

**Do Rights-Based Moralities Cause Climate Change? Balancing the Rights of
Current Persons and the Needs of Future Generations**

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CONTENTS

Abstract	4
Chapter 1: The Nature of Climate Change	6
Chapter 2: Rights-based Moralities	38
Chapter 3: Future Persons and Rights	93
Chapter 4: Rights-based Responses to the Problem of Future Persons	124
Chapter 5: Mitigation, Adaptation and Rights	172
Chapter 6: Rights-based Responses to Climate Change	227
Conclusion	284
Bibliography	297

ABSTRACT

This thesis explores the relationship between rights-based moral systems and climate change. It argues that supporters of rights-based moralities must give the realisation of rights priority over non-rights-based moral concerns. It further contends that future persons cannot possess rights that would place current persons under correlative duties towards them before their conception. The thesis then highlights that climate change will need to be combatted through programmes of adaptation and mitigation. Unfortunately, the majority of those protected by such programmes will be future persons. It is therefore argued that rights-based moralities struggle to endorse – and might even actively oppose – the imposition by states of extensive programmes of adaptation and mitigation. Such programmes actively and directly restrict the realisation of the rights of many current persons. Even if this were not the case, supporters of rights are unable to justify the kind of spending that would be needed to finance those aspects of adaptation and mitigation which aim to benefit future persons while the fundamental rights of a great many current persons go unmet due to a lack of funds. As a result, rights-based moralities must justify climate burdens solely through reference to current persons. It is argued that, in the case of Interest- and Choice-based theories of rights, this would encourage an increase in emissions through the implication that pollution was permissible provided adaptation burdens were met. Alternatively, support for a rights-based morality akin to that put forward by Robert Nozick would enable us to implement mitigation, but the system's disavowal of positive rights would simultaneously cause excessive harm to the wellbeing of many. The inability of rights-based moralities to deal with

climate change in an effective and ethical manner leads us to question their legitimacy more generally.

CHAPTER 1: THE NATURE OF CLIMATE CHANGE

Outline of Thesis

The purpose of this thesis is to demonstrate that moral (as opposed to legal) systems which are based upon rights produce inadequate answers to the unique challenges posed by climate change – at least for those of us who feel it to be wrong to cause irreparable harm to future persons (let alone non-human animals and plants).

What exactly qualifies as a rights-based moral system is outlined in detail in Chapter 2, which also provides a detailed analysis of what I believe to be the three fundamental types of such systems (Interest Theories, Choice Theories and Libertarian/Nozickian accounts).

Chapter 3 then explains why future persons cannot be considered to possess rights. Objections to this argument are considered and rejected in Chapter 4.

Chapter 5 outlines why the status of future persons as non-right-holders is so problematic. It does so, firstly, by explaining how and why programmes of adaptation and mitigation will harm the rights of current persons – harm that cannot be accepted as the unfortunate consequence of clashes of rights since the future persons such policies aim to protect are not right-holders. It then goes on to argue that, even if such programmes did not directly harm rights, they would remain unacceptable to supporters of rights as they make distinctly inefficient use of significant resources which might otherwise be utilised to greatly improve levels of rights realisation across the present generation.

Finally, Chapter 6 examines possible attempts to subvert the issues raised in the previous chapters through a focus on current persons as the beneficiaries of programmes of adaptation and mitigation. It concludes that, through such an approach, some limited programmes of adaptation and mitigation might be plausible under certain rights-based moralities,¹ but that they will nonetheless be comparatively ineffective in quelling (and might even increase) the long-term dangers of climate change.

Preceding the above, this chapter seeks to outline the nature of the climate change process with a specific focus on the unusual timescales involved between cause, effect and catastrophe and the unique influence these have on established ideas about ethics.

Introduction

The next few centuries will be the most important in human history.² In the worst case scenario, climate change could cause the extinction of humanity.³ Even if the best case predictions for the effects of climate change are realised and combined with a dedicated, co-ordinated campaign of mitigation and adaptation, much damage would still inevitably be caused to the human rights of a great many individuals in the future. It is widely accepted by experts that the extent to which the climate changes (and, thus, the extent of the damage to the human rights of its victims) will largely be decided by the actions humanity takes in the relatively

¹ Different rights-based moral systems will permit different programmes of adaptation and/or mitigation.

² Parfit, D., *Reasons and Persons* (Oxford: Oxford University Press, 1986), p.352.

³ McKinnon, C., *Climate Change and Future Justice: Precaution, Compensation and Triage* (London and New York, Routledge, 2012), p.1

near future.⁴ The problem is that, even for the most well-meaning individuals, such decisions are extremely complex from a moral perspective. As De-Shalit highlights, “[m]any governments face a new dilemma today. Seeking to improve the welfare of the present population, they find that some policies which best do so incur some severe environmental risks for contemporary people, but even more so for posterity. This raises moral questions of relations between generations”.⁵ As this chapter will demonstrate, the negative effects of our (often innocuous and even essential) emission-producing actions will primarily be felt by people whose existence is both geographically and chronologically remote from our own. Until relatively recently, such a concept was simply beyond the purview of our ethical reasoning.

This chapter aims to briefly outline the manner in which climate change works, the effects the process is likely to have on human rights (both now and in the future) and what actions humanity might take to lessen and/or slow such effects. Most importantly for a proper understanding of the thesis that follows, this chapter goes on to emphasise the large timescales involved in climate change with regard to both the (often extensive) length of time between cause and effect and the (even more extensive) length of time a particular effect lasts for (i.e. the length of time certain gases remain in our atmosphere). The chapter then highlights some of the complex ethical questions raised by scholars working in the area in light of the unique nature of the climate change process. Finally, it closes with an

⁴ Holden, J.P., ‘Introduction’ in Schneider, Stephen H. *et al.* (eds.), *Climate Change Science and Policy* (Washington: Island Press, 2010), p.4. As will become clear in both this chapter and throughout the thesis, while the decisions humanity makes with regard to its emissions in the near future will be of immense significance in terms of the path climate change takes, it is not necessarily the case that *any* of the decisions humanity makes in the short-term will lead to an irreversible level of climate change.

⁵ De-Shalit, A., *Why Posterity Matters: Environmental Policies and Future Generations* (London: Routledge, 1995), p.113

explanation of the relevance of a rights-based approach to the climate change problem.

Climate Change is a Fact

Before commencing with any debate as to whether and how human beings ought to adapt their behaviour in order to lessen the negative effects of climate change it is, unfortunately, necessary to assert that climate change is a fact and that it is (at least primarily) caused by human actions.

Climate change was described by one US Senator as “the greatest hoax ever perpetrated on the American people”.⁶ This attitude is frequently reflected in the popular media. A study took a wide sample of articles from across various media outlets. It found that 53% questioned either the fact that climate change was occurring as a result of human actions or the fact that climate change was occurring at all. The same study found that, in a similarly wide sample of academic articles on the subject published in scientific journals, absolutely none questioned the existence or cause of climate change.⁷ As Holden puts it,

(t)he most important conclusions about global climatic disruption – that it’s real, that it’s accelerating, that it’s already doing significant harm, that human activities are responsible for most of it, that there is a growing danger of its becoming unmanageable, and that there is much that could be done to reduce the danger at affordable cost – have not been concocted by environmental

⁶ Guggenheim, D., *An Inconvenient Truth* (Beverly Hills: Lawrence Bender Productions, 2006)

⁷ *Ibid*

extremists or enemies of capitalism. They are based on an immense edifice of painstaking studies published in the world's leading peer-reviewed scientific journals.⁸

With this in mind, it seems reasonable to assume both that such a wide range of experts are highly unlikely to be wrong and that there is little which could be said here to convince anybody who still doubts such a fact. This thesis will therefore treat the existence of anthropogenic climate change as a fact.

How Climate Change Works

The basic process of climate change is succinctly described by Mahlmann when he says,

Surprisingly, all of the physical drivers of the global warming problem are contained within the atmosphere. Despite being a region of relatively inconsequential mass, water amount, and heat capacity, it is in the atmosphere that the temperature at the earth's surface is ultimately determined. The special properties of the atmosphere define the essence of how climate works.

The earth is strongly heated every day by incoming radiation from the sun. This heating is offset by an equally strong infrared radiation leaving the planet. Interestingly, if the earth were without any atmosphere, and if its surface reflectivity did not change, global mean surface temperature would be roughly 33°C colder than it is today. This large difference is due to the strong atmospheric absorption of infrared radiation leaving the earth's surface. The major atmospheric absorbers are clouds, water vapor, and CO₂...Simply put, adding CO₂ to the atmosphere adds

⁸ Holden, J.P., *Op.cit*, p.5

another ‘blanket’ to the planet and thus directly changes the heat balance of the earth’s atmosphere.⁹

CO₂ represents around 76% of all anthropogenic emissions.¹⁰ The bulk of this CO₂ (and other anthropogenic emissions) has been released since the commencement of the industrial revolution around 250 years ago and it is this period which is viewed as a cut-off point marking the beginning of climate change by most climatologists.¹¹ It is widely accepted that, in order to avoid climate change reaching unmanageable, catastrophic levels, the global average surface temperature cannot be allowed to rise higher than between 2°C and 2.5°C above pre-industrial levels.¹² This seems increasingly unlikely,¹³ since, in order for this to occur, many experts feel that global emissions will need to have peaked and begun to decline within the next 10 years.¹⁴

Once we reach beyond the 2°C threshold, things will quickly escalate beyond our control. This is because of two factors known as ‘positive feedbacks’ and ‘tipping points’.

⁹ Mahlmann, J.D., ‘The Long Timescales of Human-Caused Climate Warming: Further Challenges for the Global Policy Process’ in Sinnott-Armstrong, W. and Howarth, R.B. (eds.), *Perspectives on Climate Change: Science, Economics, Politics, Ethics* (Amsterdam: Elsevier, 2005), p.11

¹⁰ United States Environmental Protection Agency, ‘Global Greenhouse Gas Emissions Data’. Available at: <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data>. Last accessed: 26 November 2017.

¹¹ Page, E.A., *Climate Change, Justice and Future Generations* (Cheltenham: Edward Elgar, 2006), p.25

¹² Holden, J.P., *Op.Cit.*, p.3; McKinnon, *Op.Cit.*, p.4; Humphreys, S., ‘Introduction: Human Rights and Climate Change’ in Humphreys, S. (ed.), *Human Rights and Climate Change* (Cambridge: Cambridge University Press, 2010), p.20

¹³ Humphreys, S., *Ibid.*, p.20

¹⁴ Holden, J.P., *Op.Cit.*, p.4. Indeed, some scholars feel this peak should have already been reached (McKinnon, C., *Op.Cit.*, p.4). It is, however, incredibly difficult to predict such figures with any great accuracy. It is also not absolutely clear what is meant by climate change having reached irreversible levels, or at what point such levels will actually be reached. If and when emissions levels do reach ‘irreversible’ levels, the resultant harm will likely still be many decades away. This chapter will explain why this should be the case.

Positive Feedbacks and Tipping Points

A key difficulty with climate change is the fact that it is neither linear nor gradual in nature. We cannot simply wait until its consequences become intolerable and then implement policies to slowly reverse the process. At a certain point (located somewhere after the 2°C threshold) the process simply becomes irreversible. This is due to a combination of the long timescales involved in the emissions of Greenhouse Gases (GHGs) (an issue which will be returned to shortly) and the existence of ‘positive feedbacks’ and ‘tipping points’.

Positive feedbacks are ‘natural’ climatic events which are created by the earth’s reactions to anthropogenic emissions. They will greatly accelerate the climate change process, thus substantially diminishing our chances of reversing it.¹⁵

Some examples of positive feedbacks include an increased amount of water vapour in the atmosphere and a reduction in the amount of ice on the Earth’s surface.

Water vapour has a strong capacity for holding heat, significantly amplifying the initial warming of effect of CO₂ by as much as a factor of three and a half in some circumstances.¹⁶ The more CO₂ in the atmosphere, the higher the temperature, causing more water vapour to be absorbed into the atmosphere, thus further amplifying the effects of the initial CO₂, creating a vicious circle of increased warming.

¹⁵ Friedlingstein, P. *et al*, ‘Positive Feedback Between Future Climate Change and the Carbon Cycle’, (2001) *Geophysical Research Letters*, Vol.28, No.8, pp.1543-1546. Friedlingstein *et al* estimate that positive feedbacks lead to a 15% increase in overall warming (p.1543). Estimates regarding this figure vary substantially across the field, but there is widespread consensus that such feedbacks are a fact.

¹⁶ Stocker, T.F. *et al*, ‘Physical Climate Processes and Feedbacks’, in Houghton, J.T. *et al* (Eds.), *Climate Change 2001: The Scientific Basis* (Cambridge: Cambridge University Press, 2001), p.425

A similarly dangerous cycle can be seen when it comes to ice and snow. The hotter the average global surface temperature, the less snow and ice that will exist on the Earth's surface. This creates certain difficulties in and of itself – for example, many countries rely heavily on snowmelt from mountains for their water supplies. Of greater concern is the fact that snow and ice are much better reflectors of solar radiation than the ground, vegetation or water that lies beneath them.¹⁷ Therefore, the less snow and ice that remains on the Earth's surface, the greater the average surface temperature increase, causing the melting of more snow and ice.

These positive feedbacks will combine to greatly increase the speed at which climate change occurs in comparison to current levels. This will mean that certain 'tipping points' will be reached more rapidly, beyond which it will no longer be possible to effectively combat climate change through mitigation and adaptation. Lynas succinctly explains how such a process might work:

If...we cross the 'tipping point' of Amazonian collapse and soil carbon release which lies somewhere above two degrees, then another 250 parts per million of CO₂ will unavoidably pour into the atmosphere, yielding another 1.5°C of warming and taking us straight into the four degree world. Once we arrive there, the accelerated release of carbon and methane from thawing Siberian permafrost will add even more greenhouse gas to the atmosphere, driving yet more warming, and likely pushing us on to the five degree world. At this level of warming...oceanic methane hydrate release becomes a serious possibility, catapulting us into the ultimate mass extinction apocalypse of six degrees.¹⁸

¹⁷ *ibid*, p.12

¹⁸ Lynas, M., *Six Degrees: Our Future on a Hotter Planet* (London: Harper Collins, 2007), pp.270-71

It should be noted that, while the threat of tipping points is often the primary focus of our concerns when it comes to the dangers of climate change, very real dangers are also posed by a more gradual process of climate change regardless of whether and when this gradual climate change leads to a tipping point being reached.

Even if tipping points were not a possibility, the gradual increase in global temperatures which continues to occur would remain a morally problematic issue because of the many harms it causes (e.g. the increase in cases of malaria that result from rising temperatures in many poorer African states). However, as this thesis will explain, it is possible (and, under some rights-based moralities, demanded) that the vast majority of the harms human beings face as a result of gradual climate change could be avoided through ‘adaptation’ tactics (e.g. vaccinating those at risk against malaria). When it comes to tipping points, adaptation ceases to be a possibility. As a result, to say that people living today ought to do something to prevent tipping points is to say that people living today must curb their emission-producing behaviours, as opposed to merely making a financial contribution to ensure that those emissions cease to be harmful.

The nature of the climate change process means that its negative effects will worsen rapidly once the 2-2.5°C threshold is breached. If we are to stop the worst effects of climate change we will need to act a significant amount of time *before* they occur. This is particularly true since (as the next section will explain) when it comes to GHGs, there is a significant gap between emission and warming, but once the warming effect begins it continues to affect the climate for a significant period of time.

What we do not know about tipping points is *when* they will occur. As a result, knowing that we need to commence mitigation programmes significantly in advance of such tipping points being reached does little to tell us at which point we *must* begin mitigating if we are to avoid catastrophic runaway climate change. In reality, this is of little significance.

For many people, the fact that we know that tipping points will one day occur as a result of our emission-producing actions might be seen as a good enough reason to curb such actions immediately in order to give us the best possible chance of avoiding the catastrophic harm that will result from runaway climate change.

Those individuals (including supporters of rights) who do not feel that protecting future persons from harm¹⁹ is something that is morally required from current persons draw the opposite conclusion.

The important thing to note about tipping points is that implementing the type of mitigation programmes necessary to prevent them is something which will *only* benefit future persons. As a result of the timeframes involved both with emission and with implementing an effective programme of mitigation in a rights-friendly manner,²⁰ if a tipping point is to be reached within the lifetime of current persons,

¹⁹ The reasoning behind the inability of supporters of rights to assign rights to future persons is explained in Chapter 3. Chapter 2 demonstrates that the provision of rights is the only way in which supporters of rights-based moralities are able to demonstrate that a particular entity is of such significant moral value that the rights of others might be restricted in the name of protecting said entity.

²⁰ A hurried programme of mitigation which, for example, banned the use of fossil fuels before alternatives were widely available would doubtlessly cause irreparable harm to the rights of many current persons who rely upon carbon-heavy fuel sources to meet their most basic rights such as heating their homes and cooking their food. It is, I suppose, possible that such extreme measures *might* be justified if they were taken in the name of protecting current persons from tipping points. However, given the very small chance that a tipping point will both occur within the lifetimes of current persons *and* not already be inevitable as a result of a combination of past emissions and unavoidable current and future emissions (breathing, boiling water, etc.), this does not seem a course of action supporters of rights would endorse. This is particularly true when we

it is *already* too late to stop its occurrence through mitigation.²¹ And if we are temporally distant enough from a tipping point to avoid its occurrence then all of the people we will protect through this avoidance will be future persons.

The Timeframe of Emissions

The first thing to note about the emissions we produce today is that, because of the inertia of the Earth's oceans, their negative effects on the climate will not begin to be felt for at least several decades.²² Once they do begin to take effect however, they will continue to do so for extensive periods of time. CO₂ (by far the most prevalent of all GHGs in terms of contribution to climate change) remains in the atmosphere for 50-200 years, methane (also a significant contributor) remains for up to 120 years, and other GHGs which make a more minor contribution can continue to do so for millennia.²³

With the above in mind, it becomes clear that the primary victims of climate change will be future generations. Indeed, many of the most negative consequences of the phenomenon will be felt *only* by the as yet unborn.²⁴ This is because the tipping points mentioned above will be caused by the unprecedented

consider that such extreme mitigation might end up causing a similarly catastrophic level of damage to that caused by the tipping point its.

²¹ This argument is presented in greater detail in Chapter 6 once the claims inherent within it regarding mitigation, future persons and rights-based moralities have been laid out and justified.

²² Zickfield, K. and Herrington, T., 'The Time Lag Between a Carbon Dioxide Emission and Maximum Warming Increases With the Size of the Emission', (2015) *Environmental Research Letters*, 10 031001, p.1.

²³ Page, E.A., *Op.Cit*, p.25. Indeed, some scholars believe that the harm caused by CO₂ is also more long-lasting than the commonly agreed figure. Archer and Brovkin, for example, argue that 20-60% of CO₂ remains in the atmosphere for over a thousand years (Archer, D. and Brovkin, V., 'The Millennial Atmospheric Lifetime of Anthropogenic CO₂', *Climatic Change* October 2008, Volume 9, Issue 3, pp.283-297, p.283).

²⁴ Page, E.A., *ibid*, p.36-7

(and still rising) amount of GHGs which are now being pumped into the atmosphere as a result of globalisation, immense population growth, and widespread industrialisation across the developing world.

Due to the increase in green technologies, it may well be the case that many individuals living in developed countries are producing *fewer* emissions than their parents did, but the number of individuals producing such emissions has risen significantly in recent decades and continues to do so. It took 10,000 generations for the world's population to reach two billion in 1945.²⁵ Today, just 70 years later, it stands at over seven billion and is predicted to reach 11 billion by the end of the century.²⁶ Due to the fact that our emissions remain in the atmosphere for centuries, the combined emissions produced by the ever-increasing global population today will eventually come to cause the deaths of millions of people. However, the vast majority of those individuals who will be affected (and *all* of those individuals who will face the catastrophes caused by reaching 'tipping points')²⁷ do not currently exist. By the time they do exist, however, it may be too late to reverse the climate change process. Given this fact, many people might feel that the current generation is placed under a duty to take action to combat climate change while it is still possible for such action to be effective.

Adaptation and Mitigation

²⁵ Guggenheim, D., *Op.Cit*

²⁶ Carrington, D., 'World Population to Hit 11bn in 2100 – with 70% Chance of Continuous Rise', *The Guardian* (18 September 2014). Available at: <http://www.theguardian.com/environment/2014/sep/18/world-population-new-study-11bn-2100> . Last Accessed: 15 February 2016

²⁷ Unless, of course, those tipping points occur within our lifetime. As already noted though, if they do so (which is unlikely), their occurrence will primarily be the result of the emissions of past persons combined with the unavoidable emissions of current persons.

As Page astutely notes, “(t)here would, perhaps, be little point in considering climate change as raising important ethical questions if little could be done to offset or reverse the bad effects it threatens for future quality of life”.²⁸

Fortunately, this is not the case. As Pacala and Socolow assert, “(h)umanity already possesses the fundamental scientific, technical, and industrial know-how to solve the carbon and climate problems...”.²⁹ Unfortunately, due to the aforementioned facts that there are already a great deal of GHGs affecting our atmosphere, that there will be more to come as our recent emissions take time to take effect, and that GHGs remain in our atmosphere for so long, it is already too late to stop climate change.³⁰ Therefore, preventing the negative effects of climate change will involve a mixture of policies. Some of these will aim to substantially reduce our current emission levels in order to slow (and eventually reverse) the increase in average global surface temperature, while others will aim to lessen the negative effects of that climate change which is already unavoidable. These policies are known as mitigation techniques and adaptation techniques respectively.

Mitigation techniques are those actions we could take now in order to ensure that the average global surface temperature remains below the 2-2.5°C threshold.

Such techniques would include the banning of non-essential air travel and deforestation and the development of alternatives to fossil fuels. As Humphreys notes, effective mitigation will come at a significant cost to current persons:

²⁸ Page, E.A., *Op.Cit*, p.27

²⁹ Pacala, S. and Socolow, R., ‘Stabilization Wedges: Solving the Climate Problem for the Next 50 Years with Current Technologies’, *Science*, Vol. 305, Issue 5686 (13 August 2004), 968-972, p.968

³⁰ Sinnott-Armstrong, W., ‘It’s Not My Fault: Global Warming and Individual Moral Obligations’, in Gardiner, S., et al. (eds), *Climate Change: Essential Readings*, (Oxford University Press: Oxford, 2010), p.332

First, it will drastically reduce access to and dependence upon fossil fuels – currently the most reliable and cost-effective fuel-source on the planet (measured in terms of energy yield against cost of extraction/generation). Second, it will curtail the development policy options available to governments everywhere – an implication that matters especially in those countries that have not yet reached a level of economic growth sufficient to guarantee basic needs. Not only will climate change mitigation policies profoundly influence the allocation and use of scarce resources, they will do so far into the foreseeable future. In short, climate change mitigation efforts will reorient and fix national development paths over the long term, and these in turn will tend to set limits on the capacity of countries to fulfil basic human rights, albeit to different degrees.³¹

Adaptation techniques are those actions taken to combat the irreversible negative effects of climate change. Such techniques might include building sea walls to protect coastal areas or vaccinating against diseases like malaria and cholera (the spread of which will increase as a result of rising temperatures).³² As part of this adaptation the UNFCCC requires wealthier states to provide financial assistance to poorer states in order to help them to implement such measures.³³ The World Bank estimates that this last element alone is likely to cost between US\$4 billion and \$37 billion per year.³⁴

Adaptation, then, is an expensive process which will severely impact upon the lives of current persons. More importantly, the greater the increase in climate change, the more costly and less effective adaptation will become.³⁵ Since

³¹ Humphreys, S., *Op.Cit*, p.22

³² Caney, S., 'Cosmopolitan Justice, Responsibility, and Global Climate Change', in Gardiner, S., et al. (eds.), *Climate Ethics: Essential Readings* (Oxford: Oxford University Press, 2010), p.124-5

³³ UNFCCC, 'Paris Agreement (as contained in the report of the Conference of the Parties on its twenty-first session)', FCCC/CP/2015/10/Add.1 (2015), Article 4(5).

³⁴ Stern, N., *The Economics of Climate Change: The Stern Review* (Cambridge: Cambridge University Press, 2007), p.442

³⁵ Holden, J.P., *Op.Cit*, p.3

adaptation will only slow the *effects* of climate change, not the climate change itself, it will do nothing to prevent us from reaching ‘tipping points’ at which adaptation no longer has a use. Therefore, any meaningful attempt to combat climate change in the long term must consist of a mixture of adaptation and mitigation techniques. This will mean making significant sacrifices. Due to the timeframe of climate change, many of these sacrifices will need to be made by the current generation, even though many of the resultant benefits will fall upon future persons.³⁶

The Response of Ethics

The nature of climate change and the time delays built into it raise many difficult ethical issues with regard to which actions (if any) we should take to reverse the process. This section will highlight these issues so that they may be investigated in more detail throughout the thesis.

The Role of Intention

Nobody deliberately causes climate change. None of the actions we take are taken with the intention of producing emissions. Rather, they are innocuous (and sometimes essential). How does this affect our moral reasoning? Is the fact that the consequences of such actions are knowable enough to render them immoral?

³⁶ The costs (both financial and otherwise) of mitigation and adaptation that will be felt by current persons are outlined in greater detail in Chapter 5.

Certainly, according to the doctrine of double effect, this is not automatically the case. According to this doctrine, if our only means of stopping a paramilitary radio station from broadcasting information necessary for its troops to carry out a genocide is to bomb it from the air, we are entitled to do so even if we know that our action will also kill a small number of innocent people (hostages, cleaning staff, children playing outside, etc.). This is (at least primarily) because we do not undertake the bombing with the *intention* of harming these innocents, even though we know that they will indeed be harmed.

It is not immediately clear, however, that the doctrine of double effect can be used as a way of justifying the emissions (particularly the non-essential emissions) of current persons. For one thing, ethicists may question the validity of the doctrine of double effect under *any* circumstances.³⁷ One might legitimately ask whether it really is permissible to cause harm simply because you did not *intend* to do so. This is particularly true when the word intention is used in such a manner as to enable us to claim that we did not *intend* to create a certain consequence that we did in fact *know* we would create.

Additionally, anthropogenic climate change seems to be a very different scenario from those which the doctrine of double effect is usually invoked to defend. Ceasing those actions which produce so-called 'luxury emissions' (i.e. those which are not essential to our existence in the way that breathing or boiling water are) would have less of an impact on our own lives than the consequences those actions will have upon future persons. In the scenario above we justified our bombing of the radio station and subsequent destruction of innocent life on the

³⁷ See, for example: Persson, I., *From Morality to the End of Reason: An Essay on Rights, Reasons and Responsibility* (Oxford: Oxford University Press, 2013), p.140-159

basis that we intended to save (ideally a larger number of) the innocent lives of others. It was this initial good intention that outweighed the unintended (but, crucially, foreseeable) consequences of causing the deaths of innocent people through our bombing. When it comes to climate change however, my *intention* is to drive to the supermarket because carrying my shopping home on foot would be a chore. While there is nothing wrong with such an intention, it does seem reasonable to claim that it is outweighed if my drive causes severe harm to a vast number of other people (and I am fully aware that this is the case). It seems, then, that even if we believe the principle of double-effect to be valid, it (at least) cannot be applied to defend the most banal of day-to-day actions which will cause such significant harm to others if those others are appropriate objects of moral concern.³⁸

There remain, however, two key issues surrounding the relationship between intention and emission which will have a bearing throughout this thesis.

Firstly, as will be highlighted in Chapter 3, it is not an unquestionable truth that future persons *are* appropriate objects of moral concern. In fact, this thesis will demonstrate that, under a rights-based morality, they are not. As a result, the double-effect scenario is further complicated by the temporal distance between the current persons and the victims of the unintended consequences of their actions. This issue will be explored in greater detail in parts 3 and 4 of this section.

Secondly, many of the emission-producing actions of people living today might be legitimately labelled ‘subsistence emissions’. Such emissions would certainly include those associated with breathing and boiling water, but might be justly

³⁸ The status of less banal emission-producing actions is considered below and at various points throughout this thesis.

extended to include a wide range of other activities in the modern world such as heating one's home or driving from an isolated rural area in search of food or medical attention. The fact that we do not intend to harm others through our actions appears to be of greater relevance when we cannot easily avoid taking such actions. This is especially true if not taking such actions would cause harm to us. Under a rights-based morality, something is judged harmful when it is harmful to the rights of a right-holder. As Chapter 5 explains, a great many of our emission-producing activities are protected by rights, thus making their restriction a morally complex issue.

The Collective Nature of the Problem

My actions alone are not enough to cause climate change. The emissions I produce only make a difference to the global climate when taken in conjunction with the emissions of others. For some ethicists, such as Sinnott-Armstrong, this is enough to call into question the idea that there is anything inherently wrong with individuals producing even so-called 'luxury emissions'.

He highlights the difficulty with holding individuals accountable for climate change as follows:

There is nothing immoral about greenhouse gases in themselves when they cause no harm. Greenhouse gases include carbon dioxide and water vapour, which occur naturally and help plants grow. The problem of global warming occurs because of the high quantities of greenhouse gases, not because of anything bad about smaller quantities of the same gases. So it is hard to see why I

would have a moral obligation not to expel harmless quantities of greenhouse gases. And that is all I do by myself.³⁹

Sinnott-Armstrong acknowledges that, under certain circumstances, it is possible for a person to be held accountable for an action even if that action is neither necessary nor sufficient for the resultant harm to occur. He uses the example of five individuals pushing a car off a cliff with the passenger locked inside. He (correctly) asserts that it would be morally wrong to join in and help push, even though had I been the only one pushing no harm would have occurred, and had I not pushed, the same harm would have occurred as a result of the actions of the other five people.⁴⁰ He argues, though, that this situation is different from that of climate change for two reasons: firstly because I intend to cause harm to the passenger and secondly because my action is unusual.

As noted in the previous section, it is not clear that a lack of intention to cause harm should, in all circumstances, be enough to justify actions which nevertheless do cause harm, especially if that harm was knowable before the action was taken. Similarly, while it is true that my actions alone will only cause climate change if everybody else acts in a similar way, since I know fully well that everyone else *will* indeed act in a similar way, it does not seem reasonable that I should not be responsible for the negative knowable consequences to which such actions contribute.

³⁹ Sinnott-Armstrong, W., *Op.Cit*, p.337

⁴⁰ Sinnott-Armstrong, W., *ibid*, p.334

Of more interest is Sinnott-Armstrong's assertion that the banality of my action means that I should not be held accountable for its consequences. Perhaps a key difficulty with our emissions is not that we do not intend to harm others through them, but that ceasing such emissions would require drastic changes to the way we live our lives which may have serious negative consequences for current persons. While it did not seem unreasonable to prohibit the use of CFCs in aerosols in order to repair the hole in the ozone layer, it seems more questionable whether we might legitimately ask current persons to stop driving or taking flights and pay heavier taxes to meet adaptation burdens in order to protect temporally remote persons from harm.⁴¹ This is particularly true given that the harm that will be felt in the coming centuries partially arises as a result of the significant emissions of previous generations which remain in our atmosphere.

The collective nature of climate change, then, raises important issues about who (if anyone) ought to bear the burdens associated with mitigation and adaptation. The key theories surrounding such a question (the Polluter Pays Principle, the Beneficiary Pays Principle and the Ability to Pay Principle) are examined from a rights-based perspective in Chapter 6. The collective nature of the problem, though, is not merely of relevance with regard to the costs of preventing climate change but also in relation to how we think about climate change in general. This is most apparent in Chapter 4, where the fact that climate change cannot be caused by individuals undermines an otherwise valid objection to the non-identity problem.

⁴¹ The effects of such policies on the rights of current persons are examined in Chapter 5.

The Nature of the Victims

The reason that climate change represents such an interesting and morally complex subject for ethicists is the fact that those causing harm and those suffering from that harm lack contemporaneity. As McKinnon highlights, “...climate change presents problems of justice in global and intergenerational arenas that are unprecedented”.⁴² The vast majority of the victims of climate change (and, in all likelihood, *all* the victims of tipping points) will be future persons.

It was, until relatively recently, simply beyond the purview of ethicists to think that the (often innocuous) actions of current persons could have such disastrous effects on those individuals populating (sometimes very distant) future generations. As Parfit highlights, this is no longer the case: “Unless we, or some global disaster, destroy the human race, there will be people living later who do not now exist. These are *future people*. Science has given to our generation great ability both to affect these people, and to predict these effects.”⁴³

The important question, then, is that raised by Singer: “How do we adjust our ethics to take account of this new situation?”⁴⁴

One answer to this question (provided by people of different moral schools of thought for different reasons) is that we should not. This view - when proposed directly, as opposed to arising as the (often unintended) consequence of certain

⁴² McKinnon, C., *Op.Cit*, p.72

⁴³ Parfit, D., *Op.Cit*, p.355

⁴⁴ Singer, P., *One World* (London, Yale University Press, 2002), p.120

forms of reasoning⁴⁵ – is known as ‘presentism’. Howarth describes presentism as

...the view that the preferences of the present generation should play a dominant role in the formulation and evaluation of public policies. In this framework, the interests of future generations are pertinent only to the extent that the present generation holds an altruistic concern for its children, grandchildren, and subsequent descendants.⁴⁶

This view, Page suggests, is born out of a belief that

...the lack of mutual benefit (or reciprocity) that characterises dealings between members of different generations undermines the claims of future persons to resources currently at the disposal of existing persons. This is because, it is claimed, the scope of ethics and justice is determined by a principle of *reciprocity*.⁴⁷

Other scholars, such as Vandeheiden, argue that ‘neither spatial nor temporal distance between agents and their victims can excuse acts of intentional or predictable harm’.⁴⁸

The issue of whether and to what extent the potential nature of future persons affects what we can ask current persons to do in order to safeguard them is highly complex and will be returned to throughout this thesis. For now it is enough to highlight that the fact that the people who will suffer most from climate change do not currently exist will have a significant bearing on our moral decision making.

⁴⁵ Such as in the case of the ‘non-identity problem’, which will be discussed in Chapter 3.

