner? Don’t make us wait any longer.’ I don’t think there’s any question where the feelings of the Iraqi people are.⁵

Posing a slightly different hypothetical, he also said, ‘I’m absolutely sure that if you could take a free poll among Iraqis, they would say ... “Please come; please do the job, and do it quickly”’.⁶

⁴ M. de Montaigne, ‘Of Husbanding your Will’ (1585–8), in D. M. Frame (trans.), *The Complete Essays of Montaigne* (Stanford University Press, 1958), 766–84.

⁵ DefenseLink News Transcript: Deputy Secretary Paul Wolfowitz Interview with BBC TV and Radio, US Department of Defense, 19 February 2003, www.defenselink.mil/transcripts/transcript.aspx?transcriptid=1936.

⁶ DefenseLink News Transcript: Deputy Secretary Paul Wolfowitz Interview with ITV London, US Department of Defense, 17 February 2003, www.defenselink.mil/transcripts/transcript.aspx?transcriptid=1934.

We do not know what Iraqis would have said to pollsters before the war. Asking the question requires a careful posing of the counterfactual. We can safely guess how Iraqis would have answered an actual poll had they faced the prospect of arrest for answering wrongly, but that of course is not the counterfactual Wolfowitz had in mind. If the aim is to justify the invasion by appeal to implicit but actual consent, however, neither can the right counterfactual be 'How would Iraqis answer a poll had they not had their political views shaped by decades of tyranny?'

Fortunately, we do not have to guess what Iraqis would have said, because we know what they *did* say soon after the invasion and continue to say. The one indisputably enduring contribution of Western democracy to Iraq is the public opinion poll, and, unfortunately for Wolfowitz, there *was* a question about the feelings of the Iraqi people. One fortuitously timed poll was conducted in February 2004, right before the outbreak of hostilities in Fallujah and Najaf that marked the beginning of organised resistance to the occupation, and before the Abu Ghraib revelations.⁷ The results showed that support for the invasion and occupation was then mixed. When asked about whether the invasion by US-led forces was right or wrong, 48% answered absolutely or somewhat right, and 39% answered absolutely or somewhat wrong.⁸ The most intriguing question asked whether the invasion liberated or humiliated Iraq. Of all Iraqis polled, 42% said liberated and 41% said humiliated.⁹ In posing this as a binary choice, the pollsters did not allow for what may be both the best answer and the answer that would have been chosen by most Iraqis: that the invasion *both* liberated *and* humiliated Iraq. One of the purposes of this chapter is to explore how this might be so of a people that is forced to be free.

⁷ Oxford Research International, 'National Survey of Iraq, February 2004', for ABC News and BBC.

⁸ More recently, in a March 2007 ABC News poll, 52% answered somewhat or absolutely wrong, with wide disparities by faction: 98% of Sunnis, 29% of Shia and only 17% of Kurds. See <http://abcnews.com/pollvault.html>.

⁹ By faction, among Sunnis, 21% said liberated and 66% humiliated; among the Shia, 43% said liberated and 37% humiliated; and among the Kurds, 82% said liberated and 11% humiliated. Oxford Research International, 'National Survey of Iraq, February 2004'.

II

Consider an extended passage from an 1859 magazine article that startles our contemporary sensibilities, John Stuart Mill's 'A Few Words on Non-Intervention'. The main thrust of the piece is to argue against intervention in the civil wars and revolutions of civilised nations, but barbarians are another matter:

To suppose that the same international customs, and the same rules of international morality, can obtain between one civilised nation and another, and between civilised nations and barbarians, is a grave error ...

In the first place, the rules of ordinary international morality imply reciprocity. But barbarians will not reciprocate. They cannot be depended on for observing any rules. Their minds are not capable of so great an effort, nor their will sufficiently under the influence of distant motives.

In the next place, nations which are still barbarous have not got beyond the period which it is likely to be for their benefit that they should be conquered and held in subjection by foreigners. Independence and nationality, so essential to the due growth and development of a people further advanced in improvement, are generally impediments to theirs ...