⁴⁶ Howarth, R.B., ‘Intergenerational Justice’, in Dryzek, J.S., Norgaard, R.B., and Schlosberg, D., *Oxford Handbook of Climate Change and Society*, (Oxford, Oxford University Press, 2011), p.338

⁴⁷ Page, E.A., *Op.Cit*, p.10

⁴⁸ Vanderheiden, S., ‘Conservation, Foresight and the Future Generations Problem’, *Inquiry*, Vol. 49, Issue 4 (01 August 2006), pp.337-352, p.343

The nature of the victims of climate change is particularly relevant to supporters of rights since (as Chapter 2 highlights) they require individuals to possess rights if they are to be considered objects of moral concern and (as Chapter 3 explains) future persons fail to meet such criteria.

When Will the Negative Consequences be Felt?

Even those individuals who do currently exist and who *will* be harmed by the emissions we produce today are not harmed by them *now*. If a baby is born today and lives beyond the age of fifty, the negative effects of climate change s/he feels will have been caused, in part, by the emission-producing actions that other individuals conduct in the present.

The immense gap between cause and effect which exists in relation to climate-changing emissions raises the difficult question of when we might judge an action to be wrong – when we take the action, or when that action causes harm?

Additionally, if our only concern is with current persons, it seems likely that – if we bear any duty at all before our actions cause harm – that duty might legitimately be adhered to through the meeting of an additional financial burden in order to adapt to the harms we cause as and when they occur. This is because, as previously noted, in the short-term we will almost certainly be able to protect the relatively small number of people who are alive today and will still be alive to feel the effects of the emissions we produce now through adaptation measures alone.⁴⁹

At this point in time, future persons with whom we will lack contemporaneity are the only individuals whose welfare necessarily relies upon mitigation.

⁴⁹ Such an approach is, however, not compatible with all types of rights-based morality. This issue is examined in Chapter 6.

Why a Rights-based Approach?

Given the plethora of existing systems of morality, it is not unreasonable to ask why this thesis should focus on rights-based moral systems. The question seems particularly relevant when we consider that the thesis will ultimately argue that rights-based moralities are unable to provide appropriate answers to the climate change problem.

The first reason for a focus upon rights-based moral systems is the fact that rights will be threatened both by climate change and its potential remedies.

Climate change represents the greatest single threat to humanity in history. It is already causing enormous damage to rights. The right to health of millions is threatened by an increase in diseases like malaria and cholera. The right to food of millions more is put at risk by an increased number of droughts. And an increase in extreme weather events provides a further threat to rights to shelter and life. If climate change is left unchecked, such problems are only likely to grow in the future. That future will also bring with it entirely new problems which are especially relevant to issues of rights. What, for example, happens to rights surrounding nationality, asylum and 'statelessness' when one's state is entirely submerged by rising seas?

Perhaps more interesting is the moral status of the sacrifices current persons will need to make in the near future if the aforementioned damage to rights climate change will cause (and is causing) are to be lessened. Mitigation and adaptation techniques will come at a considerable financial cost – money which arguably might otherwise have been spent protecting a wider range of rights (as opposed to just those endangered by climate change) more effectively. Of even more concern and confusion is the fact that the enforcement of such techniques actually appears to come into conflict with the rights of current persons. These issues are examined in Chapter 5.

The second reason, which strongly informs attitudes of supporters of rights in relation to the aforementioned issues, is the moral status they assign to future persons. As Chapter 3 explains, future persons cannot be said to possess rights which confer correlative duties upon current persons in the present. In light of this, it is important to explore whether and how combatting climate change can be justified solely on the basis of the damage it does to the rights of current persons, particularly when we consider that those current persons' rights are also endangered by measures taken to protect against climate change. This issue is considered in Chapter 6.

Both of these reasons for a focus on rights, one might argue, are derived from the particular difficulties which rights-based moralities face when confronted with the issue of climate change. This is undoubtedly true. I make no apology, however, for deliberately targeting rights-based moralities with the specific aim of exposing their inadequacies in this area. Any moral system worth its salt should be able to provide its followers with adequate answers to big ethical questions like those

posed by climate change. The fact that rights-based systems seem to struggle with climate change is, in itself, a very good reason for an in-depth investigation of the relationship between rights-based moral systems and climate change.⁵⁰ It is not, however, the only reason for such an investigation.

The other primary reason for a focus upon rights-based moralities is that they seem, in many ways, to be the most obvious and appropriate moral systems for considering issues relating to climate change. As Langlois asserts, “[t]oday...the language of human rights has become globally recognised as a response to injustice.”⁵¹ Climate change, one might argue, represents the globalisation of injustice. The emissions of some will come to have extreme negative effects upon others who are geographically, culturally and even temporally remote from them. Ideally, then, the rightness and wrongness of these emissions should be judged by a moral standard which both polluter and victim endorse. Rights-based moralities would seem to be the strongest candidates for meeting such a standard.

As Chapter 2 explains, the rights with which rights-based moralities are concerned are human rights. While such systems may not follow the logic or content of established human rights *law*, all are egalitarian in nature and are indiscriminate with regard to which (current) individuals ought to possess which rights. Given that climate change is similarly indiscriminate in selecting its victims, this egalitarian aspect of rights-based moral systems provides further reason for

⁵⁰ Were the relationship between a particular moral system and climate change a simple or straightforward thing it would hardly be worth exploring in any great detail.

⁵¹ Langlois, A.J., ‘Normative and Theoretical Foundations of Human Rights’, in Goodhart, M. (ed.), *Human Rights: Politics and Practice* (Oxford: Oxford University Press, 2009), p.12

thinking them a highly appropriate means of judging the moral status of our pollution.⁵²

Moreover, this widespread application of human rights is not merely conceptual in nature. As Morinsk highlights, the adoption of the Universal Declaration of Human Rights (UDHR) in 1948 “profoundly changed the international landscape, scattering it with human rights protocols, conventions, treaties, and derivative declarations of all kinds.... [There is now] not a single nation, culture or people that is not in one way or another enmeshed in human rights regimes.”⁵³ With this fact in mind, Donnelly draws upon Rawls’ idea of an ‘overlapping consensus’ and applies it to human rights, claiming that “there is an international overlapping consensus on the Universal Declaration model.”⁵⁴ He argues that:

Human rights have moral and political authority that goes well beyond their backing by power (force). They dominate contemporary political discussions not only, or even primarily, because of the support of materially dominant powers but rather because they respond to some of the most important social and political aspirations of individuals, families, and groups in most countries of the world. Human rights have become internationally ‘hegemonic’ in a Gramscian sense of the term.⁵⁵

⁵² It should be noted that I consider the rights that are the concern of rights-based moral systems to be human rights *only* in the sense that they are rights held by *all* humans *because* they are human. As Chapter 2 explains, different rights-based moralities differ substantially in the content of the rights they impose and the duties they feel to be the correlatives of such rights. Sometimes, such as in the case of Nozick, these differences will be so great that it is difficult to view the rights that are being defended as human rights *except* in the sense that they are rights which are held by all humans as a result of their humanity. In other words, for the purposes of this thesis, human rights are defined by their justification as opposed to their content.

⁵³ Morinsk, J., *The Universal Declaration of Human Rights: origins, drafting and intent* (Philadelphia: University of Pennsylvania Press, 1999), p.x

⁵⁴ Donnelly, J., *Universal Human Rights in Theory and Practice (2nd Edition)* (Ithaca, New York: Cornell University Press, 2003), p.40

⁵⁵ *Ibid*, p.40

I am not absolutely convinced of an overlapping consensus among *individuals* of a *UDHR* model of human rights.⁵⁶ However, Donnelly's claim does have a strong element of validity in as much as the UDHR has come to represent a moral language adopted by all legitimate states in their discussions of right and wrong as well as forming a list of principles to which lip-service is near-universally paid (regardless of the practical reality of the behaviour of states when it comes to protecting and respecting human rights).

While the UDHR certainly provides a potential starting point for supporters of rights-based moral systems, it is far from a necessity for such individuals. People can (and do) consistently disagree with many of the rights listed within the UDHR (let alone the interpretation of the duties such rights are said to bestow upon others) whilst remaining supporters of rights. Therefore, even if there is an overlapping consensus when it comes to the values and basic qualities held sacred by supporters of human rights, it is arguable as to what extent the UDHR represents the best way of realising those values and qualities.⁵⁷

Furthermore, one would have to question the extent to which *individuals* from all societies (especially non-Western societies) have, in fact, reached a consensus on the opinion either that all of the qualities rights aim to protect ought to be held to be morally sacrosanct, or that, even if they are, rights are the best way of protecting such qualities.

⁵⁶ As I will go on to contend, the idea of an overlapping consensus - at an individual level - in favour of *some* form of universal human rights *does* seem plausible. It is only the idea that this should surround a UDHR model that I find contentious.

⁵⁷ The work of Nozick, for example, while undoubtedly egalitarian and rights-based, would seem difficult to align with a UDHR model. This issue will be examined in Chapter 2.

Both of these potential objections, though, are somewhat overcome by the fact that Donnelly refers to an overlapping consensus on human rights as a system of *political* morality. When he speaks of an overlapping consensus, he speaks of a consensus among states that they be responsible for the basic rights of their citizens and among those citizens that such a role is appropriate for states. For Donnelly, then, human rights are about relations (both moral and legal) between states and citizens.

While this fact does not make Donnelly's claim of overlapping consensus irrefutable, it does help us to see the relevance of his argument in underlining the value of a rights-based approach to climate change. It is governments who will need to implement the policies necessary to ensure programmes of adaptation and mitigation are large enough and successful enough to have a meaningful effect upon climate change. (And, as Chapter 5 will demonstrate, it is governments who will risk violating the human rights of their citizens in doing so.) Regardless of what they do in practice, almost every government in the world pays lip service to human rights. As Goodhart puts it, "[w]hile the idea of human rights has provoked sometimes sharp controversy, it has nonetheless become the dominant normative or moral discourse of global politics and a major standard of international legitimacy."⁵⁸ It is for this reason that rights-based moralities might be considered the most appropriate moral systems by which decisions about combatting climate change should be judged. Human rights are universal (or at least universalisable) in a way that Christianity or even utilitarianism never could

⁵⁸ Goodhart, M., "Introduction: Human Rights in Politics and Practice," in Goodhart, M. (ed.), *Human Rights: Politics and Practice* (Oxford: Oxford University Press, 2009), p.2

be.⁵⁹ Regardless of whether they make any real effort to ensure that human rights are realised, or of whether they agree on the content of human rights, there exists a good deal of agreement between governments that human rights exist and that they give us an appropriate language through which to consider the fundamental problems facing human beings at a national and international level. And if governments across the globe are to successfully address the problems that will affect people living in every state in the world, having a single, agreed-upon ethical language through which to frame their concerns would be a good starting point.

Finally, while their number has increased in recent years, academic studies considering climate change from a rights-based perspective remain relatively few and far between. Those that do exist predominantly focus upon legal (as opposed to moral) rights and the relationship between such rights and the effects of climate change. With this in mind it seems there is room for a thorough investigation of the relationship between *moral* rights, the effects of climate change, and the burdens associated with protecting others against those effects. This thesis aims to provide a tentative entry point to such a debate.

⁵⁹ What I mean by this is, while it is theoretically possible for everyone on Earth to become a Christian or a Utilitarian, those who are not already of such a persuasion would need to drop their current belief systems in order to do so. On the other hand, it seems that people of particular religious and/or philosophical persuasions might actively endorse human rights in some form without abandoning their own primary moral doctrines. Thus, people with radically different moral beliefs might, for different reasons, feel it appropriate for all humans to be considered to possess certain rights without needing to agree upon why they should do so.

Conclusion

This chapter has discussed the nature of the science surrounding climate change and the ethical issues which emerge from it. The problem is perhaps best summed up by McKinnon when she states:

The climate change we are experiencing requires swift, far-ranging, globally coordinated and probably very unpopular political action. Depending on the action taken in the next ten to twenty years, the current generation will either stand as the cohort who pulled humanity back from the brink of environmental disaster – possibly even from extinction – or as the cohort who missed the last big opportunity to do so. The current generation did not create the climate change problem (although many of us are doing much to exacerbate it), and are horribly unlucky in having been born at a time in human history when the science that reveals the scale and potential devastation of anthropogenically caused climate change is maturing just in time to show how little time we have left to do something about it.⁶⁰

Current persons are, then, largely the victims of circumstance. The primary reasons that we have to make such difficult decisions are as follows:

- The size of the current generation is unprecedented;
- The technology we use every day (to which viable alternatives are not widely available) produces vast amounts of GHGs;
- This technology is more widely available than ever before;

⁶⁰ McKinnon, C., *Op.Cit.*, p.2. Just how much time we have to ‘do something about’ climate change is, in fact, particularly unclear. This is partly because it is difficult to predict with any great accuracy the correlation between our emission levels, the length of time they remain at such a level, and the climate-related harm that will occur. It is undoubtedly true that, should humanity continue to pollute at the current rate, we will cause significant damage to present and future persons. It also seems very likely that such behaviour will eventually lead to us crossing a tipping point beyond which adaptation ceases to be a possibility. What is far less predictable is exactly when we will reach such a tipping point. The certainty with which McKinnon asserts that, within the next ten to twenty years, pollution will rise to a level where the eventual crossing of a tipping point becomes unavoidable seems decidedly questionable.

- The atmosphere is already heavily laden with emissions of previous generations who had little or no idea of the problem they were causing.

None of these factors are the fault of the current generation, yet, as the first generation to be fully aware of both the nature and temporal closeness of the problem, many people would feel that current persons are under a duty to make the sacrifices necessary to tackle it. Responses to the question of which sacrifices (if any) current persons can be asked to make will vary considerably depending on the particular moral systems we adopt and the ways in which such systems view future persons. This thesis will demonstrate that all rights-based moral systems struggle (albeit in different ways) to justify a suitable combination of both adaptation and mitigation methods as a result of their inability to assign significant moral worth to future persons.

CHAPTER 2: RIGHTS-BASED MORALITIES

Introduction

Rather than analysing the ability of a specific rights-based morality to effectively deal with climate change, this thesis takes on the more ambitious task of highlighting the problems faced by rights-based moralities *in general* in this area. With this in mind, this chapter seeks to outline those qualities which must apply to all rights-based moral systems, while also highlighting some of the key differences which might reasonably occur between such systems.

The chapter begins by identifying the basic qualities which must apply to any moral system which might be considered rights-based. It then outlines the ways in which the rights which are to be protected by such systems might be decided upon.

Having highlighted these more generic features, the chapter goes on to examine specific rights-based moralities in order to illustrate the finer details of their inner workings as well as the significant differences that occur between them. The chapter outlines Interest and Choice Theory as well as Nozick's libertarian proposal for a rights-based morality stemming from natural rights. Each of these theories has been the subject of criticism from both supporters and sceptics of rights.⁶¹ I make no attempt to endorse any of the theories discussed. Rather, I investigate each in order to provide a broad spectrum of what rights-based

⁶¹ This is particularly true of the work of Nozick, which has been subject to significant criticism. As I will argue, regardless of whether such criticism is justified (and much of it is), Nozick's theory remains the clearest possible example of a rights-based morality and thus merits serious consideration in any attempt to provide an overarching assessment of such systems.

moralties might entail in order that the problems with such theories when applied to climate change can be shown to be problems with rights-based moralities in general, as opposed to problems which can be dismissed as faults with one specific rights-based morality.

The chapter concludes by examining under which circumstances (if any) rights-based moralities might allow rights to be restricted/overridden.

Rights-Based Moralities

Before embarking upon an investigation into the validity of rights-based moralities with regard to climate change, it is crucial to pin down exactly what is meant by the term ‘rights-based morality.’ This section aims to elucidate the point at which a moral system might be legitimately considered rights-based as well as considering the nature and content of the rights in question.

To say that a moral system is rights-based must be to say something more than it is a system which uses rights. Many moral systems could (and do) use rights as a way of achieving their goals. Utilitarians, for example, might feel rights could be used to ensure the greatest good for the greatest number is achieved in practice.

Yet to label systems which use rights in this way as rights-based moralities would render the distinction close to meaningless. As Nozick puts it, “[u]tilitarianism doesn’t, it is said, properly take rights and their nonviolation into account; instead it leaves them a derivative status.”⁶² In order to be considered rights-based, then,

⁶² Nozick, R., *Anarchy, State, and Utopia*, (Oxford: Basil Blackwell Ltd, 1986), p.28

a moral system must consider the non-violation of rights to be the basis of right and wrong.

This distinction, though, is not a simple one to pin down. Even Nozick, whose philosophy is as ardently rights-based as it is possible to imagine, notes that rights are to act as side constraints on the achievement of goals which are not, in themselves, rights-based.⁶³ Yet this is surely a claim which could be made of any moral system which uses rights. The difference with a rights-based morality, then, is the strength that is assigned to those side constraints.

To be considered rights-based, a moral system must hold the securing of inviolable individual rights to be the highest possible moral objective. The purpose of rights is to constrain the actions which might be taken in pursuit of a particular goal, regardless of how admirable that goal may be, if said actions conflict with rights. Under moral theories which are truly rights-based, rights may only be sacrificed, restricted or overridden in the name of other rights. They must be more than simply convenient tools which might happily be abandoned in the name of some sort of ‘common good,’ ‘general welfare’ or any other worthy higher purpose unless that good/welfare/goal is itself in some important sense rights-based (indeed, as shall be noted later in the chapter, for thinkers like Nozick even this will not be a good enough reason to justify the sacrifice of rights). Exactly which rights may be sacrificed/restricted/overridden and under which circumstances is a complicated issue which will be returned to at the end of this chapter.

⁶³ *Ibid*, p.29

In summary, the first key element which defines a morality as rights-based is the strength it assigns to rights. To put it simply, rights-based moralities use rights to determine the most fundamental aspects of right and wrong. As a result, it would be impossible for rights to be usurped by non-rights-based goods since the very fact that such goods are not the objects of rights is itself evidence of their lesser status.

It is important, at this point, to emphasise the second sentence of the above paragraph. The second key element of rights-based moralities is the fact that the rights therein *only* determine the *key* areas of right and wrong. Rights-based moralities are concerned only with what Raz would label ‘narrow morality,’⁶⁴ which he describes as follows:

Morality in the narrow sense is meant to include only all those principles which restrict the individual's pursuit of his personal goals and his advancement of his self-interest. It is not ‘the art of life’, i.e. the precepts instructing people how to live and what makes for a successful, meaningful, and worthwhile life. It is clear that right-based moralities can only be moralities in the narrow sense.⁶⁵

Rights-based moralities, then, cannot tell us whether it is wrong to have sex outside of marriage or to swear in the presence of the elderly. Instead, they focus on those elements of existence which are crucial to all human beings if they are to have a minimally good life. This brings us to the third key element of rights-based moralities: they are universal. It is this universality which leads their

⁶⁴ Raz, J., *The Morality of Freedom*, (Oxford: Oxford University Press, 1988), p.213

⁶⁵ *Ibid*, p.213

supporters to feel rights to be a particularly useful way of providing moral regulation on relationships between states and citizens.

Rights-based moralities are derived in the abstract and, therefore, are not, according to their authors, based upon life within a particular society.⁶⁶ As will be examined further in the next section, the moral systems they propose are founded upon the idea that there exist certain core qualities which are highly valued and thought to be essential by all humans, universally.

If a morality is universal, then when that morality is based upon certain core rights, those core rights (or at least the majority of them) will apply universally.⁶⁷ And if the rights at the core of rights-based moralities apply to *all* humans (and only humans) *because* (and only because) of their humanity, then they must be considered to be *human rights* (as opposed to, say, the specific rights which emerge from being a citizen of a particular country or from being party to a contractual agreement). As Gewirth puts it, “[h]uman rights are rights or entitlements that belong to every person; thus, they are universal moral rights.

⁶⁶ While there is a substantial body of work which argues that the concept of human rights is western in nature and frequently amounts to an imperialist enforcement of western values upon other cultures, this is not a position which is endorsed or accepted by those who found their moral theories upon rights.

⁶⁷ It is possible that there may be certain rights within a rights-based morality that are unsuitable for universalisation, but these will be the exception, not the rule and will emerge from justificatory principles which *are* universal. They are applied to ensure that the principle which rights are designed to protect/enhance - and/or some of the general rights themselves - are adequately enjoyed by all people. For example, individuals from a Romany background may have rights pertaining to the availability of adequate caravan sites since living in a caravan is an important part of their cultural and/or religious beliefs and way of life. While this specific right would not apply universally to all people, it is derived from the right to partake fully in one’s cultural life and maintain one’s cultural practices which *is* universal as is the principle it is derived from (whether that principle be the idea of fundamental interests, a capacity for choice, or pre-existing natural rights).

There may of course be other moral rights as well, but only those that morally ought to be universally distributed among all humans are human rights.”⁶⁸

A primary task for any rights-based morality, then, is to establish *why* there are certain rights that all human beings should have and which rights these should be.

How Do We Determine Which Rights Are Human Rights?

Having established that the rights with which rights-based moralities are concerned are human rights, the next question to emerge is *which rights are human rights?*

When it comes to moral (as opposed to legal) rights this is not a question which can be answered with a definitive list. Different moral systems may include significant variation in those aspects of morality they feel warrant the special status of being protected by a human right while still being legitimately considered rights-based moralities.

Having said this, the rights espoused by legitimate⁶⁹ rights-based moralities cannot be derived at random. There must be some examinable reasoning behind

⁶⁸ Gewirth, A., *Human Rights: Essays on Justification and Applications* (Chicago and London: University of Chicago Press, 1982), p.42

⁶⁹ As indicated earlier in this chapter, in order to be legitimately considered to be a rights-based morality a moral system must have rights at its core and derive guidance on which actions are right and wrong on the basis of whether those actions violate or enhance rights. A moral system which simply uses rights as a convenient tool through which to achieve a particular goal / fulfil a particular principle, but which does not hold rights to be an inevitable truth could not be considered legitimately rights-based. Utilitarians, for example, might seek to use rights as a means of achieving the greatest good for the greatest number. Similarly, as Beyleveld suggests, Kantians might use rights as a way of fulfilling the categorical imperative. (Beyleveld, D., 'Korsgaard v. Gewirth on Universalization: Why Gewirthians are Kantians and Kantians Ought to be Gewirthians,' *Journal of Moral Philosophy* 12 (2015), 573-597). However, the fact that both of the aforementioned theories can take or leave rights demonstrates that they are not rights-based.

the choices of which aspects of human existence are deemed to be appropriate objects of rights. This reasoning tends to boil down to some form of one of two justificatory models: Choice Theory or Interest Theory.⁷⁰

Choice Theory places the free exercise of choice at the foundation of the human rights doctrine. Choice theorists feel that “to be a human agent is to possess both the condition of liberty and sufficient opportunities for exercising one’s liberty”.⁷¹ As such, they believe that the “purpose of human rights is to secure and promote the exercise of free choice”⁷² for all humans, equally. For choice theorists, then, the appropriate objects of rights are those conditions which are essential to the full and free exercise of liberty.

Individuals who support rights but are opposed to the idea that liberty forms a sufficient basis for their justification turn to universal human interests as the justification for human rights. Some form of Interest Theory is put forward in various guises by numerous theorists, including Sen, Nussbaum and Finnis. The Interest Theory approach is summarised by Fagan:

The common basis for the interest theory approach consists of the appeal each theorist makes to the existence of fundamental human interests. Human beings are viewed as physiological and social agents who require the sufficient protection and promotion of certain interests in order to be human. These interests pre-exist, so to speak, the institution of human rights and social

⁷⁰ The key exception to such schools of thought comes in the form of natural rights theories which assert that human beings somehow naturally possess rights which exist prior to society and which must therefore be respected within that society. Nozick is the most prominent defender of such a position in the modern era and his ideas will be examined in greater detail later in this chapter. Natural rights are not discussed in this section because they provide little in the way of reasoning as to how we might identify which rights it is that are ‘natural’ to all human beings or why.

⁷¹ Fagan, A., ‘Choice Theory’, *Essex Internet Encyclopaedia of Human Rights*. Available at: https://www.essex.ac.uk/hrc/research/publications/EIHR/c.aspx#Choice_Theory. Last accessed: 24 January 2014.

⁷² *Ibid*

institutions more generally. That is to say, human rights are viewed as grounded in our very nature and exist in order to promote and protect those interests which constitute us: human rights are viewed as the mechanism through which these interests are best identified and secured.⁷³

Rather than focussing upon choice as the essence of what it means to be human, then, interest theorists hold that there are numerous crucial basic interests which all human beings commonly have merely by virtue of their humanity. The universality and primary nature of these interests is what qualifies them as being suitable objects for the protection of rights.

If asked to compile a conclusive list of human rights, it seems unlikely that interest theorists or choice theorists would be able to agree upon exactly which rights should be included even among themselves.⁷⁴ The differences between the rights listed by one group to those in the other are likely to be all the more abundant. It is for this reason that no attempt is made here to outline exactly which rights we are referring to when we speak of rights-based moralities. Such rights might vary substantially between any two theories without undermining the claim that either one genuinely meets the criteria of a rights-based morality.

Having said this, there would appear to be certain rights which one might think ought to be common to all rights-based moralities if those moralities are to be

⁷³ Fagan, A., *Human Rights: Confronting Myths and Misunderstandings* (Cheltenham: Edward Elgar Publishing Ltd, 2011), p.9

⁷⁴ See, for example, Nussbaum's attempt to create a list of 'fundamental capabilities' which she feels to be universal to all humans and about which she feels wildly variant moral theories can come to an 'overlapping consensus' (Nussbaum, M., *Creating Capabilities: The Human Development Approach* (Cambridge, Mass.: Harvard University Press, 2011) p.33-4). This list has received wide and variant criticism by numerous scholars, with some asserting that it misses certain invaluable capabilities and others arguing that those it does list are far from universal (Wells, T., 'Sen's Capability Approach', *Internet Encyclopaedia of Philosophy*. Available at: <http://www.iep.utm.edu/sen-cap/#H7>. Last accessed: 09 December 2016.

thought legitimate (although the form in which such rights appear may still vary).

Rights to life and freedom from torture would, among others, appear to be appropriate candidates for inclusion on such a list.⁷⁵

In summary, while the exact contents of the rights that any rights-based morality holds as central might vary considerably, in order for the rights they espouse to be considered legitimate, the objects of those rights must be concerned with those aspects of life which are fundamental to a minimally good human existence.

Having outlined the key characteristics commonly held by all moral systems which are truly rights-based, I will now move on to examine two specific examples of rights-based moralities – put forward by Nozick and Gewirth respectively – in order to better outline some of the implications of placing rights at the heart of our moral reasoning, as well as highlighting the vast differences which can exist between different types of rights-based morality.

⁷⁵ Having said this, the manner in which such rights are formed and the principles which justify them may vary substantially. Shue, for example, defends such rights very directly, believing that “people have a basic right to physical security – a right that is basic not to be subjected to murder, torture, mayhem, rape, or assault” (Shue, H., *Basic Rights* (2nd Edition) (Princeton: Princeton University Press, 1996), p.20). He argues that such a right is justified because “its absence would leave available extremely effective means for others, including the government, to interfere with or prevent the actual exercise of any other rights that were supposedly protected” (*Ibid*, p.21). Shue, then, argues (quite plausibly) that those rights I have identified as being common to all rights-based moralities possess this commonality because rights-based moralities simply cannot function effectively without them. Such rights are justified, at least in part, by their instrumental value.

For other theorists, these common rights exist because they are inarguably justified by the overarching principles that justify *any* rights. Finnis, for example, believes that rights are justified by seven key interests which are universally held by all humans. First among these is a right to life which, for Finnis, would encompass a right to be free from torture, since he notes that: “The term ‘life’ here signifies every aspect of the vitality (*vita*, life) which puts a human being in good shape for self-determination. Hence life here includes bodily (including cerebral) health, and freedom from the pain that betokens organic malfunctioning interests” (Finnis, J., *Natural Law and Natural Rights* (Oxford: Oxford University Press, 2011), p.86).

There is not space here to produce a definitive list of rights-based moralities and their varying attitudes to the way in which they seek to defend rights to life and freedom from torture. Sufficed to say that I can think of no rights-based theory that would not assign some version of such rights.

Nozick

Lomasky describes Nozick's *Anarchy, State and Utopia* as the twentieth century's "...most ambitious attempt to define the limits of the politically permissible by reference to Lockean-type natural rights."⁷⁶ The very first sentence of *Anarchy, State, and Utopia* is the very essence of a rights-based morality. The claim that individuals possess moral rights is presented as an indisputable fact. Indeed, if we take the first three sentences of the book, it becomes clear that Nozick believes in a right-based morality in its strongest imaginable form:

"Individuals have rights, and there are things no person or group may do to them (without violating their rights). So strong and far reaching are these rights that they raise the question of what, if anything, the state and its officials may do. How much room do individual rights leave for the state?"⁷⁷

Essentially, Nozick acknowledges that human beings will realise their natural rights more fully within a society than they would within the state of nature, and societies require some sort of state. 'State' in this context refers to an overarching system of rules designed to regulate the behaviour of 'citizens' and a governmental body with the authority to enforce those rules. For Nozick, then, the primary purpose of rights is to delineate those areas of life which are so crucial to what it is to be human that no other individual, or the state, may interfere with them, even if doing so would significantly improve the lives of others. The primary purpose of the state is to ensure that this non-interference is adhered to.

⁷⁶ Lomasky, L.E., *Persons, Rights, and the Moral Community* (Oxford: Oxford University Press, 1987), p.9

⁷⁷ Nozick, R., *Op.Cit.*, p.ix

The rights (or, rather, the duties associated with those rights) Nozick speaks of, then, are *negative* in nature. Rights simply prohibit others from taking certain actions against us, they do not simultaneously require those others to take additional actions to ensure that our rights are fully realised. So if A is bitten by a snake and cannot afford the antidote, and neither A's being bitten or poverty is the fault of B, then B is under no duty to provide A with the antidote, even if he is easily able, both practically and financially, to do so. This remains true whether B is an individual or a state. As Nozick puts it, "...your being *forced* to contribute to another's welfare violates your rights, whereas someone else's not providing you with things you need greatly, including things essential to the protection of your rights, does not *itself* violate your rights, even though it avoids making it more difficult for someone else to violate them."⁷⁸

As a result of this, he feels that taxation represents a violation of rights akin to forced labour,⁷⁹ a fact which he fully acknowledges might mean that the end goal of a successful, functioning state cannot be reached through any "...morally permissible available means."⁸⁰ While Nozick acknowledges that some limited

⁷⁸ *Ibid*, p.30. This central element of Nozick's theory has come in for wide and varied criticism. Singer, for example, is largely convinced by Nozick's argument against positive duties which are the correlative of rights, but feels that such a (correct) conclusion only serves to demonstrate that we ought to drop rights-based moral theories in favour of some form of utilitarianism (Singer, P., 'The Right to be Rich or Poor', in Paul, J., *Reading Nozick: Essays on Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1981), pp.37-56). An alternative objection is put forward by those who wish to endorse rights-based moral systems without adopting Nozick's position on the imposition of positive duties and the consequences which emerge from this. The most notable and sophisticated rejection of the alleged dichotomy between positive and negative duties comes from Shue, who argues that positive duties are an essential part of any workable theory of rights (see, for example: Shue, H., 'Mediating Duties', *Ethics*, 98 (1988), 687-704). For a more detailed argument as to why Shue must be correct in his assertions that positive duties are not only acceptable under, but also necessary to, rights-based moralities (and why O'Neil is mistaken in her criticisms of his position), see: Ashford, E., 'The Alleged Dichotomy Between Positive and Negative Rights and Duties', in Beitz, C.R. and Goodin, R.E., *Global Basic Rights* (Oxford: Oxford University Press, 2011).

⁷⁹ Nozick, R., *Op.Cit*, p.169-170

⁸⁰ *Ibid*, p.172

aspect of taxation must be permissible in order to fund the functions of a state which better protect those rights we possess in the state of nature and thus justify the existence of that state, any contribution to the positive realisation of the rights of others must be voluntary in nature.⁸¹

The reasoning behind Nozick's conclusions on the nature of a rights-based morality stems from his commitment to individualism.⁸² For Nozick, individuals are the *only* legitimate subjects of rights.

Nozick argues that rights prohibit certain actions on the basis of "the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent.

Individuals are inviolable."⁸³ It is the fact that this inviolability is protected by rights that prevents those rights from being sacrificed in the name of some collective good. Indeed, for Nozick, since individuals are the relevant unit of moral concern, the idea of a collective good simply fails to make sense at all. As he puts it:

...there is no *social entity* with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits others. Nothing more. What happens is that something is done to him for the sake of others. Talk of an overall social good covers this up. (Intentionally?) To use a person in this way does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has. *He* does not get some overbalancing good from his sacrifice, and no one is entitled to force this upon him – least of all a

⁸¹ *Ibid*, p.265-268

⁸² This is, however, not to claim that Nozick's opinions about positive duties are a necessary and unavoidable consequence of his commitment to individualism. Supporters of other rights-based systems can and do coherently support the notion of individual rights and positive duties simultaneously.

⁸³ *Ibid*, p.31

state or government that claims his allegiance (as other individuals do not) and that therefore scrupulously must be *neutral* between its citizens.⁸⁴

In summary, Nozick feels that individuals are the ultimate unit of moral concern and the state is only justified to the extent that it makes individuals better off than they would be in the state of nature. The purpose of rights is to prevent other individuals and the state from taking certain actions against us under any circumstances. Due to this focus upon individuals, the very concept of a collective good that could justify the sacrifice of individual rights would be incoherent for Nozick.⁸⁵

Criticisms of Nozick

Nozick can be criticised on two main grounds.