To characterise any conduct whatever towards a barbarous people as a violation of the law of nations, only shows that he who so speaks has never considered the subject. A violation of great principles of morality it may easily be; but barbarians have no rights as a *nation*, except a right to such treatment as may, at the earliest possible period, fit them for becoming one. The only moral laws for the relation between a civilised and a barbarous government, are the universal rules of morality between man and man.¹⁰

Mill wrote this the very same year that he published *On Liberty*, which remains just about the most uncompromising rejection of paternalism ever written. *On Liberty* argues for toleration of Mormon polygamy in the Utah Territory, although Mill views the practice as a 'direct infraction' of the principle of liberty, 'a mere riveting of the chains of one half of the community',¹¹ and a 'retrograde step in civilisation'.¹² Still, Mill holds, 'I am not aware that any community has a right to force another to be civilised'.¹³

There is a ready, uncharitable way to explain these texts: in the first, Mill is flacking for the East India Company. His family and his country

¹⁰ J. S. Mill, 'A Few Words on Non-Intervention' (1859), in J. M. Robson (ed.), *Collected Works of John Stuart Mill: Essays on Equality, Law, and Education*, vol. XXI (University of Toronto Press, 1984), 109–24, here 118–19.

¹¹ J. S. Mill, *On Liberty* (1859), D. Spitz (ed.) (New York: W. W. Norton, 1975), ch. 4, 85.

¹² *Ibid.*, 86. ¹³ *Ibid.*, 86.

had no financial stake in Salt Lake City. Explanations such as this, however, explain away the need to take a writer's thought seriously. Our concern is with reasons, not motives. There are several ways to reconcile the two passages, although none is entirely satisfactory. Most likely, despite their uncivilised practice of polygamy, Mill simply does not consider the Mormons to be an example of 'those backward states of society in which the race itself may be considered in its nonage'.¹⁴

Mill's considered view on the matter of intervention in the internal affairs of barbarous nations is not entirely transparent. Our main interest, however, is in the text of 'A Few Words on Non-Intervention' that is so jarring to our ears. What, precisely, is Mill's mistake? Instead of *ad hominem* dismissal, let us engage in perhaps overly charitable reconstruction, and, for every appearance of the quaint (and insulting) term 'barbarous', substitute 'tyrannised', and similarly substitute 'democratic' for 'civilised'. Now the view (which I confess may no longer be Mill's) is much less startling: do not think that the law of nations that applies between democracies also applies between democracies and tyrannies. Tyrannies have no rights as nations, and so no state or government interposes in our moral relations with the persons who live under tyranny. Our duties towards them are direct, governed by 'the universal rules of morality between man and man'.

What resists this easy translation are the references to 'barbarians'. In places, we can substitute 'tyrants', and the meaning is clear enough. But in places Mill is referring to the individuals who populate a barbarous nation, not its leaders, and to substitute 'tyrannised persons' simply will not do. Does a tyrannised person have a mind that is distinctively defective in the way that Mill supposes the barbarian's mind is? Here is Mill's unsalvageable mistake: he thinks that barbarous nations are barbarous because they are composed of barbarians, and barbarians are individuals whose minds are incapable of the great effort of reciprocity and whose wills are insufficiently governed by distant motives. Now, Mill is not claiming genetic inferiority here. Barbarism for Mill is a product of culture, not nature, but the ill effects of barbarous cultures operate through the shaping of the mind of the barbarian. Mill's account, even after our politically correct updating, remains insulting, because it supposes that persons who live under tyrants are likely to have tyrannised minds and wills that lack the capacity to think the thoughts and will the

¹⁴ *Ibid.*, 11.

ends that persons who live in democracies think and will.¹⁵ This is a sweeping factual claim that needs to be backed up by evidence. It may, for some persons in some tyrannies, be true, but it is not a conclusion Mill or we get for free.

Here, then, is the point of our Millian digression: Mill believes that we may paternalise barbarous nations because we may paternalise barbarians. To force a people to be free is to paternalise a people. Does paternalising a people entail paternalising the persons who are members of that people? If so, then justifying the paternalising of a people depends on justifying the paternalising of the persons who are members of that people, and the criteria for the justified paternalism of persons are stringent. If those persons are not proper targets of paternalism, then neither is their people. Yet if it is possible to paternalise a people without paternalising its constituent members, then the argument for paternalising a people does not need to meet the objection of individual persons that they are not proper targets of paternalism. It is humiliating to be paternalised (even, as I will soon argue, when the paternalism is justified). But if we can drive a wedge between paternalising a people and paternalising persons, perhaps feelings of humiliation are, in one respect, unfounded.

III

Consider three ways in which it might be *impossible* to force a people to be free.

Forcing a people to be FREE

The claim is that forcing a people to be free is a conceptual impossibility because if a people is forced, it cannot be free; if free, it cannot be forced. Now, this is true synchronically, unless we entertain a paradoxical

¹⁵ In his early writing, Mill clearly holds that tyranny plays a causal role in the shaping of the minds of its subjects. In 'Cataline's Conspiracy' (1826), he says that an aristocracy 'seldom or never reduces the human mind so completely to the level of the brutes, as a military despotism'. In a despotism, the danger faced by those who cultivate their merits and talents 'contributes most of all to sink the minds of the unhappy subjects of a despotism into the lowest state of brutality and degradation of which human nature is susceptible' (J. S. Mill, *Collected Works of John Stuart Mill: Essays on Equality, Law, and Education*, vol. XXVI. University of Toronto Press, 345f.). In the posthumous 'Three Essays on Religion', he returns to the idea that self-control, unnatural to the undisciplined human being and to children, must be learned. 'Savages are always liars' (Mill, *Collected Works*, vol. X, 395).

understanding of forced freedom that is often attributed to Rousseau. Rousseau infamously writes, 'Whoever refuses to obey the general will shall be constrained to do so by the entire body; which means only that he will be forced to be free'.¹⁶ There is some textual evidence in the *Geneva Manuscript* that suggests Rousseau meant nothing quite as frightening as this sounds, but in any case, I have no use here for accounts of higher freedom.¹⁷ What I mean by freedom is independence, the power of a moral agent to both set and pursue one's own ends without being subject to the domination of another.¹⁸ But there is nothing incoherent about forced freedom understood diachronically. It is not impossible to force a people in time t so that it is a free people in time $t + 1$, unless one holds to a pedigreed conception of freedom under which any force in the history of a people renders it incapable of freedom in the future. On such a view, there are no free people, because, with the possible exception of Plymouth Plantation in the period immediately following the signing of the 'Mayflower Compact', there has never been a political society of any consequence that was freely constituted.

FORCING a people to be free

The second claim of impossibility is empirical, not conceptual: there is no known causal mechanism of regime change that has outside force as one of its inputs and a free people as an output. Attempts to force a people to be free are futile. When Mill writes about civilised as opposed to barbarian peoples, this is the view that he endorses:

The only test possessing any real value, of a people's having become fit for popular institutions, is that they, or a sufficient portion of them to prevail in the contest, are willing to brave labour and danger for their liberation.

I know all that may be said. I know it may be urged that the virtues of freemen cannot be learnt in the school of slavery, and that if a people are not fit for freedom, to have any chance of becoming so they must first be free. And this would be conclusive, if the intervention recommended would really give them freedom.

¹⁶ J. J. Rousseau, 'On the Social Contract' (1762), in R. D. Masters (ed.) and J. R. Bush (trans.), *On the Social Contract: with Geneva Manuscript and Political Economy* (New York: St Martin's Press, 1978), 55.

¹⁷ See Rousseau, 'On the Social Contract', 1:7 (138), and 'Geneva Manuscript' 1:3 (164).

¹⁸ Here I follow Arthur Ripstein's Kantian account in A. Ripstein, 'Authority and Coercion', *Philosophy and Public Affairs*, 32 (2004), 2–35, and A. Ripstein, 'Beyond the Harm Principle', *Philosophy and Public Affairs*, 34 (2006), 215–45.

But the evil is, that if they have not sufficient love of liberty to be able to wrest it from merely domestic oppressors, the liberty which is bestowed on them by other hands than their own, will have nothing real, nothing permanent. No people ever was and remained free, but because it was determined to be so; because neither its rulers nor any other party in the nation could compel it to be otherwise ...

When a people has had the misfortune to be ruled by a government under which the feelings and the virtues needful for maintaining freedom could not develop themselves, it is during an arduous struggle to become free by their own efforts that these feelings and virtues have the best chance of springing up.¹⁹

This view is less appealing than might first appear. First, note that Mill conflates establishing a free people through force and maintaining a free people through force. It may be historically accurate that no people ever remained free, 'but because it was determined to be so', but it does not follow that no people ever remained free that had its freedom 'bestowed on them by other hands than their own'.