Firstly, his work is particularly vulnerable to the criticism of naive individualism which is often levelled at rights-based moral theories. Gewirth summarises such an objection as follows:

The emphasis on rights, it is held, entails the view that persons have rights but no duties towards others, that they are preoccupied only with claiming their own property and other goods and

⁸⁴ *Ibid*, p.32-33

⁸⁵ Such a position is one of the more controversial aspects of Nozick's theory. Supporters and detractors of rights alike frequently cite the importance of particular types of social and cultural environment to the realisation of rights-based moralities. See, for example, Gewirth, A., *Op.Cit*, p.19 and Raz, J., *Op.Cit*, p.201-6.

holding them to be inviolable, so that any attempts to enforce duties for the benefit of other persons or the general welfare are deemed morally wrong.⁸⁶

Unlike other supporters of rights, Nozick would largely agree with such a statement (although he would hold that the only duties we have are negative duties to avoid taking actions which violate rights and such duties *would* therefore be owed to other individuals). Essentially, Nozick's work mirrors the Thatcherite assertion that there is no such thing as society, and that only individuals can be deemed appropriate subjects of morality (in Nozick's case through the ascription of rights). Many would feel that such an approach failed to recognise the fact that human beings are only able to fully realise their rights within a society in which others took positive action to assist that realisation and thus also failed to assign appropriate moral weight to collective goods, which may be directly and/or indirectly antecedent to that realisation.⁸⁷

The second major criticism of Nozick is that, due to the fact that his theory is founded upon the undefended⁸⁸ claim that human beings possess natural rights which are so strong that they form the basis of what states and others can and

⁸⁶ Gewirth, A., *Op.Cit*, p.18

⁸⁷ Of course, such a criticism, even if we agree with it, is not necessarily evidence of any kind of logical miscalculation on Nozick's part. Rather, those who feel (as many Interest and Choice theorists do) that a full realisation of rights requires positive duties are simply articulating a different idea of what a right is which is incommensurable with that put forward by Nozick.

⁸⁸ By 'undefended', I do not mean to suggest that Nozick has plucked his idea that human beings possess rights out of thin air. Nozick dedicates the first chapter of *Anarchy, State, and Utopia* to explaining why he uses state of nature theory – specifically that put forward by Locke – as the starting point for his investigation of which powers a state should have. He does not, however, acknowledge that to adopt such a starting point is to begin at stage two of the argument. The question of *why* we should adopt Locke's position – and, thus, why human beings ought to be considered to have any rights, let alone those set forth by Locke – is not defended. Some, including myself, find this an odd omission given that the idea that humans would have rights in any meaningful sense in a state of nature would seem to be a deeply controversial claim.

cannot do if they are to act morally, that theory is more akin to dogma than reasoned argument.

But is Nozick's argument that individuals have rights as dogmatic as it seems?

All arguments in favour of rights-based moralities begin with some sort of assumption. Gewirth, for example, assumes that an ability to take action and to choose which actions to take is central to human functioning. Interest theorists, on the other hand, assume that there are certain fundamental interests which are universal to all humans and which are so important as to justify the existence of a system of universal rights to protect them.

Nozick's assumption (which is shared by others) is that human beings possess natural rights. These rights, which are possessed in the state of nature by all humans, form the basis of why and how we might possess rights within a society.

We can, of course, undermine Nozick's argument by denying the truth of this assumption, but we might equally deny the assumption that fundamental interests or a capacity for action are significantly important to warrant the imposition of rights. This is not to deny that interests or a capacity for action exist at all, but simply to argue that Interest and Choice theorists both fail to provide a conclusive explanation of why such things should automatically require us to adopt a rights-based morality, given that a) either or both could surely be protected in other ways, and b) we may feel that other universal human characteristics are of equal or greater importance in terms of justifying our moral thinking. Indeed, this is shown by the very existence of *both* interest *and* choice theorists. Even among supporters of rights-based moralities, some do not think human interests (which

they surely believe exist) are sufficient to justify rights, whereas others do not think a capacity for action has this status.

The fact that Nozick's theory is based upon an assumption is not, in itself, enough to deny its validity as a rights-based morality. Having said this, the strength of that founding assumption will inevitably affect the strength of the theory as a whole and the assumption that individuals have natural rights seems eminently more deniable than the assumption that individuals have fundamental interests or a capacity for action. As noted above, for Choice and Interest theorists, the question is not whether we have a capacity for action or fundamental interests, but whether these things are sufficient to justify the claim that morality is (or should be) rights-based. With regard to Nozick, however, we might question not just whether the rights we have in a state of nature warrant the imposition of a correlative rights-based morality, but also whether we really have natural rights at all.

In what sense, one might ask, are natural rights, rights?

Take, for example, liberty. We undeniably have the *quality* of liberty in the state of nature in that we are, by and large, free to do whatever we are able to do. It is questionable, though, whether this amounts to a *right* to liberty. Can we really have a right to something in any meaningful sense in the absence of a state which (at least theoretically) holds the power to enforce that right and punish those who violate it?

I do not propose to answer such a question here, but rather to highlight that the idea of natural rights is far more controversial than the idea of fundamental interests or a capacity for action. As Gewirth, highlights, we do not *have* rights in

the same way we *have* limbs⁸⁹ and so a theory of rights ought to provide some explanation as to *why* we ought to be said to have rights. Yet Nozick provides us with no explanation as to why he thinks the qualities we possess in the state of nature amount to rights to those qualities. And if such qualities do not bear the status of rights, it is less clear that these qualities ought to be used to delineate what states can and cannot do.

As Nagel puts it, “Nozick starts from the unargued premise that individuals have certain inviolable rights which may not be intentionally transgressed by other individuals or the state for any purpose.”⁹⁰ It is from this premise that his theory develops. Nozick feels such rights to bare such a strong status that even taxation for the good of protecting the rights of others is prohibited.⁹¹ Ultimately, Nozick feels that the state is permissible, but only to the extent that it better protects the very limited but very strongly-held negative rights we have in the state of nature. In the state of nature we have rights to qualities such as life and property which, morally-speaking, others ought to respect. However, in reality people will sometimes act immorally for their own self-gain and thus may murder others or steal their property. The minimal nightwatchman state is permissible because it better protects our natural rights. Anything more extensive unnecessarily harms our natural rights, as opposed to better safeguarding them. As such, the general conception of modern civilised society accepted by most people (especially supporters of rights) – free healthcare, a welfare state *et cetera* – is not simply beyond the minimum required by morality, but is actively *immoral*.

⁸⁹ *Ibid*, p.43

⁹⁰ Nagel, T., ‘Libertarianism Without Foundations’, in Paul, J. (ed.), *Reading Nozick: Essays on Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1981), p.193

⁹¹ Nozick, R., *Op.Cit*, p.30

The real problem, then, is not simply that Nozick fails to provide any kind of argument as to why we should be so certain that humans possess fundamental rights (a fact that many would disagree with), but that the nature of the rights-based morality he derives from such an assumption is also highly controversial. Nozick's ideal state, emerging from his unusually strong conception of rights, is equally objectionable to most others both in favour and opposed to rights-based moralities. And if one seeks to avoid the unfortunate conclusions Nozick arrives at through a series of detailed and logical arguments, the most obvious way of doing so is to deny the truth of the premise upon which such arguments are founded.

The questions and criticisms which arise in relation to both the theory and practice of Nozick's work are numerous. Nagel, for example, highlights that, in practice "...it is doubtful that a government limited to the functions of police, courts, prisons, and national defense would be conspicuously benign, or that it would be especially protective of individual rights."⁹²

In terms of theory, one might question whether the rights one supposedly has in the state of nature should automatically be mirrored in a society⁹³ and, more importantly, why all the rights Nozick defends must possess such equal status in terms of their non-derogability and the circumstances under which we might feel they are violated. It would seem that a right to property might be more easily and legitimately restricted (through taxation) than a right to be free from torture.⁹⁴

⁹² *Ibid*, p.194

⁹³ *Ibid*, p.194-6

⁹⁴ *Ibid*, p.199

While criticisms such as these are not necessarily insurmountable, in failing to provide any justification as to why humans should be said to have natural rights or why those rights should amount to the bedrock of morality, Nozick is susceptible to the argument that his otherwise coherent and detailed arguments are built on an unsecure foundation. If we disagree with the controversially strong status Nozick assigns to those qualities we hold in a state of nature then all of the complex and well-reasoned arguments he derives from them are undermined. Given this fact, supporters and detractors of Nozick alike might agree that his failure to provide an adequate justification of why he assigns such importance to natural rights represents a glaring and unnecessary weakness for his theory as a whole.

Despite its problems, Nozick's theory unquestionably represents a rights-based morality. It places rights in a central, foundational position and builds an overarching moral theory based around the status of those rights. Even if we think that the many criticisms of Nozick's work indicate that it is an inadequate (or perhaps just an inadequately argued) rights-based morality, none demonstrate that it is an illegitimate one.⁹⁵ For this reason, this thesis will consider the Nozickian position throughout in order to ensure that any problems identified with rights-based approaches to climate change genuinely represent problems with rights-based moralities in general, as opposed to problems which are specific to any particular rights-based morality.

There is also a second reason for considering the Nozickian position.

⁹⁵ i.e. it is a universal moral theory which affords rights a central role and powerful status as opposed to merely using them as a tool to realise non-rights-based moral goals and overriding those rights when upholding them would go against the true values of the morality.

Not only is Nozick's system undoubtedly rights-based, it is also a system which might arguably be more readily adopted by individuals who do not already have a propensity towards rights-based moralities (and who are perhaps suspicious of the notion of *any* over-arching moral system). Nozick's negative approach to rights arguably comes closer to Rawls' idea of an overlapping consensus than other rights-based approaches to morality.

At the very least, one might argue that the vast number of preventable human rights violations which occur across the globe as a result of poverty are indicative of a lack of certainty among individuals, states and international bodies alike with regard to the identity of the bearers of the positive duties which are supposedly correlative to rights. However, it could well be that the issue is deeper than this. Perhaps this unwillingness to fulfil positive duties effectively in fact stems from a more deep-seated belief that rights do not place us under a moral duty to take positive action to help others. This is not to claim that we do not think that doing so is a morally good thing, but rather that it is a matter of supererogation, not duty.

On the other hand, it would seem a more achievable (though not simple) task to gain some level of consensus among individuals who are not inherently drawn to the idea of a rights-based morality that human beings ought to refrain from taking those actions which directly cause the infringement of the rights of others. This seems particularly true if, like Nozick, we limit those rights to a narrow range of qualities which it would be fairly uncontroversial to maintain were fundamental and universal in nature. Theft, murder and torture, for example, are, all things

being equal, considered to be wrong by a great many people who espouse no clearly distinguished system of moral belief, let alone a rights-based one.

This greater propensity towards a more Nozickian system of rights is perhaps demonstrated by the fact that we venerate those who sacrifice their time and money in order to take positive action to improve the rights (especially the economic, social and cultural rights) of others by, say, paying for and/or administering vaccines against malaria to those who are too poor to otherwise protect themselves from the disease. Notice that we do not place similar plaudits upon individuals for managing to refrain from murdering others. We feel that not murdering people is a general minimum requirement of morality which we are duty-bound to fulfil, whereas to take positive action to prevent the deaths of others is to go beyond the minimum and thus to go beyond the realm of duty.⁹⁶

Of course, even if we accept that Nozick's theory might be the most acceptable to those who are suspicious of rights, we might nonetheless argue that said theory is so lacking in the protection we want any morality – particularly a rights-based morality – to offer that we might better achieve the goods most of us think rights are there to protect through some other, non-rights-based system. Kantians, for example, could surely prevent much more of the suffering we generally think

⁹⁶ In response to this argument, critics might highlight that we also venerate individuals and states who take positive action to defend others from violations of their negative rights. However, with regard to individuals this again amounts to supererogation. When it comes to states even Nozick would insist that they do in fact fall under a duty to prevent their citizens from violating the rights of others, hence we are more likely to criticise their failure to do so (as opposed to praising their successful efforts as supererogatory) than we are to criticise their failure to provide the poorest of their citizens with basic food and healthcare. Again, this is not to devalue positive rights as an ideal, but rather to highlight that a theory of rights from which they are absent might be more readily accepted by those who are suspicious of rights.

rights ought to protect us from than Nozickians without the need to refer to rights at all.⁹⁷

However, the purpose of this thesis is not to promote the adoption of rights-based moralities over and above other moral systems, but to investigate their pros and cons in tackling climate change. Therefore it is important to consider the broadest possible section of rights-based moral theories, particularly those which stand a better chance of being adopted in practice in order to address a climate change problem which is, unfortunately, not simply a thought experiment but a genuine threat to human rights.

Choice Theory / Gewirth

Despite the fact that Robert Nozick's work represents a clear and coherent example of a rights-based morality, many supporters of rights would (quite legitimately) feel aggrieved by the suggestion that any difficulties with such a theory should be viewed as evidence of difficulties with *all* rights-based moralities. The purpose of this chapter is not to advance the merits of any particular rights-based morality over another, but to identify commonalities between them as well as highlighting different interpretations of how such systems might operate. With this in mind, this section will examine the theory put forward by Gewirth, which, while varying considerably from Nozick's, remains undeniably rights-based and represents a good example Choice Theory, which

⁹⁷ Although, as previously noted, there seems no good reason as to why Kantians should be prevented from making use of rights in the achievement of their morality, even if that morality is not rights-based in the sense that those of Nozick or Gewirth are.

stands alongside Interest Theory and Libertarian approaches like that of Nozick as one of the three primary types of rights-based morality.

As Boylan notes, “Gewirth will be known first for his original and influential theory on the origin and justification of human rights.”⁹⁸ The differences between Gewirth’s and Nozick’s work are numerous and significant, but they perhaps all stem from a difference in their justifications of rights. As noted above, Nozick’s theory is somewhat lacking when it comes to justifying the ascription of rights to human beings, which is based on some vague assertion that individuals are born in possession of natural rights. Gewirth, on the other hand, seeks to provide a specific and definite justification of why human beings ought to have rights which might then act as solid foundation on which to delineate the limits and contents of his rights-based morality.

Gewirth’s work has been described as the most sophisticated and detailed account of Choice Theory available.⁹⁹ More specifically, he feels that the ability to take purposive action lies at the heart of what it is to be human and thus the purpose of rights is to protect such qualities as are needed by all humans if they are to take such action. Gewirth begins with the premise that freedom and well-being are the essential qualities or ‘basic goods’ required by all human beings in order to afford them the capacity for action that separates them from non-human animals. This fact, Gewirth believes, necessitates the existence of human rights¹⁰⁰ and ultimately

⁹⁸ Boylan, M., *Proceedings and Addresses of the American Philosophical Association*, 11/1/2004, Vol. 78, Issue 2, 139-140, p.139

⁹⁹ Fagan, A., (2011) *Op.Cit*, p.16

¹⁰⁰ Gewirth, A., *Op.Cit*, p.7

justifies the implementation of ‘social rules and institutions’ which serve to better protect such rights.¹⁰¹

It is, then, human beings’ capacity for action – and, importantly, the *universality* of the capacity for action and the freedom to choose which actions to take – that underlines Gewirth’s belief in human rights as a rational necessity. He summarises this step in logic as follows:

...human rights are of supreme importance, and are central to all other moral considerations, because they are rights of every human being to the necessary conditions of human action, i.e., those conditions that must be fulfilled if human action is to be possible either at all or with general chances of success in achieving the purposes for which humans act. Because they are such rights, they must be respected by every human being, and the primary justification of governments is that they serve to secure these rights. Thus the Subjects as well as the Respondents of human rights are all human beings; the Objects of the rights are the aforesaid necessary conditions of human action and of successful action in general; and the Justifying Basis of the rights is the moral principle which establishes that all humans are equally entitled to have these necessary conditions, to fulfil the general needs of human agency.¹⁰²

For Gewirth the idea that all human beings possess rights which all other human beings hold correlative duties in relation to is not simply a dogmatic claim but a reasoned conclusion made on what he believes are a series of irrefutable steps in logic.

Gewirth argues that what he labels ‘the exceptional mandatoriness’ of human rights is derived from the fact that the moral principle which forms the justifying

¹⁰¹ *Ibid*, p.19

¹⁰² Gewirth, A., *Op.Cit*, p.3

basis of these rights amounts to a ‘rational necessity.’¹⁰³ That moral principle is labelled by Gewirth as the Principle of Generic Consistency (PGC), which he outlines as follows: “Addressed to every actual or prospective agent, it says: Act in accord with the generic rights of your recipients as well as of yourself. (The generic rights are rights to the generic features of action – freedom and well-being – which constitute its necessary conditions.)”¹⁰⁴

Gewirth lays out four reasons for thinking that human rights should be grounded in ‘the necessary conditions of human action,’ which he argues justify the PGC.

Firstly, he argues that the undeniable ‘supreme importance’ of human rights – or, rather, the *universality* of that supreme importance – demonstrates that “every actual or prospective agent must be concerned with human rights, and... also why these rights must take precedence over all other practical criteria or requirements, including those that bear on objects or conditions of action that are of lesser stringency.”¹⁰⁵ Since the objects of rights are a) of supreme importance, and b) are of supreme importance *to everyone*, they are better candidates as the basis of morality than objects which are of less importance for everyone or which are of supreme importance to only some people. As a result, the objects of rights might legitimately be assumed to supersede other less important and/or less universal objects of morality.

Secondly, Gewirth argues that “to tie human rights to the necessary conditions of action is to connect the rights directly with morality, since action is the common

¹⁰³ *Ibid*, p.3

¹⁰⁴ *Ibid*, p.3

¹⁰⁵ *Ibid*, p.5

subject matter of all moralities.”¹⁰⁶ In this way he seeks to make his theory appeal to something like an ‘overlapping consensus.’ If we accept Gewirth’s claim that an ability to take action and to choose which actions to take represents the common subject matter of all moralities, then any objection which is made to the notion of human rights must be instrumental in nature. The only argument that remains to those objecting to Gewirth’s theory is to claim that there are better ways of ensuring this capacity for action is protected than the ascription of universal rights. If we accept this to be the case, Gewirth’s theory will be substantially strengthened since the key justificatory reason behind rights will be universally accepted and all that will remain is to convince others that rights are the best tool to achieve this uncontroversial goal in practice. In this way, this element of the PGC represents both a strength and a weakness for Gewirth, since critics might undermine his whole theory through the very plausible argument that action simply is *not* the common subject matter of all moralities (utilitarianism would appear to be an example of a moral system where a capacity for action does not obviously act as the founding moral justification, as indeed would Interest-based theories of rights).¹⁰⁷

Thirdly, Gewirth maintains that “the necessary conditions of action have more specific and less disputable contents than may be attributed to concepts like ‘dignity’ and ‘flourishing.’”¹⁰⁸ He presumably thinks that this fact makes the qualities required for the taking of action more appropriate objects of rights than

¹⁰⁶ *Ibid*, p.5

¹⁰⁷ It should be noted that this focus upon action has also lead critics to question the ‘universality’ of Gewirth’s system on the grounds that it struggles to deal with so-called ‘marginal cases’ – infants, the severely disabled, those in a permanent vegetative state etc. – whose capacity for action is severely impaired (see Criticisms of Gewirth section below).

¹⁰⁸ *Ibid*, p.5

those required for the more ambiguous concepts of maintaining human dignity or living a flourishing human life. While there is some merit in this argument, one might question why the fact that the necessary conditions for action are more specific and less disputable than other possible justificatory reasons for human rights should automatically make the capacity for action a *better* justification. Certainly such criteria might make it easier to decide what human rights ought to be rights to, but this does not mean that action is automatically a more appropriate justificatory foundation for rights than concepts like dignity or flourishing.

Moreover, outside of rights-based moral thinking, the value of the more specific and less disputable contents of the necessary conditions for action seems lessened. Indeed, a lack of such a definite structure upon which morality is founded is what allows non-rights-based moral systems to impart moral guidance on a much wider range of issues, as opposed to being forced to limit their attention to so-called ‘narrow morality.’

None of this should be seen to undermine Gewirth’s work as a whole. In deriving rights from the necessary conditions for action his theory has the advantage of enabling its supporters to coherently demonstrate which rights we should have and why. This fact, though, provides no reason as to why we should be logically bound to accept human rights or the idea that such rights are justified on the basis that they enhance our capacity for action.

Gewirth’s fourth and final reason for basing human rights on the necessary conditions for action lies in the fact that:

...this serves to emphasize that the ultimate purpose of the rights is to secure for each person a certain fundamental moral status. All the human rights, those of well-being as well as of freedom,

have as their aim that each person have rational autonomy in the sense of being a self-controlling, self-developing agent who can relate to other persons on the basis of mutual respect and cooperation, in contrast to being a dependent, passive recipient of the agency of others.¹⁰⁹

This final element is perhaps the most important aspect of the PGC. In basing rights on the central importance of autonomy to human well-being, Gewirth grounds his theory upon its ability to protect a quality that many people would agree represents a universal and crucially important aspect of human nature which is fundamental to what it is to be a human and live a minimally good life. Such a fact is highlighted by Beyleveld, who states that:

Gewirth's attempt to demonstrate a strictly a priori connection between a moral principle and the concept of being an agent as such is essentially Kantian, and recognising that the Principle of Hypothetical Imperatives is categorically binding requires Kantians to accept that Gewirth's Principle of Generic Consistency is the supreme practical principle.¹¹⁰

For Beyleveld, "...Gewirthians are Kantian in aiming to establish a categorically binding impartial principle as being connected entirely a priori with the concept of an agent as such."¹¹¹ Providing we accept Beyleveld's position, it becomes clear that neither Gewirth's insistence that autonomy is central to morality nor his claim that a binding moral principle can be derived from this fact are particularly controversial ideas.¹¹²

¹⁰⁹ *Ibid*, p.5

¹¹⁰ Beyleveld, D., *Op.Cit*, p.573

¹¹¹ *Ibid*, p.597

¹¹² Although, of course, this is not to claim that Gerwirth's ideas about the centrality of autonomy to morality are universally shared.

In summary, Gewirth's theory claims that I "*may and must* accept a maxim if (and only if) my failure to accept it entails that I fail to understand what it is for me to be an agent."¹¹³ The duties I owe to others emerge as a result of the possession of agency in both mine and their persons.¹¹⁴

According to Gewirth, the ability to take purposive action is something which all humans ought to possess if they are to live minimally good lives. In order to be able to take purposive action, certain conditions need to be met; we need others to refrain from taking certain actions against us and, where possible, to take certain actions in order to better our own ability to take action. Such conditions are safeguarded by the provision of rights. Since all humans require their own rights to be respected in order to be able to take action, rationally speaking they must also respect the rights of other human beings.

Gewirth's theory, then, affords us a reasoned account of why certain elements of morality must be given a higher status than others and are, therefore, the *objects* of rights. It also explains why such rights might legitimately be considered universal, thus providing some justification for the use of a morality based upon such rights to judge the actions of all persons, including those who may be culturally opposed to it. This is perhaps the most significant challenge faced by the supporter of rights in the real world.

Gewirth's theory is undeniably rights-based, and one which makes a highly credible attempt to demand that all must make the decision to follow it based on reason rather than dogma. This strengthens its credibility when compared to Nozick's work. Having said this, Gewirth's attempt to derive a theory which

¹¹³ *Ibid*, p.588

¹¹⁴ *Ibid*, p.590

presents rights, not simply as a plausible way of enforcing morality, but as *a rational necessity* is highly ambitious and invites criticism.

Criticisms of Gewirth

Unsurprisingly for such an all-encompassing moral theory, there have been significant criticisms of Gewirth's work. Many, though, are criticisms of rights-based moralities more generally and are thus of little relevance here. If we dismiss the validity of rights-based moralities altogether then there is little sense in determining whether their difficulties in adequately addressing the problem of climate change represent a dangerous exception to the otherwise positive idea of their general implementation. The criticisms I wish to consider here, then, are criticisms of Gewirth's theory in particular, which tend to be made by people who are sympathetic to the general idea of moral rights. They are concerned with the universality (or lack of) set out by Gewirth's theory and with his appeal to rationality as a justification for his work.

The first problem with Gewirth's work is that, while it purports to be a theory of universal human rights, it does not actually apply equally and universally to all humans. Gewirth's theory is justified by the notion that we should have rights because we are capable of action and we should respect the rights of others because we are rational beings. As, De Rose highlights, however, this reasoning denotes a flaw in theories like that put forward by Gewirth:

Some beings, including children, animals and the mentally handicapped, seem to deserve moral consideration, despite the fact that they are not rational or moral agents. These so-called marginal

cases create a problem for theories that heavily stress the role of moral and/or rational agency in ethics: the latter seem unable to account for the former's moral status.¹¹⁵

In other words, to claim that human rights are the rights of individuals with the capacity for purposive action is, paradoxically, also to claim that certain individuals do not possess human rights. Most obviously, children might be considered questionable subjects of rights, since their capacity for action is distinctly underdeveloped. However, in as much as children have the *potential* to become fully-functioning purposive agents, and considering that that capacity for action will increase in stages (rendering less clear cut the claim that children are not purposive agents at all) it would not seem unreasonable to claim that Gewirth's theory might allow children rights. More difficult cases are individuals in a permanent vegetative state, or those with severe learning disabilities. In such cases, even the potential for action is lost.

None of this is conclusive evidence of any fundamental problem with Gewirth's theory. Perhaps it is possible to treat these marginal cases in a compassionate and ethical way without the assignment of rights. However, given that Gewirth seeks to use rights as the foundations of morality, it becomes difficult to see exactly how his system could properly ensure the welfare of such people. Certainly the idea that showing adequate respect to such persons ought to be a matter of supererogation - that mistreating them would be wrong in the same way that mistreating a dog would be wrong - seems callous in the extreme. Those supporting Gewirth, then, are under pressure to find a good reason as to how and

¹¹⁵ De Roose, F., 'Ethics and Marginal Cases: The Rights of the Mentally Handicapped', *Journal of Applied Philosophy*, Vol. 6, No. 1 (1989), 87-95, p.87

why a morality founded upon the capacity for action should protect those individuals who lack such a capacity. If they do not, then the logic behind their theory will be weakened through its failure to justify a system of rights which is truly universal. The alternative is that Gewirthians simply agree that so-called ‘marginal cases’ should not receive the full protection of a moral system, but this position would obviously be met with a great deal of hostility.

The issue of to whom rights ought to apply is a difficulty which is far from unique to Gewirth in the field of rights theorists. It is an issue which will come to the fore in more detail in Chapter 5, which will investigate the moral status of future persons under rights-based moral systems.

The second major problem with Gewirth’s theory stems from his attempt to justify his ideas through an appeal to rationality. As Gewirth puts it, “[i]n sum, then, my argument for the existence of human rights is that every agent logically must hold or accept that he and all other agents have these rights because their Objects are the necessary conditions of human action.”¹¹⁶ The use of the term ‘logically must’ is distinctly problematic in a world where the meeting – and even the acknowledgement – of rights is far from universal. As Fagan argues, “...despite his appeals to the authority of logic, Gewirth’s account of the rationality of human rights is inadequate to the modern world in which human rights must secure their existence. If it is a failure of rationality to accept and respect the rights of all other moral agents, then countless millions of human agents must be condemned as irrational.”¹¹⁷

¹¹⁶ Gewirth, A., *Op.Cit*, p.20

¹¹⁷ Fagan, A., (2011), *Op.Cit*, p.19

Of course, the fact that people *do not* act in accordance with Gewirth's morality is not evidence that they *should not* do so. Rather, it is simply evidence that the world does not *currently* act in accordance with a rights-based morality – a fact which comes as no surprise. The problem Fagan seeks to highlight, however, is Gewirth's insistence that his theory stems from the rational necessity of the PGC.

Gewirth purports to arrive at the conclusion that human beings possess fundamental rights - a conclusion he determines *must* be accepted by all rationally-minded people - through a series of steps of *logic* which, he claims, must also be accepted by all rationally-minded people. Therefore, if a) it is legitimate to call into question his conclusion that the acceptance of universal human rights is a rational necessity (and it would seem that it is),¹¹⁸ and b) if that conclusion is derived from a series of logical steps, then it seems equally legitimate to question the truth both of those logical steps and of the idea that human beings have (or ought to have) fundamental rights.

If a sociological study into human behaviour resulted in a conclusion that was manifestly false, one would have to discount the legitimacy of that study regardless of the apparent quality of the methodology and thoroughness of the research. Indeed, it seems there would inevitably be some significant error with regard to either the work or the conclusions derived from it. In attempting to strengthen his theory by claiming it to be an undeniable, logical necessity, then, Gewirth actually serves to weaken his argument because his conclusion (that

¹¹⁸ I am in agreement with Fagan's position that it seems problematic to claim that the failure of many individuals and governments across the world to embrace human rights represents a failure of rationality. However, the notion that this is not the case warrants consideration. It seems at least possible that Gewirth is right and that, regardless of their numbers, those who fail to endorse and adopt human rights are simply logically mistaken. This, of course, is not to claim that such persons are not, on the whole, rational beings, but rather to suggest that, on the issue of human rights, their capacity for reason has failed them.

human beings have rights and that these rights ought to be respected by all rationally-minded people) is, in fact, at least eminently deniable and arguably logically flawed.

Despite these difficulties, Gewirth must be commended for making a detailed attempt to respond to failings he perceived in the work of other rights theorists to develop “a consecutive line of argument from first principles to practical applications” and resolve “certain basic problems about human rights, especially problems of justification.”¹¹⁹ The fact that, in doing so, he has left his theory open to well-reasoned criticism should perhaps not be seen as evidence that that theory is invalid, but rather as evidence that justifying universal moral theories in general is never an easy task. Indeed, his key failure does not arise in his ability to present a coherent and consecutive line of argument, but simply in his overzealous insistence that that it is an argument which must be accepted by all who deem themselves rational. Despite this insistence, there seems nothing within Gewirth’s theory that prevents us from arguing that it is a theory which rationally-minded people *might* accept as a good way of implementing moral principles in practice without requiring us to insist that rationally-minded people *must* accept such a theory.

Moreover, evidence of flaws with Gewirth’s reasoning are not evidence of flaws with rights-based moral theories in general and a theory something like Gewirth’s (with certain adaptations) is what is envisioned by a significant number of supporters of rights.

¹¹⁹ Gewirth, A., *Op.Cit.*, p.x

The Limits of Rights

Having established which kinds of qualities might be considered the basis of a rights-based morality and why, it is important to consider the status of human rights in relation both to other rights and to non-rights-based moral concerns.

In order to be considered rights-based, a moral system must give a particularly high level of importance to rights. Human rights must necessarily trump non-rights-based moral concerns. Gewirth attempts to express this necessity in his explanation of why the capacity for purposive action should be considered to justify a moral system based on rights:

...the correlative 'oughts' of human rights are practical-prescriptive 'musts' addressed to other persons or groups, and these 'musts' can be logically derived only from antecedents that themselves are similarly necessary. The necessary goods of human action fulfil this condition; other proposed Objects and Justifying Bases of human rights either do not do so at all or do so less directly and explicitly.

This normative necessity is a distinctive feature of human rights that gives them a more stringent modality than other moral or valuational concepts. Goods are worth having; virtues are good to have and indeed admirable; what is right is at least permissible and may also be justified by some relevant rule. Human rights, however, are normative relations to Objects which one must have in order to be an agent. It is for this reason that human rights are uniquely and centrally important among moral concepts: they are the necessary basis and focal point of all morality, since no morality, together with the goods, virtues and rules emphasized in diverse moralities, is possible without the necessary goods of action which are the Objects of human rights.¹²⁰

¹²⁰ *Ibid*, p.6

Regardless of whether we agree with Gewirth's reasoning as to the underlying justification for the imposition of a particular rights-based morality, his comments regarding the necessary features of a rights-based morality hold true. The duties which are the correlatives of human rights hold immense moral weight. As Gewirth puts it, the 'oughts' associated with most moral concerns become 'musts' when they relate to human rights. I *ought* not to spend all my wages on beer instead of buying my young daughter a birthday present. Rights-based moralities seek to differentiate such lesser moral considerations from the bigger issues about how human beings should live their lives.

As earlier highlighted, rights-based moralities are narrow moralities, focussing on the ethics of the public/political sphere and the relationships between states and their citizens.¹²¹ In order to achieve a moral system which is truly universal while remaining meaningful, rights-based moralities seek to protect only the most fundamental areas of existence, but to do so in a manner which is far more obligatory than everyday morality. Essentially, rights-based moralities seek to expand our freedom by limiting it. Rights outline those actions it is impermissible to take (or, with regard to positive duties, to refrain from taking). They tell us that certain things are always wrong and that our doing them may be legitimately prevented/punished by others with the relevant authority. Since all of the most fundamental aspects of morality are covered by human rights, human rights must always outweigh any other, non-rights-based moral concerns.

So what does this mean in terms of the 'absoluteness' of rights?

¹²¹ This is not to say that individuals do not hold duties to others under a rights-based system, but, rather, that these duties are more effectively realised when they are conferred to states through the payment of taxes by individual duty-bearers.

While lawyers are able to determine a hierarchy of rights by insisting that some are ‘non-derogable’ while others may be subject to ‘progressive realisation,’ the issue of why, when and in which ways rights may be overridden is a much more difficult task for advocates of rights-based moralities. While it may be possible to claim that it is not permissible to override rights in the name of non-rights-based goods,¹²² claiming that rights and/or the extensive list of duties which are their correlatives are absolute in relation even to each other will prove a difficult (and perhaps an impossible) task. This is because of the simple fact that rights will sometimes clash. When such clashes occur, one right must be sacrificed in the name of another. Any legitimate and effective rights-based morality ought to provide some way of deciding which right ought to be the one to give way.

Gewirth affords a clear measure by which such decisions should be made. He states that “...if two moral rights are so related that each can be fulfilled only by infringing the other, that right takes precedence whose fulfilment is more necessary for action.”¹²³ Gewirth, however, distinguishes such a process from violations of rights, stating that:

A right is *violated* when it is unjustifiably infringed, i.e., when the required action is unjustifiably not performed or the prohibited action is unjustifiably performed. And a right is *overridden* when it is justifiably infringed, so that there is sufficient justification for not carrying out the correlative duty, and the required action is justifiably not performed or the prohibited action is justifiably prohibited.¹²⁴

¹²² And even this is a controversial area which is likely to involve making difficult distinctions with regard to what amounts to a non-rights-based good and the difference between violating rights and restricting them.