Second, Mill is not simply saying that if you are not willing to face some risk of dying for freedom then you are not fit for it. If that were the claim, then once a people has shown that its members are 'willing to brave labour and danger for their liberation', why require that they brave it alone? A freedom-loving uprising of courageous but hapless Don Quixotes would then merit outside support, a conclusion Mill rejects. So either Mill's view assumes, falsely, that a brave majority always is strong enough to prevail.²⁰ Or he holds that the inability to wrest freedom from merely domestic oppressors shows insufficient love of liberty. This, to put it harshly but not inaccurately, implies that if you are not sufficiently willing and skilful to *kill* for your freedom, then you are not fit for it. But it is just a contingent matter of good luck that a popular majority that actually is capable of living free lives in peace and also has

¹⁹ Mill, 'A Few Words on Non-Intervention', 122–3. Elsewhere, Mill goes so far as to turn this into a constitutive rather than an empirical claim. 'The attempt to establish freedom by foreign bayonets is a solecism in terms. A government that requires the support of foreign armies cannot be a free government' (Mill, 'The Spanish Question' (1837), in *Collected Works*, XXI, 374).

²⁰ The passage in 'The Spanish Question' continues: 'If a government has not a majority of the people, or at least a majority of those among the people who care for politics, on its side; if those who will fight for it, are not a stronger party than those who will fight against it, then it can only have the name of a popular government; not being able to support itself by the majority, it must support itself by keeping down the majority, it must be a despotism in the name of freedom.' Note that Mill simply assumes that the side that has the majority of willing fighters is the stronger.

the strength and expertise and resources to be able to overthrow various kinds of tyranny and oppression. That such instruments of power are intimately connected with a deep desire for freedom and the capacity to carry forward with freedom just seems to be empirically false. One can know how to operate a printing press without knowing how to operate a rocket-propelled grenade launcher.²¹

I see little reason to accept Mill's (and, later, Arendt's and Walzer's) tendency to identify the violent struggle of revolution and civil war with real political voice. Rather, internal violence, though too often enough morally permitted or even required, is the utter failure of politics. The sound of gunfire never is the voice of the people.²²

The strongest retort to the objection that forced freedom necessarily is doomed to failure, however, is that there have been two spectacular successes: Germany and Japan. Many keys have been stroked arguing that the highly developed political cultures of the pre-war Axis powers render those two cases quite unlike any contemporary attempt at regime change. I do not deny the point. My claim is much more modest: the fact of two successes somewhere under some conditions shows that forced freedom is not impossible somewhere else.²³ Since we know that forcing

²¹ How is Gandhi's successful campaign of non-violent resistance in India to be analysed under this reading of Mill? First, let us bracket the fact that the British were outside occupiers, since Mill has a different account of such struggles, and suppose, counter-factually, that the British Raj was a 'domestic oppressor'. I think the Millian stance would have to be something like this. It is admirable that the Indians showed willingness to brave considerable 'labour and danger', and fortunate in two senses for them that this non-violent bravery was sufficient: fortunate in that they have won their freedom, and fortunate in having the good moral luck of not having the extent of their love for freedom put to a more stringent test. Had the British (again, assumed to be a domestic oppressor) crushed the non-violent movement and had the Indians then refused to escalate into violence, that would have shown insufficient fitness for freedom, and no outside power would have been permitted to intervene.

²² I do mean to make the counter-intuitive claim that the successful violent overthrow of a tyrant, though a moral success, is a failure of politics, if politics is understood in its normative sense as the workings of collective agency. Indeed, as the next section suggests, politics in this normative sense is not possible under conditions of tyranny. If this is correct, then even when both are morally justified, neither internal revolution nor external intervention is an expression of the general will of the people.

²³ It must be said as well that differences in prior political culture are not the only moving explanatory parts. I will refrain from saying much about comparing the effort, skill and commitment brought to bear in Germany and Japan with the current situation in Iraq, except to point out the difference in preparation. The war in Europe was over in April 1945. April also was the month that General George Marshall appointed General John Hilldring to begin training the thousands of military administrators who would govern occupied Germany – but the year was 1943.

a people to be free is possible at least under some conditions, we must address the permissibility question. But first, one last try at rendering forced freedom impossible.

Forcing a PEOPLE to be free

On this view, one cannot force *a people* to be free because an unfree people is a contradiction: if a people, it already is free; if forced, it cannot have been a people.

Now, this view seems to employ an extravagantly demanding conception of a people. It implies that an occupied population ceases to be a people, so that there was no French people in occupied France in the Second World War. For that matter, it implies that there was no French people under Louis XIV, because the French people under an absolute monarchy hardly was free.

Although extravagant, there is something to the claim, which I will soon explore. For a moment, however, simply suppose the claim is correct. If we are then to make sense of our original question, it must be recast as a question about *forcing individual persons to become a free people*. Now, even if it turns out that a people can be unfree without contradiction, this formulation of the question is independently interesting, and has the advantage of being answerable. Surely it is conceptually possible to force individuals to become a free people, so we can ask under what conditions it is morally permissible to do so. What we thought was one question is actually several:

When can and may we force an individual to be a free person?
 When can and may we force individuals to become a free people?
 When can and may we force a people to be free?

The answers will depend, in part, on the correct account of the practice Mill was so opposed to, at least among the civilised: paternalism.

IV

On the standard textbook account of the concept, A paternalises B when A restricts B's liberty for B's own good. Since an action may be undertaken for a variety of reasons, morally sufficient or insufficient, it is most illuminating to see paternalism as an attribute of reasons for action, rather than an attribute of actions themselves.²⁴ On this view, to justify

²⁴ Here I follow D.F. Thompson, *Political Ethics and Public Office* (Cambridge, MA: Harvard University Press, 1987), 153.

paternalism is to show that the paternalistic reason for restricting B's liberty – for B's own good – under the circumstances is sufficient.²⁵ The question of paternalism need not arise if there are sufficient non-paternalistic reasons for action. So, if preventing harm to C is a sufficient reason for A to restrict B's liberty, the action is justified for non-paternalistic reasons. It may also be the case that the same restriction of B's liberty also is for the good of B. Indeed, if one holds that B has a moral interest in not doing wrong, then to be prevented from wronging C always is for B's own good.²⁶ Yet it would be superfluous to persist in asking if an action also is justified on paternalistic grounds (and odd for B to demand such a justification) once the action has been justified on the grounds of harm to others.²⁷

Paternalism is a presumptive moral wrong in need of justification because the paternalist interferes with an agent's freedom to set and pursue her own ends for a reason that denies or discounts the importance of the agent's self-governance. If A does not claim that B has an impaired will, but merely that B is mistaken about her ends, then A discounts the importance of B's moral agency simply, and so disrespects B. If A claims that B's will is impaired, but is mistaken about this, B has been insulted, and is entitled to be indignant, our characteristic response to being paternalised. It is worth examining exactly why indignation is fitting. By claiming that B is insufficiently capable of choosing or pursuing ends for herself, A is treating B as something less than a full moral agent, a creature with a less dignified status. Unjustified paternalism warrants indignation because it takes a swipe at one's dignity.

Now suppose that A is not mistaken, and B knows that A is not mistaken. A precocious and relatively reflective twelve-year-old girl wants to pierce her tongue just like all her friends, but her parents say no. In a moment of clarity, she acknowledges to herself that she is not a fully mature and competent agent yet, and acknowledges that she still needs her parents to make some decisions for her. This recognition is, in a way, humiliating, because the girl now correctly sees that she is a creature of lower moral status than she had thought. This of course is

²⁵ I focus here on reasons, not motives. Paternalistic motives ordinarily do not enter into judgments of the rightness or wrongness of an action, although they do enter into evaluative judgments of the goodness or badness of the actor.

²⁶ A point I owe to Mathias Risse.

²⁷ On the view sketched here, if A is motivated by insufficient paternalistic reasons and not motivated by the sufficient non-paternalistic reasons that apply, B could complain about A's attitudes, but is not wronged by A's actions.

not to say that she counts for less. Considered as a moral patient, she is no less valuable and her claims on others are no weaker. Considered as a moral agent, however, she is not fully an end-in-herself, because others do not always have a reason to respect her ends merely because they are hers. Indignation is not called for, since her parents are not failing to recognise her moral status, and have not done anything to lower her status. The recognition of the truth of her lesser agency nonetheless carries with it a bit of self-inflicted shame. She is, after all, a little less dignified than she thought.

If A paternalises B when A restricts B's freedom for the reason that it is for B's own good, and if the presumptive wrong in paternalism is that A fails to respect B's capacity for choosing ends, then A's paternalistic action is most likely to be justified when the following three criteria are met: B's freedom already is impaired, the good of B at stake is B's future freedom, and B's retrospective endorsement is likely. The strongest case for paternalism is when the liberty of someone who has an impaired or immature will is restricted in order to develop in her the capacity to have a competent and mature will, and from that competent and mature perspective she will endorse the prior restrictions. I have just described the condition of childhood and the practice of parenting.²⁸ If we may not paternalise children, whom may we paternalise? Still, as we have seen, even justified paternalism humiliates. So perhaps the Iraqi people were both liberated and humiliated.