¹²³ *Ibid*, p.220

¹²⁴ *Ibid*, p.219

It is important to note that Gewirth's interpretation of when rights might be said to clash is broader than might be allowed by other critics and supporters of rights alike. While he maintains that rights are held by individuals, he does not assert that those rights need to clash with the rights of others in a direct manner before their restriction becomes permissible. Rather, he believes that a concern for the rights of individuals requires a concern for the common good to the extent that that common good protects the rights of other individuals. He explains his position as follows:

...social rules and institutions are justified when they are instrumental to securing person's rights to freedom and well-being. The duties of each person to respect the rights of others are extended to various aspects of political obligation. When a state is justified by the *PGC* as securing the rights of all its inhabitants, each person living in such a state has the duty to support it. This duty ranges from obeying its laws to contributing, by taxes, advocacy, and other relevant means, to the state's carrying out its justified functions. More generally, the *PGC*, in requiring respect for the generic rights of each person, requires also support of the whole system of mutually sustaining rights and duties. In this way, the emphasis on individual rights is not only compatible with, but requires a conscientious concern for, the common good.¹²⁵

Gewirth claims that this concern for the common good is so strong that even the right to life of an innocent person might be legitimately overridden were the consequences of respecting that right sufficiently dire.¹²⁶ He does not mean to

¹²⁵ *Ibid*, p.19

¹²⁶ *Ibid*, p.218. Gewirth does not provide specific reason as to why he believes this to be the case, seemingly believing such a notion to be self-evident. The examples he provides might each be justified through a utilitarian view of rights under which, in cases where the same rights of different individuals come into conflict, those of the few are sacrificed in the name of those of the many. However, the supporter of rights who does not also accept the validity of even a rights-based utilitarianism would argue that all four examples might just as easily be justified through reference to the doctrine of double-effect. Gewirth does go on to argue that certain

suggest, however, that rights ought not to be given primacy. Rather, he simply argues that the rights of any individual may be justifiably restricted in order to better protect the rights of others even if the exercise of the rights of that individual does not, in and of itself, amount to a *violation* of the rights of those others.

For example, if the exercise of freedom of opinion by A on a particular date is highly likely to cause B to murder C, D and E, it would not automatically amount to a *violation* of the rights of A if the state took reasonable measures to prevent the airing of such an opinion, even though A's exercise of her right does not directly clash with the rights of anybody else. For Gewirth, the general harm to the common good is enough to warrant the lesser right to be overridden. It is important to note, though, that this common good remains rights-based, and reference to it is only justified because of the harm *to rights* which will otherwise indirectly occur. Were the resultant harm not a harm to rights (for example, if - unlike the human A and B - C, D and E were giant pandas) or were it a harm to the lesser rights of the greater number (if, instead of killing C, D and E, B simply

rights can be absolute, but he does so by taking extremely specific scenarios and treating them as individual rights in and of themselves rather than examples of particular violations of more general rights.

So, for example, he asserts that mothers have an absolute (and in some sense distinct) right not to be tortured to death by their own sons, whereas most supporters of rights would feel that such a scenario was merely an example of one of the many ways a general right to be tortured might be violated. A supporter of rights who agreed with Gewirth's assertion that mothers ought never to be tortured to death by their own sons but did not agree that this constituted a separate right might instead argue that the general right not to be tortured is absolute, but that this does not mean that *every* individual duty associated with that right is also absolute. This position is examined in greater detail below.

planned to steal £1 from each of them), reference to the common good would not be justified.¹²⁷

Some version of Gewirth's notion that human rights may be legitimately overridden when they clash with the (more important) rights of others (either directly or indirectly) is arguably the most popular interpretation of the limits of rights among their supporters. It is, however, not the only possible interpretation left open to those who propose that morality is rights-based.

Nozick presents an alternative view of the way in which rights work in practice. As noted earlier, for Nozick rights are as individualist as it is possible to imagine. There is no such thing as a collective with a common good. Limiting the rights of one person harms that one person for the benefit of others. The type of harm which occurs is exactly the type of harm rights are designed to protect us from and thus cannot be justified under a Nozickian morality.

For Nozick, rights "...are *agent-relative*, in the sense that each agent is taken to be concerned only with his own observance of the constraints."¹²⁸ As Waldron highlights, this, in combination with their status as side constraints, has the effect of preventing the existence of *any* circumstances under which rights might be legitimately overridden, since it casts doubt over the very concept of a clash of rights:

Since a constraint presents itself to him simply as a limit on *his* conduct, he is not required by a concern for rights to try to limit the conduct of others to see that rights are respected by them, and so the question of whether he should violate some rights himself in order to prevent graver

¹²⁷ Such a fact will be of great relevance when we come to consider the moral position of future persons.

¹²⁸ Waldron, J., 'Rights in Conflict' in his *Liberal Rights: Collected Papers, 1981-1991* (Cambridge: Cambridge University Press, 1993), p.204

violations by others does not arise. On this conception, rights are more or less incapable of conflicting with one another.¹²⁹

Such a position is, of course, only possible due to Nozick's view of human rights as entirely negative in nature. Rights do not require me to *do* anything *for* others, but only to *refrain* from doing things *to* others. So, if A has a right to free speech, then it would always be wrong to restrict this right. If, as a result of A's exercise of her right to free speech, B kills C, D and E, then B has violated the rights of C, D and E, and thus acted wrongly. It may therefore be legitimate for the state to take action to prevent B from committing the violations, and/or to punish him for having done so. None of this, though, has anything to do with A. A's exercise of her right to free speech violates the rights of nobody.

Similarly, for Nozick, if X has a right to health but no money, and Y has lots of money, Y is under no duty to provide X with the funds to prevent his death through the purchase of readily available but relatively expensive medicine. X's rights are negative in nature and wholly separate from those of Y. The only way Y can violate the right to health of X is by poisoning him or forcibly preventing him from purchasing the medical treatment he can himself afford. But since Y has no right to poison X or prevent him from purchasing medical treatment, there is again no possibility of a clash of rights. For Nozick, then, rights are both absolute and strictly negative in nature.¹³⁰

¹²⁹ *Ibid*, p.204

¹³⁰ In response, one might point out that this explanation of rights presupposes direct relations between individuals. As a result, it might be argued that the conclusions Nozick draws about positive duties lack relevance to the issue of climate change, since it will only be state action (if anything) that is sufficient to quell emission levels. However, such an objection ignores the fact

One way of strengthening the status of rights (and probably the *only* way of insisting that *all* rights bear such a strong status as to be considered absolute), then, is to adopt Nozick's position and insist that rights are purely negative in nature. To do so, however, would be to limit the duties we owe others and the permissible actions of a state to a level that the majority of scholars of morality (whether supporters of rights or not) would find unacceptable. The obvious alternative for supporters of rights is to insist that rights bear positive correlative duties and to accept that such an insistence somewhat weakens the status of said rights by acknowledging that they might be legitimately overridden under the right circumstances (i.e. when they clash with other rights). Waldron, however, suggests the possibility of a third way of looking at things.

Rights are commonly viewed as 'trumps' designed to protect against the potential ills of wholly unrestricted utilitarianism.¹³¹ There is a concern, though, that supporters of rights take things too far the other way by placing too many restrictions on what might be done for the good of the many. As Waldron asserts, "[w]e surely think that *some* attention is due to considerations of ordinary utility, and while it is reasonable to postpone that until the most striking of the

that Nozick sees relations between individuals and their state as commensurate with relations between individuals since, as he puts it, "...the legitimate powers of a protective association are merely the *sum* of the individual rights that its members or clients transfer to the association. No new rights and powers arise; each right of the association is decomposable without residue into those individual rights held by distinct individuals acting alone in a state of nature." (Nozick, R., *Op.Cit*, p.89)

¹³¹ This idea is perhaps most famously and eloquently put forward by Ronald Dworkin. See Dworkin, R., 'Rights as Trumps,' in Waldron, J., *Theories of Rights* (Oxford: Oxford University Press, 1984), pp. 153-167.

requirements generated by rights have been satisfied, it is not reasonable to postpone it forever while we satisfy duty after duty associated with rights.”¹³²

What Waldron argues is that it is not rights that clash, but the duties associated with those rights and it is these duties which might, on occasion, be sacrificed either in the name of other rights or some ostensibly rights-based ‘common good.’ As he puts it, “...talking about conflicts of rights is a way of talking about the incompatibility of the duties that rights involve. What we refer to as a trade-off of one right against another, then, need not involve the sacrifice of one of the *rights*; rather, it involves a decision not to do what is required by a particular *duty* associated with the right.”¹³³ The idea that Waldron attempts to convey is that, while rights themselves are absolute and may not be removed from right-holders, the duties which are the correlatives of those rights may be extremely extensive in number and thus might, under the appropriate circumstances, go unmet without this necessarily amounting to a violation of the associated right.

In order to better elucidate his point, Waldron uses the example of the distinctly uncontroversial human right to be free from torture, asking: “[i]f the interest in not being tortured is the basis of the moral importance of the duty, and if at least one of the duties generated has priority over some other moral consideration, does

¹³² Waldron, J., *Op.Cit.*, p.216. Waldron’s argument, which is examined in more detail in the following pages, emerges in reaction to Dworkin’s idea of ‘rights as trumps’. Dworkin considers that, if left entirely unrestricted, utilitarianism could end up going against its own egalitarian values by unduly harming members of the minority. Dworkin argues that rights are necessary to overcome these potential unwanted and unintended consequences and make utilitarianism viable. Taking Dworkin’s stance as his starting point, Waldron makes a similar argument regarding the dangers of the trump status of rights. He contends that, if we assign too much strength to this trump status, we risk not simply restricting the utilitarian basis of our political system, but almost sacrificing it, thereby undermining the social good we were attempting to achieve through our introduction of rights into our utilitarian system.

¹³³ *Ibid*, p.211-212

that mean that *all* the duties generated by concern for that interest have the same priority? And if not, why not?”¹³⁴

Such a question is not an attempt by Waldron to separate the positive and negative duties associated with rights with the idea of only endorsing the latter. It is perfectly reasonable to assert that, if we genuinely believe people have a right to be free from torture, we may well want to extend the duties associated with such a right beyond the minimal Nozickian duty not to directly torture people ourselves.¹³⁵ Supporters of rights might feel that the state is also placed under some additional positive correlative duty to protect others from being tortured by others and that individuals are under a similar positive duty to pay the taxes that are required to fund that protection.

Waldron’s concern, then, is not with whether a particular duty could be considered positive or negative, but with how essential that duty is for the successful maintenance of the right which is its correlative. As he puts it, “[t]he existence of successive waves of duty associated with a given right is likely to play havoc with any tidy sense of the priority that the right has over other moral considerations.”¹³⁶

With this in mind Waldron questions whether there is no limit on what he terms the ‘social convenience’ that might be sacrificed in order to meet even the more remote duties that could be associated with a prohibition on torture. He gives the example of the establishment of an expensive but effective Commission of

¹³⁴ *Ibid*, p.216

¹³⁵ While, legally speaking, only states and state officials are capable of committing the offence of torture, there seems no reason for those endorsing a system of *moral* rights to adopt such a position.

¹³⁶ *Ibid*, p.215

Enquiry designed to bring torturers to justice and ensure torture is made *marginally* less likely in the future.¹³⁷

In light of this, supporters of rights might claim that clashes of rights are far less frequent than we might first have supposed. It might be suggested that it is the duties associated with rights that clash and are thus sacrificed, not the rights themselves. So while a right to health might be seen as being, in general, more important (or, in Gewirth's terms, more necessary for action) than a right to education, this is not to suggest that the former should always supersede the latter. If the maximum plausible level of taxation yields a limited, finite budget for public spending, it would seem unreasonable to fund expensive research into rare diseases which have non-fatal negative effects on a small number of victims each year before funding a single primary school place for those who cannot otherwise afford education.

In summary, there exist significant differences between rights-based moral theories with regard to when (if ever) rights may be legitimately sacrificed. Of greater importance, though, are the commonalities between all rights-based moralities in this area. Most central of these is the assertion that human rights (or, if one prefers, the duties associated with them) may only be sacrificed (if ever) in order to protect other, more important, human rights. This remains true even for those supporters of rights who feel that the 'common good' can represent a legitimate reason for rights/duties to be overridden. This is because a rights-based conception of the common good is ultimately a concern for the rights of others and is only employed in order to avoid the unfortunate consequences which might

¹³⁷ *Ibid*, p.216

result from a strictly individualist view of the nature of rights and, in particular, the nature of clashes of rights.

Defining rights-based moralities through reference to non-rights-based moralities

The key feature linking each of the different types of rights-based morality highlighted throughout this thesis is that rights sit at their core in a manner which is in some sense ‘natural’ and inescapable. For a morality to be truly right-based in the sense that I define it, it must espouse the existence of rights as a logical necessity.

This criterion is most obvious among those who develop theories based upon ‘natural rights’, of whom I use Nozick as an example throughout this thesis. For Nozick and others like him, the idea that human beings have rights is simply a self-evident fact. It therefore requires no justification. To ask why humans have rights would be akin to asking why they have an ability to think. Human beings have rights and thus our moral thinking must take careful account of these rights and work in a manner which respects them if it is to be considered just. Questions surrounding whether or why we have rights simply fail to emerge for natural rights theorists.

Supporters of Choice and Interest theories take a slightly less direct approach. Nonetheless, they still end up defining the existence of rights as a hard fact which *must* form the basis of morality, rather than as a matter of opinion or a tool through which the goal of a moral system might be achieved.

For Choice theorists, the ability of humans to make choices is *the* crucial factor which separates them from other animals. In order to freely exercise that ability, humans need certain scenarios to endure; one's ability to make choices is severely impaired if they are being tortured or dying of hunger. It is therefore a logical necessity that a moral system must assign rights to human beings which protect those aspects of existence most crucial to their ability to freely make choices.¹³⁸

The situation is similar for Interest theorists. All human beings 'naturally' have certain interests (in food, water, being free from torture, *et cetera*) which they hold regardless of circumstance, simply as a result of their being human. Once we accept this fact, we must also accept that a just moral system must assign rights to protect these interests.

For Interest and Choice theorists, then, rights are not 'natural' facts in the same way as natural rights theorists like Nozick believe them to be. Instead, rights quickly emerge as a logical and necessary next step as a result of the undeniable essential universal human qualities they are needed to protect (i.e. the ability of humans to make choices / the fundamental interests all humans have). Despite this difference, all three types of theory unquestionably remain rights-based. This is because all place rights at the core of how they make decisions about right and wrong and none hold the possibility of remaining coherent if we remove the rights element from them and replace it with something else.

In order to better highlight my explanation of what constitutes a rights-based morality, it will be helpful to briefly examine the moral system put forth by John

¹³⁸ For a more in-depth argument as to why Choice Theory renders rights a logical necessity, see: Gewirth, A., *Op.Cit.*, p.3

Rawls in his *A Theory of Justice*, which affords rights a role as central as it is possible to imagine without becoming rights-based in the sense that I use the term.

Rawls' Theory of Justice

Rawls' theory undoubtedly bears a great deal of similarity to the rights-based moral systems examined by this thesis. This can be seen from his own summary of the basic premise of his work:

Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests. The only thing that permits us to acquiesce in an erroneous theory is the lack of a better one; analogously, an injustice is tolerable only when it is necessary to avoid an even greater injustice. Being first virtues of human activities, truth and justice are uncompromising.¹³⁹

Such a view shares many similarities with the rights-based moral systems I explore throughout this thesis. The idea of the inviolability of individuals as something which cannot be overruled by utilitarian concerns is something which lies at the heart of rights-based moralities.

Rawls puts forward two basic principles of justice:

¹³⁹ Rawls, J., *A Theory of Justice* (Cambridge, Mass: Belknap Press of Harvard University Press, 1999), p.3-4

First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.¹⁴⁰

As he goes on to note,

[t]hese principles are to be arranged in a serial order with the first principle prior to the second.

This ordering means that infringements of the basic equal liberties protected by the first principle cannot be justified, or compensated for, by greater social and economic advantages. These liberties have a central range of application within which they can be limited and compromised only when they conflict with other basic liberties.¹⁴¹

Rawls develops these ideas on the basis that they are what any rational person would select when placed behind what he terms 'the veil of ignorance' (Rawls' version of the original position). Behind such a veil, persons lack knowledge as to their class, social status, intelligence, strength, conception of the good, *et cetera*. As a result, Rawls argues, his two aforementioned principles of justice emerge as those which all rational beings would choose and agree upon as being fairest for all in the absence of knowledge as to any particular advantages/disadvantages they might have upon entering society.¹⁴²

Were we to accept Rawls' theory as being rights-based, this concept of a veil of ignorance might prove useful in enabling proponents to better defend the welfare

¹⁴⁰ *Ibid*, p.53

¹⁴¹ *Ibid*, p.53-4

¹⁴² *Ibid*, p.11

of future persons. As Rawls highlights, people in the original position would not know at which time they would be born and thus would need to select principles of justice which were fairest for people living in future generations.¹⁴³ As a result, the Rawlsian would be duty-bound to consider the welfare of future persons when deciding upon the proper constituent elements of a theory of justice.

Exactly what difference this would make in practice is not entirely clear. While I would have to consider the welfare of future persons while deciding which rights everyone ought to have, it is not clear what difference this would make to the manner in which I exercised my rights upon my coming into existence or upon the duties I then owed to future persons who did not exist. Since I will not be focussing upon Rawls' work throughout this thesis, I will not consider such matters in any depth here. Rather, I would seek to note that the very reason I am not going to consider Rawls' work (i.e. it is not rights-based) is, in part, highlighted by this difficulty. While espousing the ascription of rights and duties,¹⁴⁴ the manner in which such things are held and realised is not central to Rawls' work in the way that it is in that of Choice theorists, Interest theorists or followers of natural rights / libertarianism – an issue I shall return to shortly.

There are, additionally, several other reasons for thinking that Rawls' theory falls outside of what I deem to be a rights-based morality, the understanding of which will help to elucidate exactly what the qualities of a true rights-based morality are.

As Rawls himself notes, his original position of the veil of ignorance is “a purely hypothetical situation.”¹⁴⁵ It is simply a thought experiment used to demonstrate

¹⁴³ *Ibid*, p.183

¹⁴⁴ And they *are* ascribed, not naturally held.

¹⁴⁵ *Ibid*, p.104

the value and logic of his theory. This is very much the opposite of a Nozickian position where human beings do, in actual fact, possess natural rights, these being the same rights that all human beings possessed before societies existed. Thus, Rawls statement that “[i]n justice as fairness the original position of equality corresponds to the state of nature in the traditional theory of the social contract,”¹⁴⁶ might be considered somewhat misleading. While Rawls’ veil of ignorance is certainly the equivalent of Nozick’s state of nature, it is by no means the same thing. For Nozick, rights come first due to their natural existence whereas society and morality emerge out of the state of nature and must therefore take account of the rights that pre-exist them. For Rawls, the starting position is purely hypothetical and does not necessitate rights in the same way.

It is clear that Rawls, despite being a social contract theorist, cannot be seen as producing a rights-based moral system in the same way that Nozick does. It is, however, worth considering whether he might instead be considered an Interest or Choice theorist.

Rawls seeks to afford all humans certain ‘basic equal liberties’ which are protected by rights. One might argue that these liberties are either those things all human beings have interests in or the constituent minimum elements needed to protect free choice. Should one adopt this position, much of Rawls’ theory would be subject to the analysis of Choice and Interest theories put forth throughout this thesis.

¹⁴⁶ *Ibid*, p.11

However, there seem several good reasons for thinking Rawls not to be an Interest or Choice theorist which serve to highlight key differences between his theory and systems of morality which I have defined as rights-based.

As earlier noted, Rawls' veil of ignorance would seem to afford some level of extra protection to future persons, but the very fact that it does so turns out to be indicative of the fact that his theory cannot be considered rights-based.

The veil of ignorance does not exist. I do. When I come into existence I will have rights and duties of the highest level allowed by equality. Not just equality between existing persons, but also future persons. This suggests that I owe some (necessarily non-correlative) duty toward future persons upon coming into existence that remains even before those future persons (and therefore their rights) come to be. While such an idea is not illogical, it is not one that is compatible with a morality which is fundamentally rights-based either. Rather, it speaks of a moral system which uses rights as a tool through which to achieve morality rather than being the basis and purpose of that morality in and of themselves.

Furthermore, while Rawls' 'basic equal liberties' might be seen as akin to the rights a Choice or Interest theorist would arrive at, the manner in which such things are derived by Rawls and rights-based theorists is far from similar.

Consider again Rawls' first principle of justice, which states that "each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others."¹⁴⁷ For the supporter of Interest or Choice theory, this way of framing things would seem odd. Interest and Choice theorists believe we have rights because those rights protect our

¹⁴⁷ *Ibid*, p.53

interests / our ability to make choices. Rawls, however, seems to derive his rights not from any basic and essential factor of our humanity, but from the concept of equality. This is made clear when he says

It is difficult, and perhaps impossible, to give a complete specification of these liberties independently from the particular circumstances—social, economic, and technological—of a given society.¹⁴⁸

For the Interest / Choice theorist, such an assertion would simply fail to make sense. Human beings have certain basic interests (including an ability to make choices) whether in or outside of a society. They therefore have rights aimed at protecting such interests under all circumstances – even if those rights cannot easily be fulfilled in every different society. It is the rights that are the basis of the morality. For Rawls, however, it seems that it is equality that is the foundation of morality. Rights are simply a tool through which equality and justice (the fundamental goods) can be achieved. For a true supporter of rights-based moralities, rights must be the fundamental goods in and of themselves.

The purpose of this section has not been to offer any meaningful critique of the work of John Rawls, but simply to briefly examine why Rawls' theory cannot be considered a rights-based morality in order to better elucidate those factors which are crucial to rights-based moral systems (factors which Rawls' theory lacks). Rights-based moral systems must insist upon a strict and immediate correlation between individual rights and duties or else, like Rawls, they risk allowing rights to be overcome by non-rights-based concerns under certain circumstances. More

¹⁴⁸ *Ibid*, p.54

importantly, rights-based moralities must take rights as their basis. Some rights theorists, like Nozick, do this by taking the existence of rights as a factual starting point and building a morality from there. Others, like Choice and Interest theorists, argue that rights are a logical necessity for any moral system as they constitute the only reasonable form of protection for the key elements of what it is to be human. Rawls, by contrast, adopts neither such position – instead using rights as a convenient tool through which to achieve the equal justice which is his goal. For this reason, his theory cannot be considered rights-based.

Conclusion

This chapter has demonstrated that rights-based moralities are concerned with those objects which are so fundamental to the realisation of a minimally good human life that they must be protected by rights which are ascribed to all humans equally. These rights are so strong that they can only be overcome through reference to other rights.

Ordinarily, far from being a weakness of rights-based moralities, the vigour with which rights are defended by such systems would be seen as a strength. By using inviolable rights to protect those areas of human existence which are truly essential and universal, rights-based moralities provide us with systems for distinguishing between different types of moral concern and guide us as to which areas of morality ought to prevail in cases of disagreement. They seek to provide moral guidelines which might more easily be accepted by people of different religions and cultures as well as providing a reasoned justification for the demand for such acceptance.

Unfortunately, as this thesis will demonstrate, climate change represents a truly extraordinary problem. As will be explained in subsequent chapters, the fact that the majority of the victims of climate change will not possess rights until the damage to those rights can no longer be reversed creates significant problems for supporters of rights. This is because, as Chapter 5 will demonstrate, the measures that states will necessarily need to take in order to protect future persons from the worst ills of climate change are at best unjustified by rights-based moralities and at worst prohibited by them.

CHAPTER 3: FUTURE PERSONS AND RIGHTS

Introduction

As explained in Chapter 2, rights-based moralities must, all other things being equal, judge the action of an individual to be wrong if that action violates the right of another right-holder. Indeed, these are the *only* circumstances under which a right-based morality may hold an action to be wrong.¹⁴⁹ The only reason a state may restrict rights, then, is when their exercise threatens the rights of others.

When it comes to the issue of climate change, then, in order to claim that those of my pollutant actions which amount to an exercise of my rights¹⁵⁰ might be justly limited, it would appear that supporters of rights-based moralities would need to demonstrate that future persons are able to possess rights before they come into existence (at which point they would cease to be future persons). As this chapter will demonstrate, this does not seem to be the case.

The chapter will begin by defining what we mean when we talk about future persons. It will go on to explain the complex philosophical conundrum known as the non-identity problem. It will then explain why each of the rights-based moral systems considered throughout this thesis (Choice Theory, Interest Theory and Libertarianism) are incapable of asserting that future persons should possess rights. Finally, it will outline why, even if such difficulties could be overcome,

¹⁴⁹ Since rights-based moralities are purely political moralities, there will obviously be many areas of morality that fall *entirely outside* their purview. However, these more banal moral areas cannot be ruled upon *at all* by a rights-based moral system and thus cannot be said to be wrong by supporters of rights.

¹⁵⁰ Exactly when a pollutant action amounts to an exercise of rights will be investigated in Chapter 5.

the non-identity problem necessarily precludes future persons from possessing rights regardless of which type of rights-based morality one adheres to.

Defining ‘Future Persons’

Before embarking upon an academic investigation of any topic, it is of crucial importance that one clearly defines one’s terms. In the case of this study, perhaps the most important term used is ‘future persons’. It will quickly become apparent that, due to the nature of climate change (i.e. the fact that the ill effects of the emission-producing actions we take today will not begin to be felt for at least twenty-five years), the way in which we define future persons may have a significant impact upon which actions we define as morally acceptable. This seems especially true for rights-based moralities, particularly if it transpires that future persons are incapable of holding rights.

Despite the theoretical importance of defining the term ‘future persons’ (not to mention the responsibilities of good academic practice), surprisingly few scholars writing on the subject of intergenerational justice have done so. One admirable exception to this is Page, who defines future generations as “...those that will come into existence after all those now living have ceased to exist”.¹⁵¹

The problem with this definition is that it refers to future *generations* and there seems no good reason as to why *generations* ought to be considered our appropriate unit of moral concern. This seems particularly true if we follow a rights-based morality, which, to varying degrees, tend to focus first and foremost

¹⁵¹ Page, E.A., *Op.Cit.*, p.53

upon protecting the well-being of individuals with the idea that this will, in turn, end up protecting humans as a collective.

And if it is individual future persons that are our concern, there seems no reason either logically or ethically, that our obligations to persons who will exist in the distant future ought to be analysed separately from those obligations we bear to persons who do not currently exist but who will come to exist within the lifetime of people who are alive today (Page makes no reference to this latter group at all). Page fails to highlight any important ethical difference between persons who do not yet exist and will not do so for 100 years and those who do not yet exist and will not do so for thirty years which might warrant us to treat the latter more favourably than the former. We might assume, then, that his definition is pragmatic in nature and is simply aimed at limiting the scope of his subject area.

In many circumstances, such an approach would be justified. It is not possible for a single academic work to cover every possible scenario, therefore boundaries are often drawn around the parameters of the subject area, thus making one's analysis more focused and complete. The problem is that, in this case, our moral position on the standing of more immediate future persons is likely to play a key role in shaping the extent to which distant future persons are affected by climate change.

Howarth hints at the difficulties that surround a focus on future generations as opposed to future persons when he highlights some of the criticisms which have been made of Parfit's similar understanding of the former:

...Gosseries (2008) notes that Parfit's argument abstracts away from a key fact of human demographics: At each point in time, the current generation of adults overlaps with its children and grandchildren whose existence and identities are fully determined. If one accepts the plausible

premise that each generation of adults holds binding duties to its flesh-and-blood progeny, a “chain of obligation” is then established between present decision makers and the unborn members of more distant generations.¹⁵²

The point noted above, while seemingly ignored by the majority of scholars in the area, may prove to be of crucial importance in our moral reasoning on the issue of climate change and future persons. As Caney notes, “...a theory of justice that is to apply to global climate change must address the question of how the intergenerational dimensions of the issue make a morally relevant difference.”¹⁵³

As noted in Chapter 1, the emissions we produce today will only begin to have negative effects on people living thirty years from now. Those *same* emissions will also contribute to the negative effects of climate change felt by *different* persons living 130 years from now. As such, if it can be demonstrated that we *do* owe duties to persons in the nearer future which warrant us bearing significant climate burdens today, it seems likely that we may *incidentally* protect those individuals which Page defines as future generations from harm in the process. Such a fact may, eventually, prove to be of key importance in rescuing rights-based moralities from the challenges posed by climate change.¹⁵⁴

In light of the above, I will focus my analysis upon future persons as opposed to future generations. I will define future persons as any persons who are more than one month from being conceived. Such a definition allows for the widest possible range of what might constitute a future person without straying into unnecessary

¹⁵² Howarth, R.B., *Op.Cit*, p.341

¹⁵³ Caney, S., *Op.Cit*, p.124

¹⁵⁴ This issue will be returned to in more detail in later chapters.

controversy. Many people feel that human life begins at some varying point during the gestation period. Others feel that it begins at conception. Others still, believe that it is before even this. By borrowing the reasoning of Derek Parfit¹⁵⁵ we can confidently claim that nobody believes that people exist before the egg which will one day become them has been produced. As such, my definition is as broad as it is possible to be without entering into unnecessarily morally and scientifically complex areas which will, ultimately, have no bearing upon the results of my study. This broadness is crucial, for it is at the boundaries of contemporaneity where the ethical stances of both supporters of rights and polluters will come under the greatest scrutiny. Before addressing the complex ethical questions which arise in this area in subsequent chapters, it will be prudent to first determine whether future persons (as I have defined them) are capable of possessing rights.

The Non-Identity Problem

Before examining the attitude supporters of rights must take toward future persons it is important to examine a more general ethical difficulty with ascertaining the moral status of such beings which will have a significant impact upon rights-based approaches to the issue.

Outside the realm of rights, it is common to assert that a particular action is wrong if that action causes harm to others which could have been averted.¹⁵⁶

¹⁵⁵ Parfit, D., *Op.Cit*, p.353. Parfit's definition of future persons is sketched out in greater detail later in this chapter.

¹⁵⁶ For supporters of right-based moralities, that 'harm' must constitute a rights violation in order to be deemed wrong.

Unsurprisingly then, those ethicists writing on climate change tend to maintain such a principle in relation to future persons. For example, O’Neill writes that “by burning fossil fuels prodigally we accelerate the greenhouse effect and may dramatically harm successors, who can do nothing to us”.¹⁵⁷

Perhaps one of the key difficulties in the field of climate ethics is that, as Parfit and other theorists highlight, O’Neill’s statement is not obviously and unequivocally true. This is because of what has come to be known as ‘the non-identity problem’. Page summarises the non-identity problem as follows: “Put simply, the puzzle is that actions or social policies that will lower future quality of life will harm few, if any, members of future generations because they are also necessary conditions of these people coming into existence.”¹⁵⁸

It is not immediately clear that the manner in which Page’s assertion is framed is correct. It seems at least possible that an action can both cause a person’s existence and harm that same person. Perhaps the issue, then, is not whether or not our actions harm future persons, but rather, whether the fact that we are accountable for such harms is sufficient reason to blame us for causing them. This is because the same actions which caused the harm were necessary conditions of their victims’ existence. Therefore, we might feel that future persons are, on balance, better¹⁵⁹ off as a result of our pollutant acts even though they are also harmed by them.

¹⁵⁷ O’Neill, O., *Towards Justice and Virtue*, (Cambridge University Press, Cambridge, 1996), p.115

¹⁵⁸ Page, E.A., *Op.Cit*, p.132

¹⁵⁹ As I will touch on later, the idea that these persons might be ‘better off’ is problematic under these circumstances. They are not straightforwardly ‘better off’ because they exist, since the other option – their complete lack of existence – is an entirely different scenario, rather than a ‘worse’ one as, in the latter scenario, the same people do not exist and thus cannot be in a state

If I push a child from the path of a speeding car, it would seem unjustified to hold me accountable for the resultant bruising to its arms. We would ordinarily say that my selfless act in saving its life (or, to draw a neater parallel, my enabling the continuance of its existence) absolved me of any guilt regarding any injuries caused to the child in the process. The question then becomes whether there is an important moral difference between deliberately protecting someone's current existence and accidentally creating some of the conditions for someone's existence in the future. This issue, as I will explain in more detail below, is at the crux of the non-identity problem.

The primary problem in assigning moral value to future persons is not that such persons do not yet exist. Rather, it is the fact that they do not exist in a very specific way; they are not yet *individuated*. We do not yet know who such persons will be.¹⁶⁰ More importantly, we do not yet know *if* they will be.

Some theorists do not think this should be an issue. They maintain that, because we can be relatively sure that *some* future persons will one day exist, we have a duty not to take actions which will cause them harm at the point at which they come into existence.¹⁶¹ As theorists such as Parfit highlight however, the problem is more complex than this. This is because, in many cases, those actions which cause climate change are the very same actions which cause the future persons who are affected by it to come into existence.

of being 'worse off'. Nonetheless, there does not seem to exist a better way of terming the problem.

¹⁶⁰ Feinberg, J., 'The Rights of Animals and Unborn Generations', in Feinberg, J., *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton: Princeton University Press, 1980), p.181

¹⁶¹ De-Shalit, A., *Op.Cit.*, p.113

In order to explain such a fact, we must begin with Parfit's 'Time-Dependence Claim', which goes as follows: "If any particular person had not been conceived when he was in fact conceived, it is *in fact* true that he would never have existed."¹⁶² Of course, there is no way to unequivocally prove the truth of such a claim, for there is no way of knowing absolutely whether, had the same two parents had sexual intercourse three years later than they did, the exact same child would have emerged. However, as Parfit notes, while not inarguably true, the Time-Dependence Claim is uncontroversial and easy to believe.¹⁶³

In order to make his claim even less controversial, Parfit reformulates it to read: "If any particular person had not been conceived within a month of the time when he was in fact conceived, he would in fact never have existed."¹⁶⁴ In doing so, he ensures that both egg and sperm would be different in the latter case, thus ensuring that the fetus conceived one month later would be biologically different to that which could have been (but was not) conceived one month earlier.¹⁶⁵

De-Shalit highlights the relevance of this logic. As he asserts, not only can a particular policy of current persons (e.g. drastically cutting emissions or allowing them to go on unrestrained) affect the standard of living of future persons,¹⁶⁶ it can (and will) "affect people's very existence, i.e. it may determine whether they are going to exist or not, and, more generally, our acts may affect the number of

¹⁶² Parfit, D., *Op.Cit*, p.352

¹⁶³ *Ibid*, p.352

¹⁶⁴ *Ibid*, p.353

¹⁶⁵ *Ibid*, p.353

¹⁶⁶ De-Shalit, A., *Op.Cit*, p.69

future generations, the size of each generation, and the identities of future people”.¹⁶⁷

As a result, Parfit notes that our moral thinking about issues which affect future persons needs to be divided into three types of choice:

- 1) Different Number Choices – those choices of current persons which will affect both the number of future persons who are born and the identity of such persons.
- 2) Same Number Choices – those choices of current persons which will affect *which* future persons are born, but which will have no bearing on *how many* future persons are born.
- 3) Same People Choices – the choices we make which will have no bearing on the number or identity of future persons.¹⁶⁸

As Parfit asserts, most of our moral reasoning tends to come in the form of Same People Choices.¹⁶⁹ However, it is often the case that we miscategorise Different Number Choices and Same Number Choices as Same People Choices, and it is this error which confuses our reasoning processes. Our concerns with regard to future persons tend to assume that *the same* future persons will be worse off if we pollute more and better off if we pollute less. However, on closer inspection this is not obviously the case.

Both the number of individuals born in the future and the identities of such individuals are at least partially a result of circumstance. The process of industrialisation (the primary cause of climate change), by, for example, causing

¹⁶⁷ *Ibid*, p.69

¹⁶⁸ Parfit, D., *Op.Cit*, p.356

¹⁶⁹ *Ibid*, p.356

more people to live in cities and enabling travel on a global scale, has had a dramatic effect on which individuals have been born.¹⁷⁰ As Parfit puts it, "...how many of us could truly claim, 'Even if railways and motor cars had never been invented, I would still have been born'?"¹⁷¹ In other words, those individuals who make up the future generations who will suffer as a result of climate change will be *different* individuals than those that would have existed had we not polluted. Thus, our pollution (which they will one day suffer the negative effects of) is a *necessary condition* of their existence.

In light of this, Parfit feels that we are faced with two questions:

"1) If we cause someone to exist, who will have a life worth living, do we thereby benefit this person?

2) Do we also benefit this person if some act of ours is a remote but necessary part of the cause of his existence?"¹⁷²

Parfit argues that, if our answer to the first question is yes, it must be the same for the second question.¹⁷³ Many people, though, would answer both questions in the negative. They would argue that, in order to benefit somebody, it must be the case that they would have been worse off were it not for our action. Since, however, if we had not performed our action, the individual who was created as a result of it would not have existed, they are not actually worse off as a result of it.

¹⁷⁰ Caney, S, *Op.Cit*, p.129

¹⁷¹ Parfit, D., *Op.Cit*, p.361

¹⁷² *Ibid*, p.358. It should be noted here that Parfit – much like Page when he makes a similar argument (Page, E.A., *Op.Cit*, p.134) – makes no reference to what he would consider to be a "life worth living", how such a thing might be judged, or why such a stipulation is included. One might argue that every life is worth living, and that, if an individual feels their life is not worth living, it is (usually) within their power to end it.

¹⁷³ Parfit, D., *Op.Cit*, p.358

They cannot be, since they never will have existed. Therefore, because they would not have been worse off had we not performed our action (indeed, they will not *be* anything), they are not better off because we did perform it. Our action does not actually *benefit* such a person. Thus, such an argument would go, future persons have a legitimate moral claim against current persons who cause them harm through pollution, even though without said pollution said future persons would not have existed.¹⁷⁴

Somehow, despite the fact that such an argument is logic-based and arrives at a conclusion many of us would agree with, the thinking involved in reaching that conclusion seems counter-intuitive. Is it really the case that never existing does not make one worse off than those persons who exist? Obviously, in terms of logic, the argument is sound. I cannot be worse off if I never exist, because I cannot *be* anything. Intuitively speaking though, it seems equally true that most of us would rather exist than never have existed. As such, it does seem in some way callous to place too much blame upon actions which were a necessary condition of existence. Nonetheless, the argument raised is an important one and will come to the fore again in an adapted manner in the later section on rights-based solutions to the non-identity problem.

Parfit highlights the problems noted above using the example of ‘the 14-year-old girl’:

This girl chooses to have a child. Because she is so young, she gives her child a bad start in life. Though this will have bad effects throughout this child’s life, his life will, predictably, be worth

¹⁷⁴ *Ibid*, p.358

living. If this girl had waited for several years, she would have had a different child, to whom she would have given a better start in life.¹⁷⁵

He notes that, even if we do not believe that causing someone to exist benefits that person, we must acknowledge that having a life worth living is better for this person than if they had not existed.¹⁷⁶¹⁷⁷ Thus, even if we believe the girl's decision was wrong, we cannot say that her child is worse off as a result of it. Analogously, we cannot say that the victims of climate change are worse off as a result of our pollution if the actions which created that pollution were a necessary factor in their existence.

As Parfit notes, “[w]e can deserve to be blamed for harming others, even when this is not worse for them”.¹⁷⁸ If my careless driving causes you to lose a leg, and then, a year-later, war breaks out, and your missing leg causes you to avoid certain death in the trenches, it is still reasonable to hold me accountable for your disability.¹⁷⁹ The problem is that climate change presents a very different scenario. While we know that our current pollution will harm future persons, we also know that those persons it harms would not have existed without it because that pollution is the by-product of our way of life, and it is that way of life which makes us have children when we do. We know that, as a result, the people harmed would not regret our act if they knew about it, and that our act will not be

¹⁷⁵ *Ibid*, p.358

¹⁷⁶ *Ibid*, p.359

¹⁷⁷ For more on the concept of wrongful birth, see: Feinberg, J., ‘Wrongful Life and the Counterfactual Element in Harming’, *Social Philosophy and Policy*, Volume 4, Issue 1 (1986), 145-178

¹⁷⁸ Parfit, D., *Op.Cit*, p.372

¹⁷⁹ *Ibid*, p.372

worse for such people than anything else we could have done.¹⁸⁰ As a result, Parfit believes that, in the case of the non-identity problem, "...we should revise the ordinary use of the word 'harm'. If what we are doing will not be worse for some other person, or will even be better for this person, we are not, in a morally relevant sense, harming this person".¹⁸¹

In summary, it seems that, regardless of whether we feel causing someone to exist benefits that person, the non-identity problem means we commit no wrong against future persons through our pollution, despite the fact that they will be harmed by it. This is because, should we cease our emissions, we will cause different people to exist than otherwise would have. Thus, those people who will be affected by our emissions cannot be viewed to have been harmed by them.

Faced with such logic, environmentalists must demonstrate other reasons as to why current persons ought to reduce their emissions.

One obvious path to take would be to claim that non-human species and/or the planet itself possess an intrinsic moral value which is separate from its value to human beings. This would mean we have a duty to cut our emissions in order to protect those species climate change will irreparably damage, most of which would not be *different* individual creatures to those which would have existed had we not polluted, and whose numbers will be greatly affected by our choices.

However, this is not an objection which could be easily upheld by supporters of right-based moralities.

¹⁸⁰ *Ibid*, p.373

¹⁸¹ *Ibid*, p.374

Before giving up on humanity as a relevant measure of morality, however, there is another way of viewing things we might consider.

We might claim that, even though no specific individual humans are made worse off by climate change, climate change still causes suffering. If, under Scenario A (not polluting) there will be a lower net amount of human suffering than under Scenario B (polluting), then it seems that many moral systems – most obviously utilitarianism – might seek to claim that, all things being equal, there is something morally wrong with causing climate change. The fact that the identity of those harmed and those not harmed will differ is of no great moral significance, one might argue, since our desire to avoid harming them is based upon their status as humans *in general*, not on the basis that they are *specific* humans.

In summary, the non-identity problem only creates a difficulty in our moral reasoning if we apply a particularly individualist take on morality. Rights-based moralities tend to be individualist in nature¹⁸² and, as the next sections will show, it is with regard to such moral systems that the non-identity problem becomes particularly relevant.

The Non-Identity Problem and Rights

At first glance, an appeal to rights appears a particularly effective way of overcoming the non-identity problem.

¹⁸² This is not to ignore the expansive literature on group rights. The question of whether future persons might be the type of entity capable of possessing group rights – and the impact this would have in enabling rights-based moralities to combat climate change – will be dealt with in the next chapter.

The non-identity problem primarily arises as a result of the fact that the emission-producing actions which cause harm to future persons are necessary factors of their existence (that is, of the existence of those specific future persons, not of the existence of any future persons at all). As such, many ethicists (including Parfit) struggle to find any good moral reason for acting to combat climate change at all. This is because, they believe, nobody is made *worse off* by climate change¹⁸³ (and, indeed, many people – current and past persons producing emissions they do not feel the effects of – are made *better off* by it). Thus, even though many future persons will suffer horribly from the effects of climate change, because they remain better off than if they had never existed, they have no moral claim against current persons for the emission-producing actions which caused both their existence and their suffering.

Supporters of rights are unhindered by such a problem. This is because, under rights-based moralities, one does not need to be made worse off by something in order to have been wronged. Individuals have rights, and other individuals (or bodies of individuals such as states) have duties to ensure those rights are met. Under such a system there is no logical reason as to why future persons could not claim that their right to health had been violated by other individuals who had caused them to contract malaria through their emissions. Importantly, under a rights-based morality, this remains the case even if the victim would never have existed without those same emissions. This is because, under rights-based moralities, all individuals are entitled to equal rights by virtue of the fact that they are human. So, while there is no right to exist, once an individual does exist they

¹⁸³ *Ibid*, p.358

possess the same rights as everybody else regardless of the circumstances of their existence.

It seems, then, that an adherence to rights-based moralities has some advantages with regard to climate change since it appears, at first glance, able to comfortably and coherently subvert the non-identity problem. However, as Callahan correctly highlights, there is a downside to this approach:

Imagine that all the inhabitants of our planet decide together that they no longer wish to reproduce, no woman conceives, and there are no future generations...the rights theorist is silent about this outcome: since none of the rights of future people are being violated by such a decision - their existence being a prerequisite for their having rights - the proponents of the rights theory cannot condemn the earth's inhabitants for this unfortunate decision.¹⁸⁴

Callahan's objection seems well-founded. Indeed, if anything, it is perhaps not strong enough. Rights theorists are not 'silent' on the issue of all human beings deliberately and voluntarily ceasing reproduction – rather, they must, logically-speaking, describe such an act as being morally-neutral. Since there is no right to be born, there is no correlative duty to conceive. Certainly, many of us might find such a conclusion morally (though not logically) objectionable.¹⁸⁵ However, given that, in practice, there seems no reason to think that the entire human race would deliberately and voluntarily stop producing offspring, it would perhaps be

¹⁸⁴ Callahan, D., 'What Obligations do we Have to Future Generations?', in Partridge, E., (ed.) *Responsibilities to Future Generations* (New York, Prometheus Books, 1981), cf, quoted in De-Shalit, A., *Op.Cit*, p.115

¹⁸⁵ Although not all of us. It does not seem unreasonable to assert that, while there are many ways in which it would be immoral to act towards individual human beings once they exist, it is not obvious that there is necessarily any inherent moral value in ensuring the continuance of the human race provided that we do not, in causing our own extinction, cause harm to existing individuals.

permissible to forgive the failure of rights-based moralities to condemn such actions. Unfortunately, however, while the non-identity problem need not prevent individuals from possessing rights upon coming into existence, it does serve to demonstrate that they cannot do so prior to such a point.

The ‘Non-Right-Holder Problem’

As earlier noted, the moral issues surrounding future persons are further complicated by the unwillingness of scholars to define their subject matter. The same might be said of the unwillingness of scholars to define which types of entity are capable of possessing rights and why. As highlighted above, an adherence to a rights-based version of morality would appear to resolve the non-identity problem when taken in isolation. Though he does not acknowledge such a fact, this is perhaps one of the reasons behind Howarth’s claim that “...rights-based ethics provides the most convincing approach to issues of sustainability and intergenerational justice...”.¹⁸⁶ The problem, however, with both Howarth’s assertion and any attempt to resolve the non-identity problem through an appeal to rights is that both rely solely upon the structure of how rights distribution works between right-holders, whilst off-handedly presupposing that future persons can be counted as right-holders. On closer examination, the issue is far more complicated than this. As Caney correctly highlights,

¹⁸⁶ Howarth, R.B., *Op.Cit*, p.348

...the effects of global climate change will be felt by future people, so that an adequate theory of global environmental justice must provide guidance on what duties to future generations those living at present have. It must consider whether future people have rights...¹⁸⁷

Perhaps the most logical starting point in answering such a question would be to return to our three types of rights-based morality (Choice Theory, Interest Theory and Libertarianism) in order to ascertain which characteristics any individual must display in order to be capable of possessing rights and whether future persons meet such criteria.

Griffin maintains that it is an individual's *personhood* which entitles them to rights:

A normal fully developed human being is of considerable moral weight, perhaps for several reasons, but one of them is simply that the human being is a *person*. What sort of being are we persons essentially? We are embodied minds – that is, something with the capacity to support consciousness. So when did I, a being of this sort, begin to exist? It must be that I began to exist when my brain first acquired the capacity to support consciousness.¹⁸⁸

Clearly, if we accept Griffin's account, future persons are simply not human beings and so are not capable of possessing rights regardless of the non-identity problem, a fact which would certainly appear to invalidate the arguments of those, like Howarth, who feel that rights-based moralities are the best way forward in our ethical thinking about climate change.

¹⁸⁷ Caney, S., *Op.Cit*, p.123

¹⁸⁸ Griffin, J., *On Human Rights*, (Oxford: Oxford University Press, 2008), p.86

It seems likely that this personhood approach is something akin to the position which Nozickians would take on the matter. As was highlighted in Chapter 2, Nozick fails to go into great detail with regard to exactly what it is about people that make them appropriate candidates for rights. People have rights because they are human beings and human beings are born in possession of rights in the state of nature. Since future persons have not yet been born (and, indeed, will never be born, since at such a point they would become current persons), they are prior to the state of nature and are not yet human in the way that Nozick imagines when he speaks of right-holders. Furthermore, given Nozick's focus on negative rights and the extensive limitations these place upon states, claiming that those states must consider even the rights of as yet non-existent persons in their decision-making would render Nozick's theory even more contentious.¹⁸⁹

Griffin goes on to strengthen his earlier statement, concluding: '...only normative agents bear human rights – *no exceptions*: not infants, not the seriously mentally disabled, not those in a permanent vegetative state, and so on.'¹⁹⁰

Such a definition plainly rules out the possibility of future persons possessing rights; if even certain types of living human beings are not eligible for rights, those that do not yet exist must clearly be excluded. Future persons are a long way from being normative agents – even if they will one day come to be so.

However, it seems likely that most supporters of right-based moralities would be unwilling to accept Griffin's definition.

¹⁸⁹ As with the rejection based on Griffin's logic, the basic Nozickian rejection of the rights of future persons is based, in the first instance, upon the non-existence of future persons as opposed to the non-identity problem. As I will shortly highlight, as a rights-based moral system Libertarianism is *additionally* unable to assign future people rights due to the non-identity problem, but the non-identity problem and the non-existence need not and should not be conflated.

¹⁹⁰ *Ibid*, p.92

Much like supporters of any moral system, supporters of right-based moralities will want to say that it is morally wrong to torture a child. As we saw in the previous chapter, the only manner in which right-based moralities can assert that an action is wrong is to demonstrate that said action violates a right possessed by the victim of said wrong. Therefore, for the supporter of a right-based morality, if it is wrong to torture a child this must mean that that child has a right not to be tortured.¹⁹¹ Such a fact would be incompatible with Griffin's definition.

As we saw in the previous chapter, in line (to some extent) with Griffin's reasoning, Choice theorists base their justification of human rights upon the notion of the capacity for action. Let us then return to Gewirth's justification for the existence of rights: "...rights and rights-claims arise logically and fundamentally out of the concern of all human beings, as prospective purposive agents, that the proximate necessary conditions of their action and generally successful action be protected."¹⁹²

Perhaps the key difference for our purposes between Gewirth and Griffin's explanations of who should hold rights is the former's inclusion of the word *prospective*. For Gewirth, the *potential* for action is enough to justify an individual's possession of rights. Clearly, such a fact is enough to rescue at least Choice Theory from Griffin's uncomfortable conclusion that children cannot

¹⁹¹ This is not to say that the entirety of the moral weight of the argument need be borne by the child. One might argue that, in forcing/convincing the torturer to take such an action, we cause a deprivation of his/her humanity which might also be deemed to go against his/her rights. Nevertheless, the child is plainly wronged by being tortured and I cannot help but feel that most supporters of rights would view that wrong to amount to a violation of rights, even if this is not the only possible means open to the supporter of rights of framing the wrongness of torturing children.

¹⁹² Gewirth, A., *The Community of Rights* (London and Chicago: University of Chicago Press, 1996), p.16

possess rights. The question then becomes, is the potentiality for action held by children of the same order as that held by future persons?

As a fellow Choice theorist, Steiner argues that "...it is precisely because future persons are necessarily incapable of choice, that they cannot be said to have rights against present persons".¹⁹³ Surely, though, as Griffin highlights, the same thing could be said of infants? Gewirth, as we have seen, seeks to avoid this problem because he feels that the fact that we know that infants *will* come to make those choices means it is reasonable to assign them rights *before* they are capable of doing so in order to safeguard their existence for long enough for them to develop into choice-making beings. Could not the exact same thing be said of future persons?

In order to highlight the difference between infants and future persons it is necessary to return to the non-identity problem. The key difference between infants and future persons is that infants currently exist.¹⁹⁴ They are individuated. We are able to point to specific infants and claim that they, as specific individuals, will one day possess the capacity for reasoned action. The same cannot be said of future persons. We are unable to point to any specific individual who will be born years from now which we are defining as our 'prospective purposive agent'.

¹⁹³ Steiner, H., 'Markets and law: the case of environmental conservation' in Moran, M., and Wright, M. (eds), *The Market and the State: Studies in Interdependence* (Macmillan, London, 1991), pp.43-58, p.52. As with Libertarians, this primary dismissal of Choice theorists is based on the non-existence of future persons. Again, as supporters of a rights-based morality, Choice theorists will be given a second (and at least equally good) reason for rejecting the status of future persons as right-holders by the non-identity problem. While the non-existence of future persons is a necessary factor of their non-identity, the two things are not synonymous.

¹⁹⁴ I should note that this is not the only difference between infants and future persons. Unlike infants, future persons are necessarily incapable of suffering (since by the time they suffer they will be current persons). Therefore, even if the Choice theorist felt both to be equally incapable of choice, there would seem to be other good reasons as to why the welfare of infants might still be placed above that of future persons even if we do not think that infants possess rights.

The fact that I am unable to identify, even in thought, the future person who I am claiming will be able to make choices seems problematic. Future persons are wholly incapable of choice and are unable to exercise or claim any rights we assign them. While we might argue that current persons could claim on their behalf, such claims would seem somewhat disingenuous if am incapable of pointing to whom I am claiming on behalf of.

Imagine I make the claim that you should not take a certain action which you have a right to take on the grounds that your doing so will one day harm someone I cannot name and who does not currently exist. I think you might reasonably argue that if your rights can be restricted under such circumstances they lose much of their meaning, since it becomes too easy to claim that such restrictions are rights-based.

When it comes to children, things are different. Firstly, we might question whether they really are incapable of making choices in the same way as future persons. A baby's choice of whether to shake the rattle or pet the teddy may not be a fully autonomous and valuable choice, but it is a choice nonetheless. Being able to make such simple choices seems fundamentally different from the inability of future persons to do anything at all.

Secondly, it seems eminently reasonable that I might make a rights claim on behalf of a child who will later benefit from such a claim. This is because I can point to the child who holds the right and demonstrate that his/her right *in particular* is being violated by your action. This seems an important difference from future persons. If you are restricting my rights in the name of some other, it

seems only reasonable that you are able to tell me who that other is, or at the very least *that* that other is.

Ultimately, future persons cannot currently make choices and so it is difficult to see how they might currently possess rights. If Choice theorists really do struggle with the moral status of infants, this struggle seems better viewed either as a problem with Choice Theory or as evidence that children really should not have rights. It cannot be seen as evidence that non-existent people possess a capacity to make choices. It seems, then, that both a Nozickian personhood theory and Choice Theory are ultimately unable to provide any good reason as to why future persons could or should be said to possess rights before they are conceived. It is perhaps for this reason that Page seeks to base his assertion that future persons might legitimately be considered right-holders on Interest Theory.

Page claims that, if one subscribes to Interest Theory, future persons *can* be considered capable of possessing rights because, as he puts it,

[i]t can be assumed that there will be people who exist in the future that these people will possess interests that will be vulnerable to harm, and that the actions of existing persons – particularly those affecting the integrity of the natural environment – will have profound effects on these interests.¹⁹⁵

Of course it is fairly safe to assume that, at some point in the future, persons will exist who do not exist today and that those persons will have interests which may well be significantly negatively affected by the actions of current persons. But surely the same defence could be made of Choice Theory? Surely the choices of

¹⁹⁵ Page, E.A., *Op.Cit.*, p.144

such persons will, in many cases, also be severely limited by the actions of current persons? The choices of who to marry or which religion to adopt or even where to shop will be severely limited for those future persons laying in hospital beds dying of malaria as a result of the pollution of current persons. In short, one obvious fault with Page's claim is that, if the fact that future persons *will have* interests is enough to justify their possession of rights under Interest Theory, then the fact that such persons *will have* choices must equally justify their possession of rights under Choice Theory.

A second (and more concerning) problem with Page's statement is that it misses the key issue. Nobody doubts that, upon coming into existence, future persons will hold the exact same rights as their predecessors are entitled to today.

However, what Page appears to infer is that the fact that future persons *will one day* possess interests is enough to confer duties towards them upon current persons. This cannot be correct.

It seems that perhaps Page means to say that, because future persons *will one day* possess interests, they *currently* possess rights (thus meaning that current persons currently possess correlative duties not to take actions which might, in future, violate such rights). However, Page provides us with no reason as to *why* this should be the case.¹⁹⁶

The above position is also alluded to by Feinberg, who states that:

¹⁹⁶ Indeed, it is worth noting that, were one to adhere to such a position, abortion might be considered to represent a human rights violation regardless of when we feel life begins as, according to Page's logic, individuals would possess a right to life *before* their birth. This is a position that many supporters of rights would be uncomfortable with. Additionally, its logic is questionable. How can one possess a right to life before one actually has life? A right to life, it seems, must surely be a right to the continuance of a life which has already begun.

The rights that future generations certainly have against us are contingent rights: the interests they are sure to have when they come into being (assuming of course that they will come into being) cry out for protection from invasions that can take place now. Yet there are no actual interests, presently existent, that future generations, presently non-existent, have now.¹⁹⁷

Feinberg, then, at least attempts to address the problem surrounding the fact that, while future persons will one day have interests, they do not yet do so. He feels that this fact is not sufficient to prevent current persons from bearing duties which are effectively correlative to the (not yet existent) rights which stem from the (not yet existent) interests of (not yet existent) future persons. He justifies such a position using the following analogy:

We can tell, sometimes, that shadowy forms in the spatial distance belong to human beings, though we know not who or how many they are; and this imposes a duty on us not to throw bombs, for example, in their direction. In like manner, the vagueness of the human future does not weaken its claim on us in light of the nearly certain knowledge that it will, after all, be human.¹⁹⁸

The problem is that the two examples used by Feinberg are far from analogous. I have a general duty not to throw bombs because they might harm current persons (this is particularly true if I am throwing them *at* current persons). Those current persons remain right-holders regardless of whether I can see them. The fact that I, at this present moment, am unable to discern their identity is not demonstrative of the fact that their identity is indeterminable. Plainly, they currently exist, are human, and thus possess rights. Just as plainly (as Feinberg himself

¹⁹⁷ Feinberg, J., *Op.Cit*, p.181

¹⁹⁸ *Ibid*, p.181

acknowledges), future persons do not yet exist, and thus, it would seem, do not yet possess interests or the rights which derive from them. Again, this is particularly true in light of the fact that the identity of those individuals who will one day possess interests will change in light of the adaptations we make to our behaviour as a result of the rights we have decided to assign them (something I will return to shortly).¹⁹⁹

De-Shalit appears equally confused by the difference between individuals who *have* interests and individuals who *will have* interests. He states that, “it is difficult to deny that there are some interests, at present existing, that future generations, at present non-existent, now have”.²⁰⁰ Even without reference to the non-identity problem, such a statement seems *eminently* deniable. What is strange is that De-Shalit himself provides a quote from De George which perfectly sums up the problem:

Future generations by definition do not now exist. They cannot now, therefore, be the present bearer or subject of anything, including rights. Hence they cannot be said to have rights in the same sense that presently existing entities can be said to have them. This follows from the briefest analysis of the present tense form of the verb ‘to have’.²⁰¹

De-Shalit responds to such an argument as follows:

...this argument is not strong enough to disprove the idea that future people, if and when they exist, will have rights. What matters in this case is not that future people do not exist now, but rather that if and when they exist, future people will have rights. If so we should conserve the rain

¹⁹⁹ It is worth noting once more that, while the argument that the non-existence of future persons precludes them from having rights is strengthened by the non-identity problem, it is not dependent on it.

²⁰⁰ De-Shalit, A., *Op.Cit.*, p.114

²⁰¹ *Ibid*, p.114

forests, clean up the beaches, reduce the use of gases which cause the greenhouse effect and so on, in order not to violate these eventual rights.²⁰²

De-Shalit's objection seems to misunderstand the problem. De-George is quite plainly not trying to 'disprove the idea that future people, *if and when they exist, will have rights*'.²⁰³ Rather, he simply states that future persons do not *currently* possess such rights and is concerned with the effects of this upon the duties of existing persons.

While De-Shalit raises some interesting issues,²⁰⁴ neither he, Feinberg nor Page is able to demonstrate that future persons possess interests *before* their conception (at which point they become current persons).

Nor do they address another key difficulty with the idea. If future persons could be said to have interests in the present, they would surely have an interest in coming into existence. Yet there clearly cannot be a right to come into existence since we would be constantly in violation of such a right with almost every action we took since, as the non-identity problem shows us, each of those actions could serve to prevent certain future persons from existing and cause certain others to exist in their place.

²⁰² *Ibid*, p.114

²⁰³ Although, in a certain sense, even this is not actually true, since when future people come into being and have rights, they are no longer future people.

²⁰⁴ De-Shalit raises (but fails to answer) the complicated question of what rights-based moralities necessitate we do when the actions of current persons *will* violate (but have not yet violated) the (presently non-existent) rights of individuals who are currently future persons at the point at which they become current persons. Such a question, however, remains regardless of whether one adheres to Interest Theory and, thus, is something to be returned to in Chapter 6.

Thus, if there is a reason to think that future persons are capable of possessing rights before their conception, that reason does not lie in the fact that such rights are derived from interests.

In summary, it seems clear that none of the key justifications of rights provides us with any reason to think that rights should be afforded to future persons before their conception. Future persons are not currently capable of reasoned action. They do not currently have interests and are not currently capable of making choices. They are not currently human. They are not *currently* anything. The first reason for thinking that future persons do not possess rights, then, is their non-existence. There is, however, a second, related but separate reason for thinking future persons cannot hold rights, which is highlighted by a return to the non-identity problem.

The importance of the non-identity problem for this thesis is that it demonstrates that future persons must be precluded from possessing rights.²⁰⁵ This can be seen when we consider the reality of the scenario in which future persons are said to possess rights in the present:

Living Lifestyle X causes me to violate the rights of Future Person A. Therefore I am placed under a duty to instead adopt Lifestyle Y. This causes us to be faced with a paradox. In respecting A's right by choosing Lifestyle Y, I fail to produce the pollution which was a necessary factor of A's existence. It may be that B or C or even B and C will exist instead, but A will not. And if A not only does not exist, but will never exist, then A certainly cannot have any rights which place me

²⁰⁵ An interesting question which arises here is whether future persons are precluded from possessing rights *because* of the non-identity problem, or whether they are anyway precluded from possessing rights and the non-identity problem merely helps us to demonstrate why this should be the case.

under a duty not to pollute. And since I am under no duty to choose Lifestyle Y, I may quite legitimately choose Lifestyle X (which is preferable to me and allows my rights to be met more fully). However, in doing so, I cause Person A to exist, and am thus placed under a duty to respect his/her rights...and the whole problem goes on and on in an everlasting circle.

As a result of the non-identity problem then, even if we feel that the potential to make choices / have interests is reason enough to assign rights to an individual, we remain unable to assign future persons rights. This is because future persons do not yet exist. Or, more precisely, it is because of the interrelation between that existence and the so-called rights of that individual. While an objection to the rights of future persons based solely upon their non-existence is valid in and of itself, it is greatly strengthened when combined with the paradox created by the non-identity problem.

Conclusion

In summary, there seems no way in which any form of rights-based morality is capable of producing a convincing, coherent argument to say that future persons possess rights. Future persons are incapable of making choices (and, unlike infants, always will be since once they are in a position to make choices they will be current persons) and therefore cannot justifiably be said to possess rights according to Choice Theory.

They are similarly incapable of having interests. If they were not, they would surely have an interest in being brought into existence, which would amount to a

right to such a thing, which we would all be in constant violation of since so many of our actions (especially our pollutant actions) cause certain people to exist at the expense of others. Interest theorists are therefore equally unable to hold that future persons might possess rights.

Finally, Nozickians, while being less obviously hamstrung than Interest and Choice theorists on the issue, nonetheless struggle to assert why a future person amounts to a person at all and therefore would surely maintain that future persons do not possess rights in the present. This is particularly true given the exceptionally strong, exceptionally individualist status they assign to rights.

Nozickian rights are so extensive in terms of the range of activities they cover and so powerful in how strongly they are demanded that to insist that they were possessed equally by as yet non-existent persons would likely limit the actions a state might take to such an extent as to render a Nozickian morality unworkable.

In addition to these specific theoretical objections surrounding non-existence in and of itself, the non-identity problem provides a universal, practical obstacle to the notion that future persons might possess rights. In acting in accordance with the rights of a particular future individual, we might cause that individual's non-existence, thus meaning that we need no longer act in a way which respects his/her rights. This paradox demonstrates that future persons cannot be deemed to have rights and current persons cannot be deemed to be placed under correlative duties towards them.

Future persons' lack of rights means that rights-based moralities struggle to assign them a moral status which most of us would deem appropriate. While some

amount supererogation aimed at protecting future persons would be permitted,²⁰⁶ any action which, in affording such protection, required damaging the rights of current persons could not be considered permissible. Unfortunately, as Chapter 5 will demonstrate, a great many of the paths open to states which might make a positive impact in reducing climate change will mean that the rights of current persons are negatively impacted.

²⁰⁶ As has already been noted, rights-based moralities are not all-encompassing moral systems. As such, it may well be that some supporters of rights are simultaneously followers of other moral schools of thought which they feel require them to take certain measures to protect future persons from harm. Such behaviour, though, would be considered (literally) beyond the call of duty under a rights-based morality. Therefore, not only can it not be demanded by supporters of rights, at the point where it harms the rights of other current persons, it must be actively prohibited.

CHAPTER 4: RIGHTS-BASED RESPONSES TO THE PROBLEM OF FUTURE PERSONS

Introduction

The next chapters will demonstrate that supporters of rights are left questioning the validity of their moral doctrine when faced with its apparent inability to provide good ethical reasons for reducing emissions. This difficulty predominantly emerges from the inability of future persons to possess rights – a fact which itself emerges largely as a result of the non-identity problem, which precludes them from doing so. This chapter will re-examine the nature of rights, duties and the non-identity problem in order to analyse some possible rights-friendly alternatives to the position put forward in Chapter 5.

Numerous experts in the field of climate ethics raise the spectre of the non-identity problem before dismissing it as being ultimately incapable of giving us good reason not to show moral concern for future persons. McKinnon, for example, argues:

It is true that what we do now will affect the identity of members of F, that is, will affect who it is that actually comes to be. But what matters is that, whoever comes to be, what we do now delivers justice to them. And the reason for this is...that the point in time at which a person – any person – is born is as morally irrelevant to her status as a recipient of justice as is her sex, colour, religion, etc.²⁰⁷

²⁰⁷ McKinnon, C., *Op.Cit*, p.43

She goes on to add that “[t]he morally relevant interests of future people – whoever they are – are the same as present people’s...”.²⁰⁸ One legitimate response to such a claim is to contend that it is not the case that the morally relevant interests of future people *are* the same as those of current persons, but that they *will be* the same when those future people come into being (the non-existence problem). On a related (but separate) note, while the time at which a person is born is indeed irrelevant to his/her status as a recipient of justice, the fact that our actions will effect who comes to be seems *very* relevant to the issue of whether the justice s/he will come to be owed upon being born requires current persons to take action before his/her birth.

McKinnon, and many others like her, dismiss the non-identity problem too readily in their desire to assert the moral value of preventing climate change. While I do not agree with such an approach, it will nonetheless often be the case that the non-identity problem would not have proved an unassailable obstacle in the quest of such writers to avail the virtues of not polluting. For most experts in the field the objection to the non-identity problem will sound something like this: ‘causing unnecessary suffering to future persons is wrong and ought to be avoided even if avoiding such suffering changes the identity of those future persons’. I will call this ‘The Avoidance of Suffering Goal’.

As this thesis has shown, such an objection does not hold true for supporters of rights. The non-identity problem precludes future persons from possessing rights. This is because, if Future Person A has a right which creates a duty upon current persons to not pollute, in meeting this duty current people will change the

²⁰⁸ *Ibid*, p.44

circumstances necessary for the Future Person A to exist, thus resulting in his/her replacement with Future Person B.²⁰⁹²¹⁰ Given this fact, it would be paradoxical for us to maintain that Future Person A possesses rights in the present since, as a result of the duties such rights would demand of current persons, Future Person A will never come to exist and will thus never possess rights.