V

Is it then possible to paternalise a people without paternalising the individual persons who are members of that people? Recall Mill's mistake about the barbarians. Mill held that uncivilised political societies are uncivilised because they are made up of uncivilised persons, persons who have barbarous minds incapable of enlightened thought. These societies can be paternalised because individual persons within them can be paternalised. Perhaps these societies cannot be forced to be free, since they are incapable of freedom; but they may be ruled by force, taken under the protection of a civilised society, until the individuals reach political maturity. Can we avoid Mill's mistake and recognise that individual adults who are said to make up a people are perfectly mature, competent moral agents, but still make the case that the people itself lacks the capacity to exercise competent moral agency?

²⁸ See T. Schapiro, 'What Is a Child?', *Ethics*, 109 (1999), 715–38.

Let us return to the extravagant claim that there cannot be unfree peoples. Surely this is false if by 'people' we mean the social fact of common sentiments, shared language, culture and religion that lead individuals to form bonds of solidarity and identify as members of a people. As a matter of social science, it is plausible to think that when it comes to peoplehood, collective thinking makes it so. On what I shall call the *anthropological sense* of peoplehood, of course the French under German occupation and under the reign of Louis XIV are a people. And it is no small irony that, in this anthropological sense, Iraq may fail to be one people, since it is deeply divided along religious and linguistic lines in ways that make a common Iraqi cultural identity largely illusory.²⁹

Peoplehood, however, can also be understood as a normative concept. On the normative view, the anthropological markers of common sentiment and shared cultural material are neither necessary nor sufficient. Rather, what makes for normative peoplehood is the capacity for shared agency. A people in the *normative sense* must be capable of willing as a people. What do I mean by this, and why do I think it is so?

I want nothing to do with spooky accounts of the general will here. A group agent is not a metaphysical entity, and collective willing is not a mental state in some group mind. Yet neither is a group agent a simple aggregation of the preferences of individuals. To be fully capable of competent shared agency, individuals have to be properly constituted, incorporated, represented or personated. A natural individual is capable of agency, of willing ends, when there is a unity of the self, the capacity for reflecting on desires and for endorsing some and not others. Without such a capacity, one is what Harry Frankfurt calls a wanton, a creature that simply follows the vector of his desires, rather than a person.³⁰ When a collection of individuals

²⁹ Indeed, over the course of writing and revising this article, the moral disaster of civil war has increasingly threatened. But an outright civil war in Iraq would not show that anthropological peoplehood is a necessary condition for normative peoplehood. Deep cultural division is not conceptually incompatible with the thinner shared commitments to legitimate and just law that collective political agency requires, and we have examples of divided societies that flourish as unified polities. I also believe, as an empirical matter, that what distinguishes divided societies that violently fragment from those that hold together is not the depth of the cultural divisions, but rather contingent shocks to mechanisms of social order, trust and cooperation. (Yes, the destruction of a tyrant's mechanism of order without immediate adequate replacement would be such a shock.) But this, I confess, is a rather whiggish view of the possibilities for reasonable pluralism.

³⁰ H. G. Frankfurt, 'Freedom of the Will and the Concept of a Person' (1971), in H. G. Frankfurt, *The Importance of What We Care About* (Cambridge University Press, 1988), 11–25.

has this unity of will and capacity for second-order reflection, it is capable of group action and what comes along with action: the group itself is a proper subject for moral evaluation. (The conditions under which such evaluation properly distributes to the individual constituent actors is a further question.) Without a shared will, there are only the individual wills of individual persons, which may show statistical regularities, may be coordinated in various ways, and which always result in some vector that is the consequence of individual actions, but none of this makes for shared agency. To use Christine Korsgaard's image, a bag filled with mice will move, but it will not act. This is the difference between the results of a public opinion poll and the results of an election: a public opinion poll is a mere aggregation of individual preferences. An election (when the conditions for its legitimacy are met) is performative, the action of a shared agent.

What, more precisely, do I mean by normative peoplehood? A normative people is a set of individuals that (1) has sufficient size, density of interaction among the members of the set, and differentiation from members of other sets (despite gradation, ambiguity, and overlap) to fit our common-sense, non-normative notions of a society, and that (2) is itself the proximate locus of respect and responsibility, and so is an entity that can make genuine moral claims on others and of which others can make genuine moral claims. Note that the first condition is not demanding in the way of common sentiments, solidarity or shared identity, and so may be satisfied when the conditions for an anthropological people are not satisfied. Most of the interesting work is done by the second condition. When peoplehood is invoked in political discourse, some combination of the second condition's normative attributes typically is claimed.