With the above in mind, a far more interesting rejection of the non-identity problem is put forward by Caney, who attacks the validity of the notion from a rights-based perspective.²¹¹

Caney essentially seeks to put forward a rights-friendly version of The Avoidance of Suffering Goal. In doing so, he highlights two good responses which supporters of rights might offer to the claim that, as a result of the non-identity problem, rights-based moralities are incapable of assigning future people appropriate moral weight.

Firstly, he claims that the non-identity problem only serves to undermine what Parfit would label ‘person-affecting’ views.²¹² Of course, rights, as understood both in Chapter 2 and by the majority of rights theorists, are most certainly person-affecting. Caney, however, contends that if we adopt Sen’s concept of a ‘goal-rights system’, rights cease to be person-affecting and thus cease to fall

²⁰⁹ As noted in Chapter 3, it is not necessarily the case that the relationship between Future Person A and Future Person B would be this straightforward. Our policies today will affect the number of people who are born as well as their identities.

²¹⁰ It may be worth reminding the reader of the analysis made in Chapter 3, which asserted that future persons could not possess rights before their conception because meeting the duties associated with those rights would change the identity of those future persons. To this the critic might respond that rights-based moral systems are deontological in nature and thus not concerned with the specific identities of individuals. Such a criticism misses the key point that in meeting the supposed duties associated with Future Person A we cause him/her never to exist. This was explained in detail in Chapter 3.

²¹¹ Caney, S., ‘Human Rights, Responsibilities and Climate Change’ in Charles R. Beitz and Robert E. Goodin (eds.), *Global Basic Rights*, (Oxford: Oxford University Press, 2015)

²¹² *Ibid*, p.237

victim to the non-identity problem. Sen's position essentially states that the successful fulfilment of rights should be included among the goals that any morality sets itself. And if overall levels of rights fulfilment are a moral system's primary aim (or one of them) then the specific identity of those individuals whose rights fulfilled becomes irrelevant.

Secondly, Caney feels that, in line with the thinking of Elliot, one might conceivably argue that the fact that there will one day exist some future people who *will* possess rights is enough to confer duties on current people in the present without the need to make the controversial claim that future people *currently* possess such rights before they exist.²¹³

In addition to the responses highlighted by Caney, supporters of rights-based moralities might also seek to circumvent the issues associated with the non-identity problem by claiming that future persons are capable of possessing rights *as a group*. If this could be established then, unlike in the individual cases, the meeting of duties associated with such rights would no longer affect the identity of the right-holding entity. The existence of future persons as a group would remain unchanged provided that existence is considered to be in some sense separate from that of its individual members since, regardless of our emission-causing activities, *some* future persons will continue to 'exist' to the extent that future persons can be said to have existence.²¹⁴

²¹³ *Ibid*, p.235

²¹⁴ The use of the term 'exist' in relation to future persons is highly problematic as I will explain in more detail later.

This chapter examines such positions and explains why they turn out to be unable to rescue rights-based moralities from the charge that they are incapable of assigning appropriate moral weight to future persons.

Before any of this though, I wish to begin by exploring a well-placed argument which is put forward by Carter and might be deemed to undermine the non-identity problem and therefore the subsequent difficulties it causes for rights-based thinking. As I will demonstrate, while Carter's reasoning provides supporters of rights with a plausible argument against the non-identity problem, its adoption would actually serve to cause more problems (both practical and conceptual) than it would solve for the doctrine.

Carter and the Non-identity Problem

The difficulties rights-based moralities have in finding suitable motivation for resolving the problem of climate change primarily stem from the inability of future persons to hold rights before their existence. In turn, as explained in Chapter 3, a primary reason for this inability is that the non-identity problem would appear to preclude future persons from having rights. If the identity of future persons is as of yet undecided, and if 'protecting' their 'rights' will change the identities of those future persons, it would seem paradoxical to claim that they are the types of being who might be suitable candidates for rights.

With this in mind, it is worth briefly revisiting the non-identity problem through the work of Carter,²¹⁵ who raises an interesting objection which may be relevant to supporters of rights.

Carter's argument is made in response to Schwartz's claims that, since our pollution causes different people to exist in the future than would have existed had we adopted climate-friendly policies, those future persons who will come to exist as a result of our pollution are not made worse off, and hence are not harmed, by it. As a result, he concludes that current persons are not placed under any ethical duty to reduce pollution.²¹⁶

In response, Carter makes several well-placed objections. For example, he questions the legitimacy of defining 'harm' as 'being made worse off' and asks whether it is truly reasonable to claim that a policy which creates great suffering might be considered preferable to a policy which creates less suffering provided the first policy makes fewer people worse off.²¹⁷

Like many of Carter's arguments, the above point, while interesting, is of no great use to supporters of rights. As previously noted, such individuals are troubled by a much narrower argument than Schwartz's, i.e. that the non-identity problem precludes future persons from holding rights. Carter, however, comes up with one argument which promises to be more fruitful to supporters of rights, since it attacks the reasoning of the non-identity problem itself, as opposed to simply questioning the ethical conclusions others draw from it.

²¹⁵ Carter, A., 'Can We Harm Future People?', *Environmental Values* 10, no.4, (2001), 429-454

²¹⁶ *Ibid*, p.430

²¹⁷ *Ibid*, p.448-9

Carter feels that the non-identity problem emerges as a result of our mistaken assumption that both ‘current persons’ and ‘future persons’ should be treated as collectivities. He argues that

although it appears that we (construed as a collectivity comprising all presently existing persons) are responsible, because of our destructive actions, for the existence of all distant future people, and consequently, that we (construed as such a collectivity) might, perhaps, be thought to be incapable of harming them, there can be no doubt that we, individually, are not responsible through every one of our destructive actions for every future person’s existence, and it therefore seems to be the case that we can harm even the most distant of future generations.²¹⁸

This important but complex argument is clarified by Carter as follows:

The mistaken Schwartzian view that Andrea, Ben and Clara cannot possibly harm Xerksis, Yolanda and Zak depends upon regarding Andrea, Ben and Clara as, in effect, a collective entity. When they are viewed in such a manner, then it appears that *they* cannot harm Xerksis, Yolanda and Zak. But when they are considered individually, it is clear that *they* can harm them.

Certainly, a person would be unable to harm any future person if *every* future person’s existence was dependent upon *every* one of his or her otherwise harmful actions. But it is absurd to think that anyone has the power through *every* one of his or her environmentally destructive activities to determine the coming into existence of *every* future person. Moreover, a person would *only* be *unable* to harm future persons if, for every otherwise harmful action which he or she might perform, the existence of every person who would otherwise have been harmed by the action in question was dependent upon *that* particular action. As it is highly implausible that every one of an individual’s environmentally damaging actions which will result in, or contribute towards, future suffering are of that sort, then each of us can harm (and indeed is harming) future people by our present environmentally damaging activities.

²¹⁸ *Ibid*, p.444

Why do I insist that *every* one of an agent's otherwise harmful actions and *every* one of his or her environmentally destructive activities must determine *every* future person's existence if Schwartz's claim that we cannot harm distant future persons is to succeed? Because even if I *were* able to affect the identity of every person in the distant future, it would not follow that I could not harm any of them. I could still harm a future person whose identity I determined as long as one of my actions made him or her worse off than he or she would otherwise have been – in other words, as long as that action was not the one that determined his or her identity.²¹⁹

In summary, then, Carter objects that, viewed on an individual level, the non-identity problem ceases to be a problem. Since it is distinctly possible that any one of my individual actions could contribute to the harm future persons will face without being significant enough to change the identity of those being harmed, it is perfectly reasonable to claim that the actions of current persons might harm future persons. Indeed, he goes on to suggest that viewing the problem at an individual level is the *only* valid means of assessment:

...one cannot simply conclude that if the collectivity which all presently existing humans constitute is able to harm any distant future person, then it must be impossible for any of those who comprise it to do so, for one cannot straightforwardly transfer the properties of a collectivity to the individuals who constitute it...In other words, we cannot abdicate our individual responsibilities simply by viewing ourselves as a collectivity – no matter how convenient that might be. Furthermore, in the view of many today, the collectivity which all presently existing humans belong to is not, plausibly, a moral agent. And if it is not, then its inability to harm distant future generations is morally irrelevant; whereas those who *are*, without question, moral agents – individual humans – and who *are* able to harm future people, surely have the moral obligation to

²¹⁹ *Ibid*, p.442-3

alter their behaviour, and that of the communities they live within or alongside, so as to avoid bringing about the harm they can individually cause future persons.²²⁰

At first glance, such an approach appears attractive to supporters of rights. Not only does Carter's objection appear to overcome the non-identity problem, it does so in an apparently rights-friendly manner. Rights, in the sense that this thesis has discussed them, are predominantly considered to be held by individuals.²²¹ The problems for supporters of rights have thus far stemmed from the harm climate burdens would do to the rights of current individuals. It would seem quite natural, therefore, to disaggregate both future and current persons into specific (although, in the case of future persons, not *specifiable*) individuals.

Upon further examination, though, it becomes clear that accepting Carter's logic would cause supporters of rights more problems than it would solve. Its primary difficulty is highlighted by Sinnott-Armstrong, who states

There is nothing immoral about greenhouse gases in themselves when they cause no harm. Greenhouse gases include carbon dioxide and water vapour, which occur naturally and help plants grow. The problem of global warming occurs because of the high quantities of greenhouse gases, not because of anything bad about smaller quantities of the same gases. So it is hard to see why I would have a moral obligation not to expel harmless quantities of greenhouse gases. And that is all I do by myself.²²²

²²⁰ *Ibid*, p,444-5

²²¹ The issue of group rights and whether they might be held by future persons will be examined later.

²²² Sinnott-Armstrong, W., *Op.Cit*, p.337

While Sinnott-Armstrong's view is not one which I endorse overall, his claim becomes perfectly reasonable if, as Carter insists, we ignore the inherently collective nature of the causes of climate change. Carter's problem, then, is that, by compelling us to view things from an individualist perspective rather than a collectivist one in order to subvert the non-identity problem, he has inadvertently afforded current persons a different (and more compelling) reason for continuing to pollute. Unless we view climate change as a collective problem, it is difficult to see how we can view it as a problem at all. Contrary to Carter's claim, my emissions *alone* will *neither* change the identity of future people *nor* harm them. It is only when taken with the emissions of others that my emissions are able to cause harm, and when taken with the emissions of others they will also affect the identities of future persons.

In anticipation of criticism of his focus upon individuals, Carter puts forward two possible counter-objections. Unfortunately for supporters of rights, neither seems capable of overcoming Sinnott-Armstrong's argument.

Carter's first response to the objection that it is collectivities, and not individuals, that cause harm to future persons is simply to claim that it is not true. Instead, Carter asserts that, since each individual performs actions which contribute to the harm caused by the collective, each individual can be said to have in some way caused that harm. He uses the following example to illustrate his point:

Suppose that every weekday I walk over your lawn on my way to work. The harm that I do is, apparently, insignificant. However, suppose that one thousand other people also decide to use your lawn as a short cut. Collectively, we cause a great deal of damage to your lawn. It is wholly implausible to think that none of us causes any damage, but there is some collective entity which causes it. Rather, when we all act as we do, each of us causes a small amount of damage which

adds up to a great deal of damage to your lawn. And were each of us to think ‘my contribution is insignificant, therefore I won’t alter my route to work’, then the damage which each adds would persist. Hence, each of us is morally obliged to stop contributing to it.²²³

The problem is that climate change is not like my lawn. With regard to my lawn, ‘each of us causes a small amount of damage which adds up to a great deal of damage’. As such, if there is something morally wrong with damaging my lawn by walking across it, then it is morally wrong for you to walk across it regardless of whether anybody else also does so because your walk alone does *some* damage.²²⁴

This situation is not analogous to climate change because, as Sinnott-Armstrong highlights, each individual emission-causing action is neither harmful nor immoral in itself.²²⁵

Firstly, it clearly cannot be the case that *every* emission-causing action is immoral regardless of whether said action contributes to a level of climate change which harms future persons. Heating one’s home and breathing produce emissions.²²⁶

Such things are activities which individuals cannot be held accountable for, regardless of the consequences. Therefore, unlike your walking on my lawn, it is

²²³ Carter, A., *Op.cit*, p.445

²²⁴ It may or may not be the case that the extent of the immorality of your walking across my lawn is affected in some way by your knowledge that other people will do the same, particularly if it is you walking across it which in some way causes other people to do so. Further examination of such issues is, however, unnecessary. The point I am trying to make is that each single walk across the lawn itself alone causes actual, measurable damage regardless of the behaviour of others.

²²⁵ This is not to claim that individuals cannot be said to have duties which are correlative to collective goods. In this case, though, the good in question is not collective, but a series of individual rights. This has great bearing on the issue since, despite Carter’s best attempts, the harm which climate change will cause to the rights of individual future persons cannot be separated from the changes to their identities which will also result.

²²⁶ Sinnott-Armstrong, W., *Op.Cit*, p.337

not inherently wrong to produce emissions, even if those emissions might be deemed to cause harm.

Secondly, and more importantly, there is nothing inherently harmful about the emissions we produce as individuals. As Sinnott-Armstrong explains,

...the harms of global warming result from the massive quantities of greenhouse gases in the atmosphere. Greenhouse gases (such as carbon dioxide and water vapor) are perfectly fine in small quantities. They help plants grow. The problem emerges only when there is too much of them.²²⁷

He goes on to add that "...global warming will not occur unless lots of other people also expel greenhouse gases. So my individual act is neither necessary nor sufficient for global warming."²²⁸ As a result, unlike the damage to my lawn, the emissions of any current individual *only* do any damage at all when taken in conjunction with an extremely large number of other emissions created by millions of other individuals, past and present. In other words, climate change - which itself *is* harmful to future persons - only occurs as a result of many millions of actions which, taken individually, are not harmful *at all*. It is *purely* a collective problem. Therefore, Carter's move to avoid the non-identity problem through a focus on individuals rather than collectivities inadvertently affords us an altogether different reason for thinking that there is nothing immoral about climate change.

While Carter does not address the criticism of his reversion to an individualist perspective in quite the detail given above, he does acknowledge that the

²²⁷ *Ibid*, p.335

²²⁸ *Ibid*, p.334

objection that climate change is purely a collectivist problem is likely to emerge.

As a result, he makes the following statement:

...were it in fact the case that only collectivities cause significant damage, my response to Schwartz could be developed in the following way: If only a collectivity exceeding a certain size causes harm to individuals in the distant future, each of us is, whether we like it or not, a member of such a collectivity. And each of us bears some responsibility for what that collectivity does – for example, by not campaigning to alter how the collectivity behaves.²²⁹

The obvious response to this is to question whether, given such an adaption, we can still claim that it is possible for current persons, as a collectivity, to take actions which will harm certain future persons without changing their identity. Similarly, it seems pertinent to ask whether it is legitimate to separate certain pollutant actions from others if the sum total of the pollutant actions will still cause the identity of these particular future persons to change. Carter appears to feel that such problems might be overcome if we consider a collective smaller than ‘current persons’, but big enough to impact upon the identity of future persons, such as a nation-state.²³⁰

Even if we accept the legitimacy of Carter’s claim with regard to collectivities, it is still not enough to rescue supporters of rights from the consequences of the non-identity problem. While Carter’s point may cause some difficulty for Schwartz’s dramatic, generalised claim that we owe no moral duty to future persons as a result of the non-identity problem, it does not hold similar strength against the

²²⁹ Carter, A., *Op.Cit.*, p.445-6

²³⁰ *Ibid*, p.446

much narrower claim that the non-identity problem provides a strong reason for thinking that future persons are not the type of beings who can possess rights.

For supporters of rights, the importance of the non-identity problem is not related to whether it is possible for an action to ‘harm’ future persons if that same action was also a necessary factor of their existence. All individuals have rights regardless of how they came into existence. Therefore, while there is no right to be born, once an individual is born the rights they automatically possess as an existing human are in no way affected by the nature in which their existence emerged.

What the non-identity problem demonstrates, however, is the fact that, since a great many of the actions of current persons will impact upon the identity of future persons, it would be paradoxical to claim those future persons bear rights now. If they did, current persons would be required to adjust their behaviour accordingly, thus changing the identity of those who supposedly held the right.²³¹

Carter attempts to claim that, since certain of our actions (as part of a collective) might negatively affect a future person without changing their identity, the claim that we owe no moral duties to future persons is incorrect. However, such an argument does not seem sufficient to warrant granting rights to future people in the present. Even Carter acknowledges that the identities of some (perhaps a majority) of the future persons who will come to exist will have been changed as a result of our current actions. His argument is simply that, because this is not the case with *all* future persons, it is possible for us to harm *certain* future persons through our actions without having first benefitted them by causing them to exist.

²³¹ See Chapter 3 for a detailed explanation of this argument.

This is not sufficient to dispel the claim that the non-identity problem precludes future persons from holding rights. Rights are universal. We cannot assign them to certain future persons (those whose identities have not been changed by the pollutant activities they will come to suffer from) but not others (those whose identities have been changed by the pollutant activities they will come to suffer from). Moreover, it would be impossible to determine, in practice, which future persons came under which category.

In short, it may be the case that Carter provides a good reason for followers of a great many ethical schools of thought to think that the non-identity problem is not a sufficient reason to disregard the moral status of future persons. Unfortunately, rights-based moralities do not benefit in such a way. This is because, while Carter gives us reason to think it possible for current persons to harm future persons, he does not overcome the well-founded objection that the non-identity problem precludes future persons from holding rights in the present.

Future Rights, Current Duties?

Clearly, the non-identity problem remains a significant difficulty for those supporters of rights who seek to use the wellbeing of future persons to justify large-scale action to reduce climate change in the present. It is, however, not the only problem which would need to be overcome for such a goal to be achieved.

A second, perhaps more straightforward and more fundamental difficulty, is put forward by Beckerman and Pasek, who contend that "...the general proposition that future generations cannot have anything, including rights, follows from the

meaning of the present tense of the verb 'to have'. Unborn people simply cannot *have* anything.”²³² They further clarify this argument as follows:

The crux of our argument that future generations cannot have rights to anything is that properties, such as being green or wealthy or having rights, can be predicated only of some subject that exists. Outside the realm of mythical or fictional creatures or hypothetical discourse, if there is no subject, then there is nothing to which any property can be ascribed.²³³

Caney feels that supporters of rights can overcome at least this second objection by adopting what Elliot describes as 'the Concessional View' with regard to future people and rights.

While Elliot himself does not believe it unreasonable to assign rights to future persons, he asserts that one need not do so in order to provide future persons with enough moral weight to demand that we constrain our pollutant actions in the present. As he puts it,

The point is that future people will come into existence and will have interests which are then real. In the future these people will satisfy the interest principle and so will be the kinds of beings who can possess rights. The implication is that the reality of these interests in the future is of normative significance for us now.²³⁴

Essentially, the Concessional View argues that supporters of rights need not claim that either future people or their rights exist in the present in order for current people to possess duties in the present which are correlative to the rights future

²³² Beckerman, W. and Pasek, J., *Justice, Posterity and the Environment* (Oxford: Oxford University Press, 2001), p.16

²³³ *Ibid*, p.15

²³⁴ Elliott, R., 'The Rights of Future People', *Journal of Applied Philosophy*, 6 (1989), 159–69, p.160

people will have upon coming into existence. Instead, it argues that the fact that a particular action of ours is likely to violate the as yet non-existent right of an as yet non-existent person at some point in the future is enough to prohibit us from taking said action.

Elliot explains such a position as follows:

...what we presumably wish to avoid are violations of rights flowing from our actions and policies. Clearly present actions and policies will affect the interests of people who exist in the future. And the rights people have in the future will be determined by the interests which they have then. So, it would seem that if we can adversely affect their interests, which we can, we can violate their rights. The manifestations of such violations might not occur in the present but the actions or policies which cause them do....All that we need to accept to make this point is that some future event can render a present event a violation of a future right. This seems unproblematic. We do not have to accept that the violation occurs before the right exists, only that an action of ours in the present causes the violation in the future. And if we have a commitment to avoiding and minimising violations of rights we should refrain from performing the action.²³⁵

Elliot's move is a smart one and seems to offer some hope of avoiding some the criticisms of the idea that future people have rights without abandoning the moral worth of future people altogether. By specifically *not* claiming that future people possess rights in the present, Elliot avoids Beckerman and Pasek's objection that future people cannot 'have' anything, without succumbing to the conclusion that current persons are not required to care about their welfare under a rights-based morality. Instead, our duty not to cause harm apparently remains intact regardless of the present absence of any correlative right.

²³⁵ *Ibid*, p.162

Unfortunately, there are other problems which Elliot's position is not so easily able to overcome.

By insisting that future people *do not* have rights in the present, he immediately causes us to question why the supporter of rights should take their welfare into account. Essentially, since (as future chapters will demonstrate) reducing climate-related harm to future persons would involve restricting/violating the rights of current persons, such policies would need to demonstrate that these restrictions/violations were being carried out as a result of a clash of rights. If future persons do not have rights, this is impossible.

In attempting to address such an issue, Elliot refers to what effectively amounts to an appeal to the general welfare. As noted above, he states that “an action of ours in the present causes [a] violation in the future. And if we have a commitment to avoiding and minimising violations of rights we should refrain from performing the action.”²³⁶ He later adds:

We are not striving to ensure that the rights of a specific set of people are not violated, rather we are striving to ensure that rights violations do not occur. Whoever comes into existence will have rights and it is the violation of the rights of individuals which we wish to avoid.²³⁷

Sacrificing the rights of specific current individuals in the name of minimising overall levels of rights violations might, at first glance, appear to be a rights-based argument. However, on closer inspection it becomes clear that this is not the case. As Nozick notes,

²³⁶ *Ibid*, p.162

²³⁷ *Ibid*, p.163

...there is no *social entity* with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits others. Nothing more. What happens is that something is done to him for the sake of others.²³⁸

The primary way in which supporters of rights might overcome Nozick's complaint is through recourse to the general welfare.²³⁹ Yet, ironically, greater overall levels of rights recognition among as yet non-existent persons cannot be considered a legitimate exercise of the 'general welfare' for two reasons.

Firstly, under a rights-based morality, even references to the general welfare must, in a certain sense, be rights-based. As explained in Chapter 2, the purpose of references to the general welfare under rights-based moralities is to allow that certain rights-protected actions may, under certain circumstances, be restricted (solely) in order to better safeguard the rights of others. These circumstances are those where the unrestricted exercise of those rights would lead to significant harm to the rights of others but where this resultant harm would only be *indirectly* related to the actions taken and thus would not amount to a clash of rights in the traditional sense.

With the above in mind, the first reason that greater overall levels of enjoyment of rights in the future cannot be considered a legitimate goal of the general welfare is that, since future people do not have rights, it cannot be claimed that the sacrifices

²³⁸ Nozick, R., *Op.Cit.*, p.32-3

²³⁹ As noted in Chapter 2, Nozick would not allow any recourse to the general welfare, but a supporter of rights may, under certain limited circumstances, allow such a move while still adhering to a genuinely rights-based moral system (albeit one which is different to that advanced by Nozick).

of certain rights of certain current persons are even indirectly taken in the name of protecting rights. At best, they are taken in the name of potential, eventual rights. Thus, the general welfare in this case would refer to the welfare of people who do not yet exist and do not yet possess rights. Any reference to the general welfare based on their well-being would amount to sacrificing rights in the name of a non-rights-based goal. As noted in my response to Sen's 'goal rights' argument, below, a moral system which allows such a thing can no longer consider itself rights-based.

The second difficulty with Elliot's argument is that it remains vulnerable to the non-identity problem. The future people who enjoy greater levels of rights recognition will be different future people to those who otherwise would have existed. Therefore they cannot be said to have benefitted from our policy. While current people are made significantly worse off, nobody is made better off. In light of this, coupled with the inability of future persons to hold rights, it would seem that Elliot's general welfare claim that minimising violations of rights is a good thing would actually be better served by current persons *not* mitigating climate change.

Overall, while Elliot's argument that future persons are able to merit significant moral weight without possessing rights overcomes some of the problems rights-based moralities have in this area, it is ultimately incapable of resolving such issues satisfactorily. As such, I will now examine the work of Sen, Caney's other primary reference point in addressing such perceived deficiencies.

'Goal Rights' and Future Persons

Caney feels the non-identity problem is only a problem for what Parfit would term 'person-affecting' views. Such views would deem an action to be wrong if (and only if) that action made a person worse-off. As we have seen, the non-identity problem means that the pollutant actions of current persons cannot be categorised in such a manner, since they do not make future persons worse off. Caney argues, however, that if we accept Sen's concept of a 'goal rights system', the claim that future people have rights ceases to be a 'person-affecting' claim.²⁴⁰

Caney states that, if we follow Sen's view of rights

...a commitment to rights requires that we bring about states of affairs in which people are able to exercise their fundamental rights. The key point is that this is not a 'person-affecting' approach but what Parfit terms an 'impersonal' one. As such, it is not undermined by Parfit's non-identity problem.

If we use Sen's approach it follows that a rights-centered analysis does not claim, and is not committed to claiming, that an action committed now violates a particular (future) person's right in the sense that it prevents a person from enjoying a right that he or she would otherwise be able to enjoy. Rather, what it entails is that persons should not act in such a way that those who are born in the future are unable to enjoy certain rights.²⁴¹

Sen himself does not attempt to apply his account of rights to the issue of future persons. Rather, his 'goal rights' system is developed in response to deficiencies he perceives with both the welfarist instrumental approach and the deontological constraint-based approach (some version of the latter being that which I have

²⁴⁰ Caney, S., *Op.Cit*, p.237

²⁴¹ *Ibid*, p.237

earlier presented as being what I understand to be at the core of rights-based moralities).²⁴²

Sen defines a ‘goal-rights’ system as “[a] moral system in which fulfilment and nonrealization of rights are included among the goals, incorporated in the evaluation of states of affairs, and then applied to the choice of actions through consequential links”.²⁴³ This focus on consequences is important. It is the primary difference between Sen’s approach and the constraint-based approach which I have previously deemed to epitomise rights-based systems. This is because, in allowing the consequences of an action to influence our decision as to its rightness or wrongness, Sen avoids the position that rights are unassailable constraints upon action. As he puts it,

...although rights are included within the evaluation of states of affairs, there could be other things to which the evaluation of states of affairs is sensitive in a goal rights system. The crucial issue is the inclusion of fulfilment and nonfulfilment of rights-rather than the exclusion of nonright considerations-in the evaluation of states of affairs.²⁴⁴

As Caney notes, it is not that Sen would allow us to assign rights to future persons. Under Sen’s system, rights would still be held by individuals, and those individuals would still need to exist in order to possess them. Claiming that future individuals held rights which bore correlative duties upon present persons would remain absurd as a result of the non-identity problem.

²⁴² Sen, A., ‘Rights and Agency’, *Philosophy and Public Affairs*, 11 (1982), 3–39, p.5

²⁴³ *Ibid*, p.15

²⁴⁴ *Ibid*, p.15

The only advantage of Sen's system, then, would be that, because it denies the absolute nature of rights, it would allow us to restrict/violate the rights of current persons in order to protect future persons. This advantage emerges not from any claim that future persons possess rights, but from the idea that the rights of current persons may be legitimately overridden by non-rights-based concerns if such concerns are of sufficient importance.²⁴⁵ The only thing which is different about Sen's claim is that the overall effect of an action upon the successful realisation of the rights of future persons might have some bearing upon whether we deem a particular concern to be worthy of overriding the rights of current persons, *without* requiring that we deem the former to be in possession of rights in the present. In other words, Sen's approach allows its supporters to assert that improving the ability of future persons to have their rights fulfilled upon coming into existence is a goal of such moral significance that we do not require those persons to be current right-holders in order to warrant our restricting/violating the rights of current persons to protect them. And by claiming there is some sort of intrinsic good in reducing overall levels of suffering and increasing levels of rights recognition among future persons *in general*, supporters of Sen's approach are not plagued by the fact that those future persons will be *different* future persons to those who would otherwise have existed, and thus cannot be said to have benefitted from these increased levels of rights recognition.

There are several key difficulties with such an approach.

Firstly, as argued in Chapter 2, I am deeply unconvinced of the coherence of a rights-based moral system which is so concerned with moral goals which are not

²⁴⁵ *Ibid*, p.38-9

rights-based that it is willing to allow rights to be restricted/violated in pursuit of them. If we truly believe that a rights-based morality is so incapable of averting certain moral catastrophes that we have to rely upon a get out clause which enables us to sacrifice rights in the name of non-rights-based goods, then why do we endorse a rights-based system at all? If, when things get difficult, our rights-based system must be pushed aside in favour of some other moral system which is capable of arriving at a more desirable outcome, why would we not simply forgo rights altogether and wholeheartedly adopt this new moral system instead?

In response, one might argue that, because rights-based moralities work well under non-emergency circumstances they are of great worth, even if they can be legitimately abandoned when following them will lead to catastrophe. However, I would contend that in accepting such a position we inherently endorse a morality which cannot truly be considered rights-based in the sense discussed in Chapter 2. In allowing that rights may, under certain circumstances, be overridden in the name of non-rights-based goals we endorse a system which uses rights as a convenient tool to reach its goals, not one which uses rights as its founding principle.

As noted above, if our moral system is to remain rights-based then references to the general welfare must be references to those cases where the outcome of normal rights-based reasoning would result in a situation which is worse for right-holders than if we temporarily restricted certain rights. This is not the case here as future persons are not right-holders.

Secondly, why should it be the case that increasing the welfare levels of those future persons who will one day exist is considered so important that it remains

our key moral priority *even if* none of these future persons will actually *benefit* from these increased welfare levels? Due to the non-identity problem, the future people who come to exist in a world with less climate change will not be better off than they would have been if we had polluted, since if we had polluted they would have been entirely different people. Therefore, current people will be made worse off by a mitigation regime which causes no future people to be better off. Such a position seems difficult to maintain for a great many moral theories, but for those claiming to be rights-based it is clearly untenable.

Why should we think that increasing future levels of welfare is ‘sufficiently strong’ to warrant both directly violating and unduly restricting the rights of current persons? Moreover, since Sen’s theory maintains that individuals have duties to help, wherever possible, to alleviate rights violations of others when we can do so at little cost to ourselves,²⁴⁶ why should we think we should forgo such duties in favour of a highly costly policy of mitigation which will increase the welfare of (but not benefit) people who are not currently right-holders living in the distant future, but which will, in the process, greatly lower levels of rights realisation for both the present generation and those which immediately follow it?²⁴⁷

In short, while I accept Caney’s argument that Sen’s theory could, theoretically, be put forward as a rights-based answer to the non-identity problem, I would contend that no genuine supporter of rights would seek to do so. In order to avoid the non-identity problem, supporters of Sen’s theory would have to place such importance upon a non-rights-based goal - and, in the process, directly damage

²⁴⁶ *Ibid*, p.38-9

²⁴⁷ The following chapter explains why this should be the case.

and/or severely impair the development of the rights of millions - that it would become difficult to justify calling their theory rights-based at all.

Group Rights²⁴⁸ and Future Persons

One further key criticism which could be made of my rejection of the idea future persons are capable of possessing human rights is the claim that my arguments thus far are only evidence that future persons are incapable of possessing rights *as individuals*. None of these arguments, it might be claimed, categorically prohibits future persons from possessing rights *as a collective*.

Up until this point this thesis has rejected the idea that future persons might be appropriate subjects of rights on two main grounds:

Firstly, I have argued that it difficult to see how future persons can have rights because it is difficult to see how future persons can *have* anything. Future persons, by definition, do not yet exist. Moreover, they do not exist in a very specific way; they are not yet *individuated*. It is therefore hard to imagine how a future person might possess a right in the here and now (even if we accept that they will one day come to do so). And it is doubly difficult to see how either they or an agent acting on their behalf might go about claiming such a right given that there exists no individual future person who can be identified *even in thought* on behalf of whom we might make such a claim.

Secondly (and more damningly), I have argued that, as a result of the non-identity problem, the idea of individual future persons possessing rights which bear duties upon current persons is paradoxical. This is because in respecting the rights of

²⁴⁸ The term 'group' is sometimes replaced by the term 'collective' by scholars working in this area. The choice is stylistic in nature and I will use these terms interchangeably.

Future Person A (who would have existed had we polluted), we cause Future Person B to come into existence instead. This means that, a) there is no longer a Future Person A whose rights we would violate by polluting, and b) it is hard to see how we are doing the individual who is (or will be) Future Person A any favours by causing his/her non-existence. If they had the choice, it seems likely that Future Person A would waive any right of theirs at the point where its successful realisation would cause their non-existence.

It might be argued that both of these grounds for the rejection of future persons' rights are only successful if we speak of future persons as individuals. If, however, we were able to assign rights to future persons *as a collective* it seems that such problems would hold the possibility of being overcome. Future persons, as a group, are far more identifiable in thought and thus easier to claim rights on behalf of.²⁴⁹ More importantly, concerns over inadvertently changing the identity of individual group members (and thus their ability to possess rights) through actions taken to combat climate change would appear to be assuaged to some extent if we treat future persons as a whole as the relevant right-bearing entity. If we are placed under a duty to cease our pollution by the correlative right of future persons as a single, right-bearing entity, no paradox emerges through us meeting that duty. Those future persons who end up coming into existence will certainly be better off if they are less exposed to the negative effects of climate change than those (different) future persons who would have existed had we polluted. Certainly, there would still seem to be some ethical difficulty emerging from the non-identity problem, but it would no longer be one which automatically

²⁴⁹ Although, as we shall see, the idea of even future persons as a collective *having* anything, including rights, remains problematic.

precluded the possession of rights since the right-holding entity (future persons as a collective) would continue to exist regardless of the behaviour of current persons.

While, historically speaking, the concept of group rights has often been viewed with suspicion, recently things have begun to change. As Jovanovic notes, “...collective rights talk has recently gained currency both in the scholarly literature and in international and domestic legal instruments.”²⁵⁰

This is not to say that the legitimacy of group rights is by any means universally accepted even among supporters of rights. However, it does seem fair to claim that those scholars who do make serious, well-reasoned arguments in favour of group rights are now considered a legitimate part of the discussion both by supporters of more individualistic conceptions of rights and those who reject the idea of moral rights altogether. It is, therefore, at least academically legitimate for supporters of rights to endorse group rights, and thus the relationship between group rights and future persons merits careful consideration. Indeed, a move towards a more group-rights-friendly outlook has some strong potential benefits.

Firstly, as Donnelly correctly asserts, “[a] standard complaint about human rights, and about liberal visions of human rights in particular, is that they are excessively individualistic.”²⁵¹ The serious consideration of group rights is one way of lessening this perceived over-focus on individuals as the appropriate objects of moral concern (something which has, in part, led critics to claim that, far from

²⁵⁰ Jovanovic, M., *Collective Rights: A Legal Theory* (Cambridge: Cambridge University Press, 2012), p.1

²⁵¹ Donnelly, J., *Op.Cit.*, p.204

being universal, human rights are a western concept unable to properly represent the values of many non-western cultures).

Secondly, traditional, individualistic conceptions of rights struggle to show why the well-being of future persons ought to feature significantly in our moral reasoning. Many people who would otherwise be sympathetic to rights-based moral systems may find such a conclusion so disquieting as to render such systems unacceptable. In light of this, if those rights-based moralities which openly endorse group rights are able to overcome this issue by assigning appropriate moral weight to future persons, this may, in itself, be seen as a good reason for endorsing the concept of group rights.

As this section will demonstrate, however, the concept of group rights cannot easily or effectively be applied to future persons.

The section will begin by examining the many varying conceptions of what the term 'group rights' actually means. In doing so, it will argue that only if one adopts a 'Value Collectivist' position do group rights hold any possibility of being applied to future persons.

The section will then go on to explain that, even if we accept the position of Value Collectivists, two questions remain: Are the type of rights which groups can have the type of rights which would protect future persons from climate change? And, even if they are, are future persons the appropriate type of group to be capable of possessing group rights? I will demonstrate that the answer to the first question is at best unclear, and the answer to the second seems to be negative. The section will therefore conclude that future persons are no more capable of possessing rights as a group than they are as individuals.

What do we mean by group rights?

It is important to begin by defining what we mean when we refer to ‘group rights’. When it comes to this particular term, definition is complicated as different people not only consider the term group rights to mean different things, they also consider their own version of how and why group rights work to be mutually exclusive from other versions. Before moving on to discuss these different conceptions of group rights, though, it is important to first clarify what is definitely *not* meant by the term in this context.

References to group/collective rights which commonly appear often turn out to be references to collective litigation and/or jointly exercised legal or moral rights which are ultimately the rights of individuals.²⁵² So if my banker defrauded me and a number of other clients in the same ponzi scheme, it would make sense to say that s/he wronged us all and for us to make a joint legal and/or moral claim against her/him. However, we might just as reasonably each make separate individual claims without this having any effect on the outcome. In other words, there is nothing about either the right or its holders that renders it a group right. Rather, it is simply a number of separate claims to the rights of a number of separate people being claimed collectively for reasons of expediency. Plainly, if taken in this sense, group rights (if such a term is even appropriate here) would suffer from the exact same shortcomings as individual rights when it came to their inability to be possessed by future persons. In order for group rights to hold any hope of affording future persons appropriate status under a rights-based morality,

²⁵² Jovanovic, M., *Op.Cit*, p.4

they would need to represent something more than a convenient way of pursuing the rights claims of multiple individuals.

The definition of the term ‘group rights’ in the sense we are speaking of here is inextricably linked to the justification of such a position. The *manner* in which group rights exist in practice is necessarily determined by the moral reasons we provide for *why* they should exist. As Jovanovic puts it, the justification of group rights “is not only theoretical, but also moral, in so far as, in the case of collective rights, it requires taking the normative-moral point of view with respect to the issues of moral standing of groups and the value they have, particularly for individual members of the group.”²⁵³

Those who pay serious credence to the notion of group rights, then, tend to fall into one of two camps: Value Individualists or Value Collectivists.

Value Individualism

Value Individualism is perhaps the more common way of justifying group rights among supporters of rights. It is linked to – but should not be confused with – Individualism and Ontological Individualism.

As Biddle explains,

Individualism is the idea that the individual’s life belongs to him and that he has an inalienable right to live it as he sees fit, to act on his own judgment, to keep and use the product of his effort,

²⁵³ *Ibid*, p.5-6

and to pursue the values of his choosing. It's the idea that the individual is sovereign, an end in himself, and the fundamental unit of moral concern.²⁵⁴

Taking this as their base, Ontological Individualists arrive at a theory of group rights which “argues that, in phenomenological terms, all groups are in the end reducible to their individual members.”²⁵⁵ As Sheehy explains, this position “...holds groups to be identical to sets (or mereological sums of individuals or person stages), mere fictions or reductively analyzed out of social scientific discourse. The truths about groups are held to be expressible, without loss, as truths about individuals”.²⁵⁶

This way of considering group/collective rights is one which returns us to our initial question of why such things should be of any value other than as convenient tools for making multiple rights claims simultaneously. As a result, most scholars who both support group rights and feel that such rights ultimately emerge from the supreme moral status of individuals place themselves in the school of Value Individualism.

Value Individualists deny neither the existence of collective entities, nor the importance of such entities to the lives of individuals, nor even the capacity of collective entities to possess rights. They do, however, claim that “the lives of

²⁵⁴ Biddle, C., ‘Individualism vs. Collectivism: Our Future, Our Choice’, *The Objective Standard*, Vol.7, No.1 (2012). Available at: <https://www.theobjectivestandard.com/issues/2012-spring/individualism-collectivism/> Last accessed: 19 August 2016

²⁵⁵ Jovanovic, *Op.Cit*, p.45

²⁵⁶ Sheehy, P., ‘Blaming Them’, *Journal of Social Philosophy* 3 (2007), 428-441, p.438, n.3

individual human beings have ultimate value, and collective entities derive their value from their contribution to the lives of individual human beings.”²⁵⁷

This is not the place to go into a detailed argument for the acceptance or rejection of such a position. Suffice it to say that it certainly does not seem an unreasonable way of understanding group rights and, indeed, is more widely favoured than the alternative of Value Collectivism.²⁵⁸

If supporters of rights wish to claim that group rights might be assigned to future persons, however, the idea of Value Individualism is plainly not something which can be acceptable to them. The collective entity of future persons cannot derive its value (or its rights) from the individuals which make it up because, as we have already seen, future persons are a) not yet individuated and, b) because of the non-identity problem, *cannot* be individuated - even in thought - before their conception. It therefore does not make sense to claim they have rights or even value *as individuals* and thus any rights/value they have as a collective (if they have such rights/value at all) must come from some source outside of the individuals that make up the group.

Value Collectivism

Value Collectivism “is the view that collective entities can have inherent value, which is independent of its contribution to the well-being of individual

²⁵⁷ Hartney, M., ‘Some Confusions Concerning Collective Rights’, *Canadian Journal of Law and Jurisprudence* 2 (1991) 4, 292-314, p.297

²⁵⁸ Jovanovic, M., *Op.Cit*, p.46

members.”²⁵⁹ The advantages of such a position are best showcased by considering the disadvantages of its opposite.

Firstly, Jovanovic (who whole-heartedly endorses Value Collectivism) argues that the only alternative for those who seek to provide any meaningful endorsement of group rights (Value Individualism) is unable “to provide coherent grounding of certain forms of collective rights, especially those vested in groups that are not organized around liberal values of individual autonomy and tolerance (e.g. indigenous peoples).”²⁶⁰ In other words, there are certain group rights (Jones gives the example of the right to a seat at the UN),²⁶¹ the existence of which cannot be adequately or coherently disaggregated into the rights or interests of the individuals who make up the collective entity which possesses the right.²⁶² Such a realisation points to Value Collectivism as a more plausible explanation for group rights than Value Individualism.

Secondly, Value Collectivists feel that, regardless of practical considerations like that raised above, the idea that collective entities derive their rights and their value only from the individuals which make them up seems to, at least in certain cases, miss a fundamentally important factor about collectives as collectives and collective rights as collective rights.

Again, it is in the opposition to this idea that we best see its value. Boshammer argues that “...to hold the standpoint of value collectivism necessarily implies the unjustifiable assumption of the distinctive ontological existence of collective

²⁵⁹ *Ibid*, p.6

²⁶⁰ *Ibid*, p.6

²⁶¹ Jones, P., *Rights* (London: MacMillan Press, 1994), p.183

²⁶² This is not to say conclusively that group rights can *only* be held to rights which cannot be disaggregated into the rights of individuals, although such a position *is* that taken up by many supporters of group rights. The issue of which rights are group rights will be returned to shortly.

entity.”²⁶³ Since she believes this outcome is undesirable, she feels that said outcome demonstrates the indefensibility of Value Collectivism. She illustrates her point with the example of the genocide of the Inca people by the Spanish Conquistadores in the 16th Century, asking “[h]ave the Spaniards, therefore, *except* the Incas [*sic*] destroyed *additionally*, so to speak, the Inca community?”²⁶⁴

Boshammer assumes a negative answer to this question, but Value Collectivists would argue that she is wrong to do so. This objection of the Value Collectivists would not seem unjustified. Lemkin, the author of the term ‘genocide’, states that “...genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.”²⁶⁵ As a result, Jovanovic argues that

the criminalized ‘intent to destroy, in whole or in part’ relevant groups can *in principle* be established even if the killing involved only a single member of the group. This is precisely what distinguishes the crime of genocide from the ‘simple’ crime of murder. The underlying idea of genocide is, therefore, that the group physical existence *can be* detached from the existence of its individual members, not necessarily in empirical terms, but in terms of a conceptually distinctive *good* that is worthy of criminal law protection.²⁶⁶

Value Collectivists, then, plausibly argue that collective entities possess some element of value which cannot be wholly derived from the value of the individuals that make them up and that they may hold certain rights which can be held only as

²⁶³ Jovanovic, M., *Op.Cit*, p.49

²⁶⁴ Boshammer, S., *Gruppen, Rechte, Gerechtigkeit* (Berlin and New York: Walter de Gruyter, 2003), p.124

²⁶⁵ Lemkin, R., *Axis Rule in Occupied Europe* (Washington: Carnegie Endowment for International Peace, 1944), p.79.

²⁶⁶ Jovanovic, *Op.Cit*, p.50

a collective, the possession of which is not dependent upon the individual possession of such rights by the individual members of the collective. If a supporter of rights wishes to assign collective rights to future persons, they would need to adopt a Value Collectivist position.

This is not to say that Value Collectivism will automatically justify the possession of group rights by future persons. In order for that to be the case, there are other difficult questions surrounding the importance of existence which would need to be answered.

As earlier noted, Boshammer criticises Value Collectivism on the grounds that it implies that the right-holding collective entity possesses distinctive ontological existence. Even if we accept that the collective is capable of such a quality, we must ask what effect results if both the individuals which make up the collective and the collective itself, while remaining distinct from one another, lack existence? Can what Jovanovic refers to as 'the group physical existence' be detached from the existence of its individual members if neither possesses corporeal existence?

The answer to these questions is not immediately clear.

On the one hand, existence would seem a highly important quality to claiming any right, whether as a collective or as an individual. Without it the right-holding group known as future persons faces the non-existence problem in the same way as individual future persons, i.e. in what sense can a non-existent entity *have* anything, including rights?

On the other hand, if we are to accept that groups are capable of possessing distinctive ontological existence, then we are already stepping into a realm where possessing a physical body would seem not to be a crucial factor in the possession of rights. If it is truly possible for groups to exist as right-holding entities entirely separately from their individual members then it is possible to assign rights to entities whose existence is wholly conceptual. In line with such reasoning, it seems that the present non-existence of future persons is not *automatically* enough, on its own, to prevent them from being considered a right-holding group at this stage.²⁶⁷

Clearly, then, in order to maintain the position that future persons might possess collective rights, one must be a Value Collectivist of the highest order. Even if supporters of rights accept such a position, though (and there are a significant number who would not), two key questions remain before our problem of the inability of future persons to possess rights is solved:

1. Are the type of rights which would ground duties upon current persons to reduce their pollution levels (rights to a healthy environment, or even to health and life) the type of rights which it is possible for groups to hold?

²⁶⁷ I will, however, later argue that it is ultimately this non-existence which leads to severe conceptual problems that do indeed prevent the possession of group rights by future persons. Moreover, many people may feel that the existence of a group can never be *entirely* separated from the existence of its members. They might argue that even if group rights exist which are additional to the rights group members possess as individuals, those additional group rights are nonetheless in some sense possessed by the individual members of that group. As a result, if we cannot demonstrate the capacity of members of that group to possess rights, then the group cannot, independently, do so itself. And if future persons were capable of possessing rights, we would not need to rely on group rights in order to protect them. As I said, this position does not seem inevitable and the rest of this section considers other reasons as to why future persons may not possess rights. Suffice it to say that if one does hold that group members must exist in order for group rights to pertain, then future persons are clearly prohibited from possessing group rights and the further arguments in favour of such a conclusion that this chapter makes are rendered irrelevant.

2. Are future persons the type of group capable of possessing group rights?

Which rights are group rights?

At this point it seems that the supporter of rights might plausibly argue that, from a Value Collectivist perspective, it is possible to contend that groups can hold rights *as groups* without any need to rely upon the moral status of individual group members in order to justify such a claim. This, they might argue, means that it is possible for future persons to hold group rights.

This alone, however, is not enough for rights-based moralities to insist upon climate-protecting measures in the name of future persons. In order for that to happen, the type of rights groups may hold (and thus the type of rights future persons may hold *qua* group) must include the type of rights that might possibly warrant the imposition of correlative duties upon current persons to lower their emission levels. Such rights would most obviously include rights to life, health and a healthy environment. It is not clear that such rights are of the type that may be attributed to group.

Nickel touches on this problem, describing group rights as the

rights of peoples rather than of persons. Because of this they do not have a good fit with the general idea of human rights, which concern rights that people have independently of group or national membership....Group Rights are not human rights in the standard sense because they are not rights that people simply have as humans rather than as members of some state or group.²⁶⁸

²⁶⁸ Nickel, J.W., *Making Sense of Human Rights (2nd Edition)* (Oxford: Blackwell Publishing, 2007), p.164

In Nickel's view, then, group rights and those rights we would ordinarily consider to be human rights should not automatically be considered synonymous. This opinion appears to have some merit. Since, as Value Collectivists argue, the rights of the group are not derived from the rights of its individual members, there is no reason to assume that the rights of the group should be the same rights as its members possess individually.

In line with this argument, authors such as Reaume feel that the only rights which can be held collectively are rights to so-called 'participatory goods'. She argues that, in deciding whether something qualifies as a group right we must decide "...whether the interest in the enjoyment of a good is one that an individual can have *as an individual*."²⁶⁹ If so, then, by her reasoning, such a right should not be considered a group right. A similar position is put forward by Raz, who claims that the rights of groups stem from the interests of their individual members in a 'public good' and are, therefore, rights to that public good.²⁷⁰

It is worth noting, however, that neither Reaume nor Raz are Value Collectivists. Jovanovic (who is) questions the logic of their position, stating that "[c]ontra Reaume...groups can also hold rights to goods, which apparently do not satisfy her criteria of 'participatory goods'; and...individuals may also be plausible holders of rights which are grounded in interests in certain 'participatory goods'."²⁷¹ He goes on to note that

²⁶⁹ Reaume, D., 'Individuals, Groups and Rights to Public Goods', *University of Toronto Law Journal* 1 (1988) 38, 1-27, p.7

²⁷⁰ Raz, J., *Op.Cit*, p.208. Interestingly, Raz also argues that collective goods are crucial to the autonomy of individuals and that this creates a duty to provide access to collective goods where possible, although such a duty is not rights-based (*Ibid*, p.207).

²⁷¹ Jovanovic, M., *Op.Cit*, p.91

...it is possible neither to draw some sharp red line and single out a certain type of goods, which only by virtue of its external and formal features would qualify as the sole candidate for generating collective interests, nor to neglect that even the prime examples of Reaume's 'participatory goods' do have some aspects, which make them individualizable...²⁷²

For example, the right of a minority culture to education in the language of the group is something which only emerges due to the mutually agreed upon value of that language within the group. It might therefore be considered a participatory good in the strictest sense, since the preservation of that language may be key to the preservation of the group and its culture. Yet it is equally easy to see how each individual group member might also hold a right to education in the language of their culture *as individuals*, since such education may be crucial to their continued participation within their own culture. Even on an individual level, though, this right still stems from the moral value of the group as well as its value to the individual since it cannot be claimed that there is a universal right to be educated in, for example, Kurdish. Clearly such a right would only be legitimately possessed by Kurds. Of course, critics might claim this is only evidence of an individual right to the preservation of one's culture, but in recognising the importance of that cultural group to the extent that we grant it, as a group, rights to participatory goods, we blur the lines between what is the right of a group to a participatory good and what is the right of an individual member of a group to that same participatory good.

Ultimately, then, it seems that if, as Value Collectivists do, we accept groups can possess rights and that this possession does not stem from the interests or rights of

²⁷² *Ibid*, p.98

their individual members, it does not seem, in principle, unreasonable to claim group rights to things which would ordinarily be seen as individualised goods and vice versa. If a group, as a whole, would benefit from the preservation of its language then it may well be that there exists a group right or rights to education in that language. This, it seems, is difficult to separate from the very plausible idea that individual members of that group might also have rights *as individuals* to education in the language of their own culture.

On this thinking, while we may still struggle to assign future persons a group right to life or health, the closely linked rights to clean air or a healthy environment which would traditionally be viewed as the rights of individuals might plausibly also be assigned to groups. This is because neither the benefits of such rights nor the duties they impose can readily be reduced to a purely individual level (though both might *also* be claimed as individual rights). Clean air and a healthy environment will undoubtedly benefit future persons as a group and therefore, supporters of rights-based moralities might argue, rights to such things might be considered to be group rights.

While not without merit, such an argument is far from conclusive. Opponents might still contend that such rights are not group rights in the sense we imagine. Rather, they are the rights of individuals claimed as a group out of convenience rather than out of any particular unique quality of that group. They are not, it might be said, rights which are essential to the survival of the group *qua* group, in the way that a shared culture may be. This is certainly a problem but, as I will now seek to demonstrate, it is a problem which stems more from the nature of future persons as a group than the nature of the rights groups may hold. While

both the argument that group rights must only be rights to participatory goods and the definition of a participatory good appear at least questionable, the idea that future persons might be the type of entity capable of possessing group rights remains difficult to defend.

Which type of groups can possess rights?

Up until this point I have predominantly focused upon the ‘rights’ element of ‘group rights’. While this has already thrown up certain obstacles to the possession of group rights by future persons, the supporter of rights-based moralities might have argued that none are insurmountable. Far more damning practical and conceptual difficulties emerge, however, when we move from examining the nature of group rights to the nature of the groups who might legitimately be said to possess them.

The common opinion among scholars in the field of group rights is that such rights, in the sense in which I have been discussing them, cannot simply be held by any random collection of individuals. Rather, in order to exist as a separate entity capable of possessing rights, groups must possess certain qualities which clearly define them, not only as a group, but as a group worthy of protection *qua* group. In other words, groups must be of certain ‘value’ in order to warrant the ascription of group rights. Hartney argues that the idea that a group might be said to possess rights pertains to “the value of the existence of certain groups and the importance of protecting these groups against forces which might weaken or

destroy them, perhaps even to the extent of outweighing certain rights of individuals (either within the group or outside it).”²⁷³

This ‘value’ relates to the value of the group’s existence to its members; the extent to which their lives will be enriched by the group’s continued existence. This instantly creates a problem for the notion that future persons might be considered a group, since it is hard to see how the existence of future persons as a group might benefit a membership which does not yet exist. Margalit and Raz argue that group identification (among qualifying groups) provides individual group members with “a culture which shapes to a large degree their tastes and opportunities, and which provides an anchor for their self-identification and the safety of effortless secure belonging.”²⁷⁴ Such a view (or something like it) is widely accepted by scholars working in this field.²⁷⁵ It is one which, if adopted, proves damning for the notion that future persons might possess rights since they plainly lack any kind of common culture, let alone one which might ‘anchor their self-identification’, as they presently lack both a self and an identity, (and, indeed, tastes and opportunities).

One alternative to this view is put forward by Jones, who argues that the manner in which Raz justifies group rights undermines the latter’s claim that for groups to qualify for possession of group rights they must possess specific characteristics, such as a shared culture. He contends that, under Raz’s conception of group

²⁷³ Hartney, M., *Op.Cit.* p.294

²⁷⁴ Margalit A., and Raz, J., ‘National Self-Determination’, in Kymlicka, W. (ed.), *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995), pp.79-92, p.86

²⁷⁵ Thornberry, for example, argues that a group possesses value and the capacity to possess rights due to “the shared consciousness of its members, manifested perhaps through language, culture or religion, a shared sense of history, a common destiny...[w]ithout this ‘existence’ it is possible to say that individuals live but the group does not”. Thornberry, P., *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991), p.57

rights, “any set of individuals who possess a joint interest in a good can have group rights relating to that good provided that their joint interest is sufficiently significant to create duties for others.”²⁷⁶ As a result, he finds it unclear “why we should hold that a set of individuals can have a collective right only if they are antecedently identifiable as members of a group.”²⁷⁷

If adopted, such a position, despite widening the scope of which types of group might possess rights *qua* group, does nothing to help anyone seeking to claim group rights for future persons. As noted earlier in this section, basing the rights of groups on the interests of their members plainly rules out future persons from the possession of group rights for the simple reason that there are, at present, no individual future persons to possess these interests.

Ultimately, regardless of their conclusions over which types of group qualify for group rights, scholars’ justifications for such conclusions stem from the value such rights have for the individual members of the group. Thus, without being able to identify, even in thought, the individual members of the group on whose behalf we are claiming rights, those who seek to assign group rights to future persons are left with the same problem they had when trying to assign individual rights to future persons.

In the end, the issue comes down to existence (or a lack of it); a fact inadvertently highlighted by Jovanovic when he provides his own particularly inclusive definition of which groups might legitimately possess rights, stating that “groups

²⁷⁶ Jones, P., ‘Group Rights and Group Oppression’, *Journal of Political Philosophy* 4, 7 (1999), 353-377, p.357

²⁷⁷ Jones, P., ‘Group Rights’, in Zalta, E.N. (ed.), *Stanford Encyclopaedia of Philosophy* (Winter 2008 edn). Available at: <http://plato.stanford.edu/archives/win2008/entries/rights-group>. Last accessed: 28 May 2016.

‘objectively’ exist, prior to official recognition by the state, whereas in the case of students, for example, the ‘group’ label is actually the designation of a particular legal status of a person in question.”²⁷⁸ While future persons meet the criteria of objectivity (in that they are not a group which has artificially been attributed group status by the state), they fail to meet the criteria of existence.

The purpose of assigning future persons group rights *qua* group was the avoidance of the non-identity problem. Unfortunately, in avoiding this particular unpalatable conceptual hurdle we simply replace it with another.

In treating future persons as individuals, were it not for the non-identity problem, it would be relatively easy to understand why they ought to be considered to have rights and why these rights ought to impose duties on current people not to pollute. If Future Person A’s rights to health, life etc. will be negatively affected by climate change upon his/her coming into existence, then (again, were it not for the non-identity problem) it is feasible that current persons might be required to refrain from taking certain actions in order to avoid causing such violations.

The case is not obviously the same if we treat future persons as a single entity which possesses rights *qua* group. Indeed, if we view future persons in such a way, it is difficult to see why they ought to have any kind of moral status at all. Not only is it the case that future persons, as a group, do not currently exist, it is also the case that, in a certain sense, *they will never exist*. The individuals who make up the group will not be harmed by climate change until the point at which they come into existence. However, at the point at which they come into existence, they become current persons and thus lose the group membership

²⁷⁸ Jovanovic, M., *Op.Cit*, p.9

which supposedly gave them the right which placed duties on others in advance of their birth. By definition, future persons (as a group) do not and will never exist and it is therefore very hard to see how they could possess rights (as a group) and very easy to see why current persons might be legitimately aggrieved at being forced to make sacrifices on their behalf.

Concluding Remarks on Group Rights and Future Persons

This section has demonstrated that group rights are ultimately derived from the moral worth of the individuals that make up the group in question. Even if we adopt the position of Value Collectivism (and it is by no means clear that we must) *and* also conclude that group rights might be held in relation to the types of goods required to protect against climate change (a claim which is again controversial), we are still reliant on the existence of the individual members of the group for the justification of our claim to group rights. This is not to say that group rights must necessarily be reducible to the *rights* of the individual members, but they must be of value *to* those individual members. Since future persons as a group lack (and will always lack) identifiable individual members capable of benefitting from any group rights that are proposed, the possession of such rights cannot be justified. Any ensuing benefits would only be felt by a group member upon their coming into existence at which point they would be a current person and thus not entitled to membership of the group labelled ‘future persons’ and so be unentitled to any of the rights that group might be said to possess. Much like individual future persons, future persons as a group cannot be said to benefit from the ascription of rights and it is not reasonable, under a rights-based morality, to

ask that current persons be placed under duties which restrict/violate their own rights without benefitting anybody else.

Conclusion

This chapter has demonstrated that supporters of rights are unable to successfully subvert the problems raised in Chapter 3 in order to provide a coherent reason as to why the welfare of future persons is of sufficient importance to warrant significant restrictions, and even violations, of the rights of current persons. Any attempt to do so ultimately rests upon a non-rights-based claim that rights might be legitimately curtailed within a rights-based morality whenever following such a morality would lead to an apparently undesirable conclusion. As I have asserted above, such arguments amount to a misuse of the general welfare principle which cannot be justified under a rights-based morality.

In Chapter 6 I will seek to demonstrate that, through the adoption of a tweaked version of some of the reasoning used by Elliot, rights-based moralities might not be as totally incapable of providing good reasons for current persons to combat climate change as has until now seemed to be the case. As earlier noted, Elliot argues that, because future persons, upon coming into existence, *will in future* have rights which *will in future* be violated by the climate change caused by the emissions of current persons, those current persons ought to be placed under a duty not to pollute. I have already outlined the reasons for thinking this argument to be flawed (i.e. the non-identity problem and the inability of future persons to *have* anything, including rights). However, as Chapter 6 will show, if, using Elliot's logic, we take current (rather than future) persons to be the object of our

moral concern, the situation changes. Current persons possess rights *at present* which will *in future* be violated by climate change. This fact appears to provide a more credible reason as to why supporters of rights might wish to demand that people act in advance of the harm their actions will cause in order to stop that harm from occurring. As I will explain, however, it is questionable whether such reasoning enables rights-based moralities to deal with the climate change problem as extensively as many of us might like.

CHAPTER 5: ADAPTATION, MITIGATION AND RIGHTS

Introduction

The findings of the preceding chapters might be summarised as follows:

1. Under a rights-based morality, the rights of individuals must take priority over non-rights-based moral concerns.
2. It is impermissible to violate or restrict any of the rights of individuals unless such a violation/restriction arises as a consequence of protecting the rights of other individuals.
3. Future persons are incapable of possessing rights before their conception.

With the above in mind, this chapter seeks to demonstrate that climate change represents a unique difficulty for supporters of rights. As Caney puts it, “if we accept a set of fundamental human rights then it follows that any programme to combat climate change should not itself also violate these rights.”²⁷⁹

Unfortunately, those policies required to adapt to and mitigate against climate change *will*, in many cases, impair levels of rights protection/realisation among current persons (particularly those in the developing world), and in some cases will represent a severe restriction upon – or even a direct violation of - the rights of current persons. What is worse, since future persons are not right-holders, such policies will commit such violations solely in pursuit of non-rights-based goods.

²⁷⁹ Caney, S., ‘Climate Change, Human Rights and Moral Thresholds’ in Humphreys, S., *Human Rights and Climate Change* (Cambridge: Cambridge University Press, 2010), p.89

As Lomborg correctly notes, “[d]oing something about global warming has both benefits and costs”.²⁸⁰ The problem for supporters of rights is that, while the benefits will primarily be bestowed upon future generations, the costs will be met by current persons. These costs are known as ‘climate burdens’ and are broken down into two types: the cost of adapting to climate change and the cost of mitigating it. Such ‘costs’ need not be financial in nature and may also refer to restrictions on the ways of life of those individuals who are duty-bound climate burdens.²⁸¹

This chapter will seek to outline exactly how and why meeting climate burdens will often prove incompatible with rights-based moralities. Section 1 will explain the difficulties that adaptation burdens represent for a rights-based approach, before noting that such obstacles are not ultimately insurmountable. Section 2 will then go on to address the area of mitigation.

The relationship between mitigation and rights is complex and problematic and therefore warrants a much deep level of consideration. With this in mind, the chapter examines in-depth two distinct policies for reducing emissions: global prohibitions on air travel and deforestation. These policies are focused upon above others because a) they are one-off, delineable measures which are at least theoretically implementable, and b) their successful realisation would significantly

²⁸⁰ Lomborg, B., *Cool It: The Skeptical Environmentalist's Guide to Global Warming* (London: Marshall Cavendish Editions, 2007), p.190

²⁸¹ There will be certain measures which might be taken to combat climate change which could arguably be taken in the name of protecting current persons from future violations of their rights that will occur as a result of climate change. This issue will be examined in detail in Chapter 6. The purpose of the current chapter is to highlight the vastly more extensive range of anti-climate change measures which cannot, under a rights-based morality, be justified in the name of protecting future persons in order that it can later be established which (if any) of these problems may be overcome through reference to current persons.

reduce global warming.²⁸² The section will highlight why each policy must be rejected if a coherent support for rights is to be maintained.

Finally, Section 3 will argue that, even if we could ignore or overcome the direct violations/restrictions of rights that climate burdens would entail, a rights-based approach to morality still fails to provide its supporters with the necessary motivation for dealing with climate change effectively. This is because, if the protection and realisation of rights is our goal, the vast amounts of money and effort necessary to make even a minor difference to average global temperatures in the relatively distant future could be spent far more effectively on the implementation of policies and programmes which concern themselves with non-climate-related ways of ensuring increased levels of rights protection/realisation.

Adaptation

The Intergovernmental Panel on Climate Change (IPCC) defines adaptation as “[a]djustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities.”²⁸³ Examples of adaptation include increasing flood defences to combat rising sea levels or vaccinating individuals against malaria in areas where

²⁸² Banning all fossil fuel use would obviously be more effective in terms of reducing climate change than either of the policies considered, but doing so would completely change (for the worse) life as we know it. From the building of hospitals to the heating of homes, almost every right we hold is in some way linked to fossil fuels and a blanket ban with no viable alternative energy source would so obviously violate rights that its discussion here would be senseless. The purpose of this chapter is to investigate whether there are viable policies for preventing climate change which other moralities might allow but which would be prohibited under rights-based systems. While banning fossil fuel certainly would not be permissible under a rights-based morality, it is hard to see how *any* human-focused moral system could allow it.

²⁸³ IPCC, ‘Appendix I: Glossary’, *Climate Change 2007: Impacts, Adaptation and Vulnerability*, p.869

mosquitoes carrying the disease may become prevalent as a result of rising temperatures.

An effective, all-encompassing global adaptation strategy will be highly difficult to devise and implement in practice. As Humphreys notes, “[i]t is widely recognised that adaptation funding cannot be delivered effectively until it is known where assistance will bring the most benefit. Unfortunately, it is just this information that is generally lacking.”²⁸⁴ Of course, the pattern of such information we hold is far from uniform, and tends to be far sparser in relation to developing countries which, paradoxically, are likely to witness greater damage from climate change than their developed counterparts.²⁸⁵

Aside from this difficulty, there is the further problem of the financial burdens involved with such a process. The cost of adaptation is large, growing and difficult to pin down. Latest estimates suggest it could reach \$500bn by 2050.²⁸⁶ While such a figure will be much lower in the present and is not yet so prohibitive as to necessitate that a full-scale programme of adaptation becomes untenable, it is significant enough to add an additional layer of complexity to any rights-based justification of adaptation burdens. Essentially, the supporter of rights is forced to ask whether, in a world where the resources available for the safeguarding of rights are limited, the money that would be needed to adapt to climate change might not be better spent addressing other, non-climate-related, rights issues.

²⁸⁴ Humphreys, S., *Op.Cit*, p.18

²⁸⁵ Sinnot-Armstrong, W., *Op.Cit*, p.332

²⁸⁶ UNEP Newscentre, ‘UN Environment: More and Faster Support Needed for Climate Change Adaptation’, (15 November 2016). Available at: www.web.unep.org/newscentre/newscentre/un-environment-more-and-faster-support-needed-climate-change-adapation (last accessed: 12 December 2016)

Adaptation and Rights

The idea of adaptation is not something which would appeal to followers of libertarianism. Being forced to act in advance of harms to the rights of others which you did nothing to cause is not something which sits well with a libertarian view. According to the libertarian, if an action I have taken will lead to a violation of the rights of others, I simply should not have taken it. If the rights of others are threatened by the actions of someone else, this is not my concern. In either case, the notion of adaptation simply fails to arise.²⁸⁷²⁸⁸

For supporters of Choice and Interest Theory, however, adapting to climate change before it occurs is broadly in line with rights-based moral thinking. As Humphreys notes,

²⁸⁷ These issues are examined in greater depth in Chapter 6.

²⁸⁸ This issue is more complex than there is room to discuss here. Nozick considers in detail the issue of whether a rights violation ceases to be impermissible (or perhaps just ceases to be a violation) if the specific violator pays adequate compensation to the specific victim. His discussion, however, does not provide a straightforward parallel with the phenomenon of adaptation. Nozick states that:

“[s]omething fully compensates a person for a loss if and only if it makes him no worse off than he otherwise would have been; it compensates person X for person Y’s action A if X is no worse off receiving it, Y having done A, than X would have been without receiving it if Y had done A.” (Nozick, R., *Op.Cit*, p.57)

In most cases, adaptation burdens are unable to meet the above criteria. If my small island state is entirely submerged under water, the fact that I am given a house of a similar size in an entirely different state is not sufficient compensation to be able to say that I am *no* worse off than I otherwise would have been. Certain compensatory actions, such as paying for malaria vaccinations, might plausibly be argued to entirely negate the rights violation which emerges from the increased risk of malaria resulting from climate change and thus render the preceding emissions justified. Most compensatory actions, though, would clearly fail to avoid making the victims of climate change *any* worse off (i.e. would fail to avoid violating any of their rights in any way) and would thus fail to enable a policy of adaptation as a way of circumventing those climate-related rights violations under a libertarian theory of rights. And because those climate-related harms to rights which can be compensated are caused by the same emissions as those which cannot be, it is not possible to justify any pollutant actions through a programme of adaptation according to the libertarian/Nozickian position.