Can there be normative peoples, understood as societies that are bearers of respect and responsibility, and if so, what properties must they have? First, if the idea of a normative people is to be taken seriously, then all of the moral claims a people can make and all of the moral claims that can be made against it cannot merely be direct pass-throughs for the separate and several moral claims by and on the natural individual persons who make up the normative people. If that were so, talk of a normative people would simply be a convenient shorthand, a manner of speaking.

Yet the idea of a normative people should not be taken seriously in the wrong way, and be given moral standing unconnected to the moral standing of the natural persons that constitute it.³¹ In ways that are

³¹ So, although a normative people is not merely instrumentally valuable, the source of its value is extrinsic. On the distinction, see C. M. Korsgaard, "Two Distinctions in

often complex, claims against a normative people distribute into claims of some sort against at least some of its members; claims against one set of individual members sometimes generate claims against the normative people as a whole, and these in turn may distribute onto a different set of individual members; at least some claims by individual members generate claims by the normative people; and at least some of the claims of individuals can be discharged by satisfying claims made by normative people (even though the substance of the claim of the natural person may fail to have been met).

In short, if normative peoples are possible, any normative status they have must be in virtue of the normative status of natural persons. If peoples in some measure are owed respect and can be held responsible in some ways, this is because they are made up of natural persons who are owed respect and can be held responsible. But there is no simple reduction or one-to-one correspondence from the claims attached to persons and the claims attached to peoples.

I take it to be a conceptual truth that anything that properly can be held responsible is (or at some time was or will be) capable of action. So a normative people, if it is to have the properties specified above, must be an agent of some sort, and it must be an agent in virtue of the connection it has with the individual agents of which it is constituted. Something that is an agent, in turn, must have three capacities or their functional equivalent:

- (1) considering: the capacity to respond to considerations for action, endorsing some and rejecting others;
- (2) willing: the capacity to intend or to decide to act (or not act); and
- (3) doing: the capacity to behave in ways guided by these considerations, intentions, or decisions.

So a complete account of normative peoplehood would show how individual capacities for and instances of considering, willing and doing can combine to constitute an entity with sufficient unity of the right sort to count as an agent that itself considers, wills and acts.

If a people succeeded in forming such an agent, then one of the important moral claims it would make against others is a claim of immunity from outside interference in its internal affairs. A competent collective agent would claim the respect owed to any competent agent,

who ordinarily has the right to exercise self-governance in ways that are harmful only to oneself. Just as it is disrespectful to overrule a competent natural agent's self-governed choice among ends, even when that choice is mistaken, the claim is that it is disrespectful to overrule a competent collective agent's self-governed choice among the claims of its constituent members, even when that choice is mistaken. As is the natural agent's, the collective agent's entitlement to immunity from interference is limited in both scope and force. Clearly, the actions of a group agent that will wrong or harm those outside the group have no protection under this sort of immunity claim any more than a natural agent who is prevented from harming another can cry paternalism. Moreover, even when only constituent members are affected, the group agent's complaint of disrespectful interference need not trump all other moral considerations. In particular, as I argue later, a group that violates the basic human rights and political liberties of some of its members is an impaired or even a failed collective agent. From a properly constituted collective agent, however, the claim that interference disrespects is weighty.

I do not have a complete account of agency, individual or collective, but I can offer one necessary condition: *agents must be sufficiently free*. A natural agent must have an adequate set of freedoms necessary to have the three capacities of considering, willing and doing, and a collective agent must be made up of sufficiently free natural agents whose individual capacities for considering, willing and doing mesh in a way that renders the collectivity sufficiently free to have the capacities of considering, willing and doing.

A natural individual can fail to be a moral agent in degree, hence the notion of an impaired or incompetent person. Children and those who are demented, mentally ill or mentally retarded are still persons. Similarly, shared agency can fail in degree. So the account of normative peoplehood would also specify the minimal capacities for considering, willing and doing that make a collectivity an agent at all, and, as with individual natural agents, specify the thresholds that distinguish competent from incompetent collective agency. I do not need to deny that the French under German occupation were a normative people. Understood as a group agent, however, occupied France was impaired, incapable of effective willing. This can be so, of course, even if every single French individual had a mature and competent will. Here, I side with Hobbes and Kant against Locke: there can be no legitimate political society prior to legitimate political

institutions.³² So, here is the truth in the extravagant claim: an aggregation of individuals that does not meet even minimal threshold conditions does not count as a shared agent at all, and so does not count as a normative people at all. Since the conditions for normative peoplehood and anthropological peoplehood may be different, a people in the anthropological sense may fail completely to count as a normative people. The extravagant claim remains extravagant, however, because it does not admit that an aggregation of individuals can meet the minimal threshold conditions for shared agency and so for normative peoplehood, but fail to meet the more demanding conditions for competent and effective shared agency. A collective agent can fail the test of sufficient freedom, either because the natural persons that make it up are not sufficiently free, or because their individual capacities for considering, willing and doing have not combined in the ways needed to form a collective agent that is sufficiently free. So not all normative peoples are already free peoples.

The question that began this section can now be answered. It is possible to paternalise a people without paternalising the individual

³² In what way are the French under occupation a normative people at all? Both in the occupied north and the unoccupied south, both after Germany's military occupation of the entire country in 1942 as well as before, the Vichy state had quite a bit of continuity with what came before, and Vichy exercised substantial autonomy. Much of the legal system and the civil administration of France continued unchanged. The government, though no longer democratic, was responsive to its (non-Jewish) citizens, and was not a mere puppet of Berlin. France was not Poland. Here, I follow the now standard accounts by S. Hoffmann, 'Collaborationism in France during World War II', *Journal of Modern History*, 40 (1968), 375–95, and R. O. Paxton, *Vichy France: Old Guard and New Order, 1940–1944* (New York: Knopf, 1972). One should not press the analogy to impaired persons too far, in part because it is hard to draw a sharp distinction between natural individuals who are seriously impaired persons and those who are not persons at all. But I am supposing that a natural individual whose capacity for self-governance is seriously impaired, but who nonetheless has remaining domains of meaningful, purposeful action responsive to reasons and desires and has enough psychological continuity among these domains, can still be considered an agent, although an impaired one. If the analogy holds, a normative people whose institutions and practices that make it a group agent are seriously undermined but survive in part and show appreciable continuity with what came before can still be considered a group agent, although an impaired one. Not much turns on establishing the possibility of an impaired or unfree normative people, however, since mere normative personhood is not a sufficient condition for political legitimacy, which is a more demanding standard. With its reversion to authoritarianism and its willing persecution and deportation of French Jews, Vichy could hardly be considered legitimate. I take no stand on its *legality*, for the legal validity of the legislative vote that accepted the armistice, terminated the Third Republic, and installed Pétain does not settle the matter of legitimacy one way or the other.

persons who are members of that people, and the conditions that would justify such paternalism can be offered. A set of individuals who make up a society, by having some measure of group agency, can succeed in being a normative people that is itself an entity entitled to some measure of respect, but still fail to be a competent group agent. As an agent with independent (but not intrinsic) moral standing, a normative people is the sort of entity that can possibly be paternalised, because it has a will that can be forced for the reason that such force is for its own good. That this will already is impaired and that the good in question is the people's future freedom would both count towards the justification of such paternalism. This justification would not extend to restrictions on the liberty of individual members of the normative people who are themselves capable of competent willing. But though such restrictions of liberty need justification, a justification of *paternalism* is not needed, since the reason for the restriction on the liberty of the individual agent is not for the individual's own good, but for the good of the collective agent. This might seem to be an excessively formalistic answer, for though the collective agent is an entity with independent moral standing, such standing ultimately comes from the standing of the natural agents that constitute it. Recall, however, that one of the defining attributes of a genuine collective agent is that the distribution of moral claims from and to its constituent members is no mere pass-through. Although a collective agent has interests and a will only because its constituent members have interests and wills, it is not the case that anything done for the sake of the collective agent is done for the sake of each constituent member. The short answer why an individual forced to constitute a free people need not be paternalised is that such force need not be for the individual's own sake, but for the sake of others. The non-paternalistic justification for such force is offered in Section IX below.

VI

So far, I have said little about what the conditions for shared agency are. We need a conception of shared agency to plug in here, but we may disagree about the correct conception, and so disagree about the correct criteria. Here, I will simply sketch the beginnings of such a conception. If you do not like it, plug in your own. Only two claims are essential to my overall view. First, we cannot do without *some* conception of normative peoplehood. Second, a society ruled by a tyrannical regime either is not a people at all in the normative sense, and so is incapable of shared agency,