Issues regarding the libertarian/Nozickian position on whether and when current persons might be asked to meet adaptation and/or mitigation burdens will be dealt with in more detail throughout this chapter and in Chapter 6.

Adaptive interventions before or during climate change impacts reduce the likelihood that rights infringements might result from those impacts; adaptation actions after the fact may provide redress where rights protection has already suffered. Indeed, discussions of adaptation at international and governmental level (as opposed to autonomous local measures) already assume a rights basis for policy construction, even if it is rarely articulated in those terms.²⁸⁹

It seems reasonable, then, for supporters of Interest or Choice Theory to claim that the concept of adapting to climate change in order to protect its victims from harm is in no way at odds with a rights-based approach to morality. There are, however, two issues which arise in relation to adaptation which might be considered problematic (though by no means catastrophic) for supporters of rights.

Firstly, Humphreys raises the fact that the very policies we implement in order to protect people by adapting to climate change may themselves have a negative impact upon rights.²⁹⁰ He states that this might occur “for example, if communities or individuals are forcibly removed from disaster or flood-prone areas, or, less forcibly, expected to conform to new economic policy imperatives (by adopting different cash crops or energy sources, for instance).”²⁹¹ He goes on to note that “[m]ore than any previous issue, climate change places the question of

²⁸⁹ Humphreys, S., *Op.Cit.*, p.2

²⁹⁰ Clearly, not all rights will be affected by climate burdens. Rights to a fair trial, for example, will remain unaffected regardless of our attitudes toward climate change. It is important, wherever possible, to outline *which* rights will be affected by *which* policies. Humphreys attempts to do this, as does this chapter in the sections concerning prohibitions on air travel and deforestation. However, the rights affected by both climate change and the measures taken to combat it will vary significantly in accordance with which policies we do or do not pursue. It will sometimes be necessary throughout this chapter and beyond to make a more general reference to the rights affected by climate change and/or anti-climate change measures. Such general references should not be considered to refer to each and every right that human beings are generally considered to possess.

²⁹¹ *Ibid*, p.2

human rights fulfilment firmly within the context of development policy. This is because tackling climate change will require revisiting development models and making far-reaching decisions about access to and use of resources, questions which in turn have direct human rights consequences.”²⁹²

The issue of development policy in relation climate burdens will be returned to in more detail shortly. For now it is enough to note that adaptation policies will not be cost free when it comes to the safeguarding of rights and these costs would need to be carefully considered in any decisions as to whether particular adaptation policies ought to be pursued at the expense of policies which afford a more central place to the safeguarding of rights. This does not mean that such policies cannot be pursued by supporters of rights-based moralities. Adaptation will unquestionably require some sacrifices of the rights of current persons.

However, in line with the reasoning laid out in Chapter 2, where such sacrifices amount to a restriction (as opposed to a violation) of rights they will not *automatically* be rendered impermissible under a rights-based morality.

Specifically, adaptation policies made with the goal of protecting large numbers of important rights of existing right-holders might justifiably be implemented.

There will, of course, be difficult decisions to be made regarding which rights may be restricted in which ways under which circumstances, but these will need to be made on a case-by-case basis and in no way preclude supporters of rights from also being supporters of adaptation.

A second issue arises as a result of the unique timings involved in climate change.

As Jamieson highlights, adaptation techniques could be sub-categorised into two

²⁹² *Ibid*, p.11

types; “some adaptations are anticipatory, while others are reactive. An example of an anticipatory adaptation is constructing sea walls in order to minimize the impact of an expected sea-level rise. An example of a reactive adaptation is the efforts of a coastal community, damaged by a hurricane, to rebuild to a more secure standard.”²⁹³ As Baer correctly asserts, “where such risk-reducing actions have costs, it makes sense to make such investments in advance, rather than waiting until the harm has occurred to provide compensation (when some of those requiring compensation may be dead).”²⁹⁴ However, while Baer is correct in his assertion that anticipatory adaptations are a better way of preventing harm (which, for supporters of rights, must be preferable to compensating for harm), they are not necessarily perfectly aligned with rights-based moral thinking.

Reactive adaptations seek to repair damage that has already been done to the rights of current people and restore them to their previous level. They are, therefore, obviously permissible under (indeed, demanded by) rights-based moralities. The issue of anticipatory adaptation is more complicated. The question of at which point a society must begin to implement policies which will prevent future rights violations has no simple answers. This is particularly true if and when a) the adaptations we make to prevent future harm come into conflict with rights in the present, and/or b) the costs associated with such adaptation are such that the finite funds needed to implement the policy might protect greater numbers of more fundamental rights if spent in other areas. Given that future

²⁹³ Jamieson, D., ‘Adaptation, Mitigation and Justice’ in Gardiner, S., Caney, S., Jamieson, D., and Shue, H. (eds.), *Climate Ethics: Essential Readings* (Oxford: Oxford University Press, 2010), p.265

²⁹⁴ Baer, P., ‘Adaptation to Climate Change: Who Pays Whom?’ in Humphreys, S., *Human Rights and Climate Change* (Cambridge: Cambridge University Press, 2010), p.251. This is particularly true when it comes to rights as rights-based moralities would demand protection from harm in advance of its occurrence in a manner that was more primary than the need for compensation.

persons do not possess rights, it is difficult to see how adaptation aimed at protecting such persons could be justified in scenarios where the rights of current people suffer as a result.

If we follow the ‘gradualist paradigm’ favoured by the IPCC,²⁹⁵ then there is little difficulty in aligning rights-based moral thinking with some form of adaptation policy. If climate change is gradual and predictable, then it should be possible to take actions to adapt to it before specific rights violations occur, but not so long before that the holders of the rights we aim to protect have yet to come into existence. While questions may remain over how far in advance of potential violations we ought to act²⁹⁶ (particularly if the adaptations we make infringe upon the current rights of some and/or divert limited resources from the avoidance of other, more immediate, rights violations), the idea of taking action to prevent violations of the rights of *current* persons as opposed to merely resolving them as they arrive is by no means alien to rights-based thinking.²⁹⁷ And given the inherent uncertainty associated with trying to predict exactly when a rights-threatening climatic event will occur, it seems that a rights-based morality might allow some margin for error in this area. If it is reasonable to assume that any particular policy of adaptation will end up benefitting current people, then a rights-based morality holds the potential for justifying that policy even though, in

²⁹⁵ McKinnon, C., *Op.Cit.*, p.48

²⁹⁶ For example, if a sea wall is needed to protect against sea-level rises which will reach dangerous levels in fifty years (well within the lifetime of many current persons), does this mean the state is under any duty to build such a wall *now*? Or is it permissible for each government to pass this knowable and costly problem on to their successors until, say, five years before the dangerous sea-level is reached, by which time construction of the wall has become a “now or never” scenario?

²⁹⁷ I will return to the moral status of future violations of the rights of current persons in Chapter 6.

this way, some such policies might accidentally and unknowably end up benefitting *only* future persons.²⁹⁸

Difficulties arise, however, when we move away from the gradualist paradigm and consider the effects of tipping points on our thinking. Tipping points are one-off events caused by climate change which will dramatically and rapidly increase the speed and magnitude of the process. Such events include, for example, massive melting of glaciers and ice sheets caused by a rapid increase in oceanic temperatures, leading to a dramatic rise in sea levels.²⁹⁹ Clearly, such events would require enormous amounts of adaptation (in the form of robust and extensive coastal defences) and the process of adapting would need to begin well in advance of such tipping points being reached. The problem is that, as McKinnon highlights, “the state of knowledge with respect to tipping-points and climate change catastrophes is such that, with respect to many of them, experts do not know their proximity to us in time.”³⁰⁰ Given this fact, it is likely that costly, large-scale adaptation programmes undertaken with the idea of protecting against sudden climate events would benefit *only* the as yet unborn, despite the fact that their costs were met *only* by current persons. As previously noted, where these costs lead to a reduction in the level of protection/realisation of the rights of current persons, this would seem highly problematic for supporters of rights-based moralities. Moreover, even if such costs did not amount to a violation of the rights of current persons, it would nonetheless be difficult to see, under a rights-

²⁹⁸ For example, if we can be reasonably sure that sea levels will rise substantially at some point between 25 and 125 years from now (a brief window geologically speaking), it seems acceptable for supporters of rights to commence with the necessary adaptation now despite the fact that, if the rise comes at the latter end of our timescale, it *could* end up that their actions benefit nobody who is alive today.

²⁹⁹ McKinnon, C., *Op.Cit*, p.48

³⁰⁰ *Ibid*, p.49

based theory, what wrong current persons would commit by not implementing them.

Having said this, the fact that tipping points *might*, in the future, affect current persons could be determined to be of sufficient concern to warrant the implementation of adaptation programmes now. Such a choice, though, would not be automatic, and would need to be based on a complex cost/benefit analysis which not only carefully considered the impact of adaptation on rights versus the impact of tipping points, but also factored in the likelihood that such tipping points would occur during the near-medium future.

It is not clear why governments ought to adopt ‘worst case scenario’ thinking in their decisions over climate-based policy decisions (as many campaigners feel they should) when they do not do so in other policy areas. For example, all governments (especially those in developed countries) spend a certain amount of money planning for and combatting security threats. Despite this, acts of terror sometimes still occur. It could be argued that the number of these acts of terror might be reduced through a combination of greater financial investment and the curtailing of certain rights surrounding privacy, freedom of speech and freedom of movement. However, governments determine that the likelihood of any terrorist attack – let alone the kind of multiple, largescale attacks that could threaten a country’s stability in the longer term – is minimal enough that, while it cannot be ignored, it also cannot justify excessive restrictions on either the rights of citizens or the funding needed to properly safeguard those rights.³⁰¹

³⁰¹ It is worth noting here that my analysis of the approach of governments to terrorism is purely an economic analysis of the reasonableness of such an approach. In reality, governments may have very different motivations for following particular anti-terrorism policies and not others.

In line with this type of thinking, if their only concern is current persons, governments would need to strongly consider the likelihood of a tipping point being reached within the next century when deciding whether to commit funds to adapt to it.³⁰² Such an issue, of course, only truly arises when we frame our thinking in terms of rights, since we can say with a great level of certainty that tipping points will occur; it is simply that we cannot determine whether any current persons will be their victims.

Overall, while the concept of adaptation to climate change is certainly well-aligned with rights-based moral thinking in principle, in practice decisions about which policies of adaptation to follow and when will be complicated by a rights-based approach. Taking action to prevent the damage to rights caused by climate change before that damage occurs is in no way ruled out under a rights-based morality. However, decisions about when such actions (particularly those which impede the rights of current persons, either directly or through using resources which could otherwise be used to enhance rights protection/realisation) ought to be taken will be complicated if the primary reason for making such decisions is the protection of rights. This problem emerges largely because future persons do not have rights, but also as a result of the complex issue of how far in advance governments ought to act to protect against future violations of the rights of current persons.³⁰³

³⁰² I do not, here, mean to make assertions regarding exactly *how* sure a government needs to be. If there is *any* risk that a tipping point could be reached within the next century, then a rights-based morality would seem to provide a mandate to commence with adaptation. The issue in such circumstances then becomes what level of adaptation (and what level of restriction of other rights) is permitted by what level of certainty about a tipping point?

³⁰³ This issue will be returned to in greater detail in Chapter 6.

None of these problems are insurmountable. If current persons are the concern of rights-based moralities, then acting in advance of climatic events in order to prevent the resultant harm to them would seem to be something which is demanded by Interest- and Choice-based theories. Just how far in advance of such events such theories might *demand* that governments act is not a question which can be easily answered. What is clearer, however, is that, given the immense levels of uncertainty over when particular climatic events will occur, such systems would *allow* governments to act far in advance of such catastrophes provided, a) there was a reasonable risk of such catastrophes arising within the lifetimes of current persons, and b) the limitations placed on rights in the present in the name of adaptation were proportionate (or better than proportionate) to the amount of harm that would be caused by not adapting.³⁰⁴

A more pressing difficulty arises as a result of the fact that adaptation does not, in itself, reduce climate change. While adaptation policies will help to lessen the negative effects of climate change on human beings in the short-medium term, in the long-term they will not be sufficient. This is because, if we keep emitting GHGs at our current rate, various tipping points will inevitably be reached at some point (though the timings on *when* they will be reached are quite unclear; we may still be centuries away), causing runaway climate change of a level far exceeding the ability of humanity to adapt to or mitigate.³⁰⁵ If we wish to stop the eventual catastrophic damage the worst effects of climate change will cause to future persons, we will need to drastically reduce our emissions. Experts broadly

³⁰⁴ e.g. if the financial cost of the adaptation burden pushes its bearer below the level of subsistence in order to build the coastal defences necessary to prevent a collection of luxury second homes from falling victim to rising sea levels, that adaptation will not be permissible under a rights-based morality.

³⁰⁵ McKinnon, C., *Op.Cit*, p.48

agree that, in order to best safeguard against the possibility of reaching various tipping points, we need to begin policies designed to reduce emissions ‘now’.³⁰⁶

Mitigation

The IPCC defines mitigation as “[a]n anthropogenic intervention to reduce the anthropogenic forcing of the climate system; it includes strategies to reduce greenhouse gas sources and emissions and enhancing greenhouse gas sinks.”³⁰⁷

Essentially, rather than seeking to adapt to the effects of climate change, mitigation policies aim to reduce the impact of such effects by limiting the level to which the climate does in fact change. Mitigation policies may include those designed to reduce the amount of GHGs we emit (such as investing in renewable energy as opposed to fossil fuels) and those designed to lessen impact on the climate of those we do produce (such as preserving and growing forests which absorb GHGs before they affect the climate).³⁰⁸

Mitigation and Rights

At first glance, forming a rights-based argument in favour of implementing widespread mitigation techniques seems unproblematic. As noted earlier, adaptation alone will not be sufficient to combat the worst effects of climate change (whenever they might occur). More than this, as Jamieson notes,

³⁰⁶ *Ibid*, p.128; Page, E.A., *Op.Cit*, p.64-5. As previously noted, we cannot be too precise about such timings. Moreover, while implementing mitigation programmes ‘now’ may represent our best defence against tipping points, it is unlikely to benefit current persons – see Chapter 6.

³⁰⁷ IPCC, *Op.Cit*, p.878

³⁰⁸ Humphreys, S., ‘Introduction’, *Op.Cit*, p.21

Even without abrupt climate change, an ‘adaptation only’ policy runs serious moral risks. For such a policy is likely to be an application of the ‘polluted pay’ principle, rather than the ‘polluter pays’ principle. Some of the victims of climate change will be driven to extinction (e.g., some small island states and endangered species), and others will bear the costs of their own victimization (e.g., those who suffer from more frequent and extreme climate-related disasters).³⁰⁹

For Jamieson, then, an effective mitigation regime has two clear advantages over an ‘adaptation only’ regime:

First, slowing down the rate of change allows humans and the rest of the biosphere time to adapt, and reduces the threat of catastrophic surprises. Second, mitigation, if carried out properly, holds those who have done the most to produce climate change responsible, at least to some extent, for their actions. It is a form of moral education.³¹⁰

Humphreys agrees with this assertion, and argues that this second advantage is in line with the doctrine of human rights. As he puts it: “A negative duty not to violate basic human rights presumably calls at a minimum for an urgent and stringent mitigation regime.”³¹¹

Unfortunately, the unique timescales involved in the climate change process, combined with the fact that future persons cannot be said to have rights, calls the validity of such a claim into question. As explained in Chapter 1, emissions produced today will not begin to affect the climate for several decades. Once they do begin to affect the climate, they will continue to do so for centuries. This,

³⁰⁹ Jamieson, D., *Op.Cit*, p.267

³¹⁰ *Ibid*, p.271

³¹¹ Humphreys, S., ‘Conceiving Justice: Articulating Common Causes in Distinct Regimes’ in Humphreys, S., *Human Rights and Climate Change* (Cambridge: Cambridge University Press, 2010), p.301

combined with numerous other factors, has caused experts to determine that any feasible programme of mitigation embarked upon today will *only* be of significant benefit to future persons.³¹² As a result of these factors, it seems difficult to claim that a failure to mitigate climate change represents a violation of rights.

Even taken in isolation, such a fact represents a significant difficulty for supporters of rights. If the protection of rights is our primary concern, then there are far more efficient programmes we could implement than those of mitigation in order to protect against climate-related harms. Therefore, rights-based moralities are faced with the question of why anybody should be motivated to reduce their emissions, given that doing so will, at the very least, cause us significant inconvenience while protecting the rights of nobody. Due to their inability to maintain that future persons hold rights, rights-based moralities struggle to find a reason as to why future persons should possess any kind of moral value. Indeed, they struggle to even enunciate the concept of non-rights-based moral goods. This issue will be returned to in Section 3.³¹³

³¹² For example, Kavuncu and Knabb claim that the first generation to actually benefit from any emissions stabilisation programme will be born early in the 24th Century (Kavuncu, Y.O., and Knabb, S.D., 'Stabilizing greenhouse gas emissions: assessing the intergenerational costs and benefits of the Kyoto Protocol', *Energy Economics*, 27(3), (2005), 369-86, p.383). Similarly, when looking specifically at the EU mitigation proposal, Lomborg states: "In March 2007 the EU promised that they would unilaterally cut emissions to 20% below 1990 levels by 2020. This would mean a 25% cut of emissions from what they would otherwise have been in 2020. Yet the effect on temperature would be smaller than Kyoto...postponing warming by the end of the century by about two years." (Lomborg, B., *Op.Cit.*, p.169)

³¹³ Supporters of rights would not be prohibited from voluntarily making sacrifices in relation to the exercise of their own rights (though not those of others) in the name of protecting future persons. However, such individuals would have had to have developed their concern for future persons from outside of their own moral system. And if they do possess a concern for future persons that is so great that they are willing to severely restrict the ways in which they exercise their own rights, would they not also feel that a) others might be morally required to do the same, and b) a morality which entirely fails to recognise the moral value of future persons might not be the morality for them.

A much greater problem for supporters of rights arises if/when any programme of mitigation has a negative impact upon the rights of current persons. This is because, under a rights-based morality, any violation of rights can ordinarily only be justified if taken in the name of protecting other rights, which is not something which can be said of mitigation.

In light of this, this section will consider the ways in which specific mitigation policies – global prohibitions on air travel and/or deforestation - violate rights. Section 3 will then go on to consider how a dedicated, global mitigation programme would limit progress in the developing world and thus indirectly slow the growth of the number of people whose rights are properly realised and protected due to the direct link between levels of poverty levels and rights fulfilment.

Air Travel and Rights

There are many policies which governments might adopt in order to reduce the amount of damage being done to the climate current persons. In reality, there is no single human activity or behaviour that, even taken across the entire global population, would be enough to cause climate change in isolation. Rather, climate change results from a hugely variant number of (often only slightly) harmful human activities carried out by an enormous and growing global population the size of which would have been unimaginable even a century ago.³¹⁴

³¹⁴ The population of the world took ten thousand generations to reach one billion. In the space of the next one generation it went from one billion to seven billion (Guggenheim, D., *Op.Cit*)

With the above in mind, there are many policies which governments might adopt in order to reduce climate change. There is not room within this thesis to consider each of these individually. I do, however, feel it to be helpful to consider the practical implications of specific policies of mitigation rather than considering the phenomenon only in the abstract. In a certain sense, then, my choice to examine the impact of a ban on air travel (and later a ban on deforestation) is arbitrary. Certainly, were we to decide that travelling in planes or felling trees constituted an irreplaceable good for humanity then we could substitute either policy for an alternative of similar value in terms of positive effect on the climate.

My choice of which policies to analyse, however, is not *entirely* arbitrary. Rather, I have tried to focus upon those which a) might be viably adopted relatively quickly, and b) have less obviously harmful human rights implications. I could, of course, have chosen to examine the impact upon rights of an outright ban on the use of fossil fuels in the production of energy. However, as Lomborg correctly points out, “[c]hanging national energy systems takes a long time and has huge costs.”³¹⁵ Therefore, such a policy would either take a very long time to implement while we waited for greener energy alternatives to become available, or would be implemented immediately resulting in a huge swathe of rights violations as billions of people had removed from them their only means of heating their homes. As a result, holding up such a policy as evidence that rights-based moralities and mitigation policies as a whole are incompatible would seem disingenuous. A prohibition upon air travel, however, appears at first glance to represent a more viable, more rights-friendly way of cutting emissions.

³¹⁵ Lomborg, B., *Op.Cit*, p.169

In fact, Monbiot views a prohibition on air travel as a necessity if we are to avoid catastrophic climate change.³¹⁶ Air travel accounts for 4-9% of the total amount of anthropogenic CO₂ produced each year. These emissions have increased by 83% over the past twenty-five years and continue to rise.³¹⁷ As well as significantly reducing the amount of CO₂ in the atmosphere, such a policy seems more obviously implementable and justiciable within a relatively short period – if a government banned fossil fuels, it seems many people would go ahead and burn them anyway rather than freeze/starve to death. A ban on air travel would seem more likely to be obeyed and easier to police. Perhaps most importantly, as has been alluded to above, the link between air travel and rights appears, at first glance, less direct than the link between other mitigation policies and rights. This section, however, will demonstrate that even less obviously controversial mitigation policies still cause tremendous harm to rights; harm that cannot be justified as the unfortunate consequence of a clash of rights.

Air Travel and the Right to Liberty

There is no specific right to air travel. Therefore, there is also no correlative duty upon states to facilitate their citizens in taking planes through, for example, providing subsidies for those who cannot afford to do so. Despite this, most of us (whether supporters of rights or not) would find it in some way wrong for the government to prohibit us from ever taking a flight again. Our sense of injustice would not be greatly diminished on discovering that such a policy applied not just

³¹⁶ Monbiot, G., *Heat: How to Stop the Planet Burning* (London: Allen Lane, 2006), pp.170-188

³¹⁷ 'Air Travel and Climate Change', *David Suzuki Foundation*. Available at: <http://www.davidsuzuki.org/issues/climate-change/science/climate-change-basics/air-travel-and-climate-change/>. Last accessed: 24 August 2015.

to us, but to all citizens, so that we could not claim discrimination to be the root of our concern.³¹⁸ For supporters of rights, the disquiet felt at such a policy is best explained by an assertion that a violation of the right to liberty has occurred.

Dworkin defines the right to liberty as “the absence of constraints placed by a government upon what a man might do if he wants to.”³¹⁹ This is something close to the way in which Nozick would describe such a right. Nozick, like Interest and Choice theorists (if they endorse such a right at all), would seek to highlight that such a right may be legitimately restricted when it clashes with other rights.

As libertarians, followers of Nozick-style systems of rights must unquestionably accept the concept of a moral (and probably also legal) right to liberty. As Nagel explains, “[i]nstead of embracing the ideal of equality and the general welfare, libertarianism exalts the claim of individual freedom of action, and asks why state power should be permitted even the interference represented by progressive taxation and public provision of health care, education, and a minimum standard of living.”³²⁰ Nozick himself explains that “...the state may not use its coercive apparatus...to prohibit activities to people for their own good.”³²¹ And if liberty is so strong that the state may not even restrict its use in the name of the welfare of the citizen who exercises it, it is clear that Nozick believes in a right to liberty in its strongest sense. This should come as no surprise. Nozick’s theory of rights stems from the idea that we have certain natural rights and that such rights must

³¹⁸ See Hart’s assertion that, as a result of similar reasoning, liberty and not equality must be afforded key importance by supporters of rights. Hart, H.L.A., ‘Between Utility and Rights’, *Columbia Law Review*, 79 (1980), 828-846, p.845

³¹⁹ Dworkin, R., *Op.Cit.*, p.267

³²⁰ Nagel, T., *Op.Cit.*, p.192

³²¹ Nozick, R., *Op.Cit.*, p.ix

be respected. In the state of nature, Nozick would argue, we are certainly free to do as we wish.

So how would a Nozickian right to liberty be impacted by a ban on non-essential air travel?

Most obviously, if I have a right to do as I wish without the interference of government, this includes within it the right to get on planes and the right to start a business offering air travel to others. Certainly such rights do not have as their correlatives duties to be provided with air fare or start-up capital if I cannot otherwise exercise them, but this is not a problem for Nozickians, who do not endorse positive duties. I have a general right to act as I wish provided my doing so does no harm to the rights of others. Setting up a business selling flights to others and/or taking advantage of the services of others doing the same certainly fall well within a Nozickian notion of freedom which it would be wrong for the government to impede without good cause. Since the emissions from my air travel harm no current persons they do not violate rights and thus my right to liberty may not be justly limited through their prohibition.

Outside a Nozickian framework, the existence of a right to liberty becomes less concrete. While it is certainly true that Choice and Interest theorists *could* consistently endorse such a right, it is less clear that they are bound to do so in order for their theory to remain coherent. Neither the rights that Choice and Interest theorists endorse nor the manner in which they endorse them necessarily rely upon the existence of a *right* to liberty. Having said this, even for Choice and Interest theorists who choose not to adopt such a right, there remains some sort of presumption in favour of liberty.

It seems difficult for the Interest Theorist to argue that human beings do not have a fundamental interest in being free to do as they wish. Of course, there need to be limitations upon this freedom, and those limitations arrive in the form of rights. Whether liberty is itself protected by rights or is simply one of the goals that the enforcement of such rights seeks to achieve, it remains something which is highly important to Interest theorists.

For Choice theorists, the centrality of liberty is all the more apparent. Indeed, some Choice theorists such as Hartnack³²² and Gewirth³²³ maintain that liberty is so foundational to rights there must exist a right to liberty. Unlike Nozickians, though, Choice theorists are not compelled to take such a stance. They might instead argue that an ability to make choices is the goal of their system of rights and that that ability is best protected (and limited) by rights, but that those rights need not include a *right* to liberty. In this way, they are able to increase the level of liberty people have without the risk of following a Nozickian path and assigning it a status so grand as to unduly limit the power of governments to restrain liberty through positive actions which might, in the end, increase it; i.e. overall levels of liberty might be better served if we restrict the liberty of A by placing moderate taxation on her considerable earnings in order to pay for the relatively cheap medicine B requires (but cannot afford) to move from her hospital bed. Insisting upon a right to health but not a right to liberty makes such positive duties easier to justify.

³²² Hartnack, J., *Human Rights: Freedom, Equality and Justice* (Lampeter: The Edwin Meller Press, 1996), p.13. Hartnack asserts that, “[e]very human being, just because she or he is a human being, enjoys the right to freedom. No person’s freedom can therefore be restricted without it being a violation of this inalienable right”.

³²³ Gewirth, A. (1982), *Op.Cit*, p.15

For those Interest and Choice theorists who *do* endorse a right to liberty, the situation with regard to a ban on air travel is much the same as it is for Nozickians. In most cases, Interest and Choice theorists can be distinguished from Nozickians by the less extreme conclusions they draw whenever a right comes under threat. As highlighted in Chapter 2, the individual, negative nature of rights under Nozick means that they tend not to ‘clash’ and thus rarely require restriction. However, under Choice- and Interest-based systems (particularly those which demand positive as well as negative duties) it will often be the case that the exercise of one right will be restricted by the exercise of another. This would seem especially true of a right to liberty. My right to do as I wish will usually prove to be the most obvious sacrifice in the frequent clashes such a right will create.³²⁴ My right to drive quickly is limited by the right to life of others. My right to property is limited by the taxes I pay in relation to your right to health. The situation with air travel, however, does not mirror such scenarios.

A prohibition upon non-essential air travel unquestionably limits my liberty. As noted earlier, if am not free to travel in the manner I would like, then I am far from free to do as I wish. Under ordinary circumstances, this would be no great problem. Were it the case that the emissions from my air travel would cause a tipping point which would harm current persons, a clash of rights would ensue and it might well prove that a prohibition on such air travel amounted to a permissible restriction upon my right to liberty. This is because the rights to life and other fundamental goods of the current persons who are harmed by air travel

³²⁴ Indeed, it is perhaps this fact that leads many to question whether a right to liberty can really be considered a right at all. Rights are typically considered to be of equal status to one another and which right is forsaken in any clash is largely a matter of circumstance. It seems, however, that whenever such clashes involves a right to liberty it is almost always that right which loses out.

outweigh the right of polluters to take non-essential flights. However, since prohibiting non-essential air travel will only benefit future persons, there is no clash of rights and thus, if I have a *right* to liberty, that right automatically wins out against non-rights-based moral considerations such as the welfare of future persons.

Supporters of Interest-/Choice-based systems who find such a conclusion uncomfortable might justly circumvent it by denying the existence of a right to liberty. If there is no right to liberty, there is one less reason for Interest and Choice theorists to object to a prohibition upon non-essential air travel. There remains, however, a question of motivation. If liberty is so important that it represents the goal (or one of the goals) of any rights-based system, it would seem that supporters of that system would require a particularly good reason for limiting the liberty of so many so widely. And yet it is difficult to see how they could consider protecting future persons to constitute such a reason. In order to do so, they would need to look outside of their own moral system for a justification as to why protecting future persons from harm might be considered a morally worthy cause. While this is an option that remains open to those Choice and Interest theorists who do not endorse a right to liberty, it is a situation which is far from ideal. If a rights-based morality is unable to provide a rights-based reason to restrict one of its key goals, and yet its supporters feel that there is, nonetheless, good reason for restricting actions taken in the name of realising that goal, one might ask why and to what extent such individuals actually continue to follow a rights-based morality at all.

Air Travel and Freedom of Movement

The right to freedom of movement would clearly be negatively impacted upon by a ban on non-essential air travel. Such a right has strong associations with a right to liberty and might even be viewed as one of its constituent elements. Freedom of movement, however, is widely accepted as a right in and of itself and has a much broader acceptance among Interest theorists, Choice theorists and Nozickians alike. While the positive duties associated with freedom of movement may be difficult to ascertain, it seems that such a right must *at least* necessitate a universal negative duty not prohibit me from taking certain forms of transportation without a solid (rights-based) reason for doing so. This is particularly true in situations where such forms of transportation are the only realistic way I have of accessing many places throughout the globe, and perhaps even throughout my own country. If I am truly to have freedom of movement, I must not be prevented from accessing all those methods of transport which I can afford to take. The only circumstance under which any rights-based morality can place restrictions on this negative aspect of the right is when its exercise harms the rights of others. This is not the case if the restriction is put in place to protect future persons.

Air Travel and the Right to Family Life

In today's globalised world, for many people the right to family life might be considered to require access to air travel in order for family members living in different states (or different parts of the same state) to be able to see one another. While we may question whether such a right includes a positive duty to furnish

such individuals with the financial means to fly (and it seems unlikely that many supporters of rights would argue for such a duty), the sudden removal of their only means of reaching family members would certainly appear to violate a negative duty associated with the right. This is particularly true given that it is only the process of globalisation and the proliferation of affordable air travel that caused families to live further away from one another in the first place. To suddenly change the rules without a particularly sound rights-based reason for doing so would seem an unreasonable infringement of a right to family life. Of course, it might be argued that, unlike with rights to liberty and freedom of movement, supporters of rights could consistently uphold a right to family life while simultaneously supporting a prohibition on non-essential air travel, depending upon their categorisation of ‘essential’. However, since it is unlikely that airlines would continue to operate on the basis of the limited number of customers who could not possibly use another means of transport to visit family, it seems likely that even with the inclusion of such an exception, any ban on air travel would amount to a *de facto* violation of the right to family life for many people.

Air Travel and Indirect Rights Violations

Finally, there exists a different, less direct class of rights violations that is highly likely to occur as a result of a ban on non-essential air travel.

The UK is the sixth largest economy in the world, making up 4% of global GDP. It is also a country where the human rights are, on the whole, comparatively well looked after. Even in the UK though, removing all industry that surrounded air

travel or the exporting and importing of goods by air would do massive damage to the economy. Profits would fall heavily, thousands (perhaps hundreds of thousands) of jobs would disappear. As a result, less tax would be gathered by the government, causing there to be less money for the National Health Service, or to pay out in welfare payments – at precisely the same time as the market was flooded with the newly out of work. While the UK might be strong enough to survive such a policy, the human rights of those living there would suffer as a result.

What would be a huge setback for the UK would represent a catastrophe for Thailand. The Thai economy relies primarily on tourism and the export of fresh fruit and vegetables. The effect of this loss of income on the number of unemployed would be immense, with 14.1% of all jobs linked to travel and tourism alone.³²⁵ It is doubtful whether the country's limited welfare system could support such a sudden and dramatic rise in unemployment. It seems equally difficult to believe that the country's universal healthcare system, on which the government currently spends around 4% of GDP,³²⁶ could withstand the 19.3% drop in GDP that would result from the removal of the tourist industry.³²⁷

Thailand's situation is by no means unique, and it seems clear that a prohibition on air travel would have a significant impact upon the global economy and that

³²⁵World Travel and Tourism Council, 'Travel and Tourism Economic Impact 2015: Thailand' (London, 2015), p.1. Available at: <https://www.wttc.org/-/media/files/reports/economic%20impact%20research/countries%202015/thailand2015.pdf>. Last accessed: 27/05/2016.

³²⁶World Health Organization, "Thailand: Healthcare for All at a Price", *Bulletin of The World Health Organization*, Volume 88, No.2 (2010), 81-160. Available at: <http://www.who.int/bulletin/volumes/88/2/10-010210/en/>. Last accessed: 27/05/2016.

³²⁷World Travel and Tourism Council, *Op.Cit*, p.1

the effect of that impact upon rights would be significant, particularly for the global poor.³²⁸

Moving away from economic consequences, one might also claim that the process of globalisation – fuelled by air travel – has had a significant impact upon the universality of rights and the ability of individuals to claim those rights, often within extra-territorial courts. Without air travel, it seems highly possible that states may become more isolated and introverted and thus more susceptible to autocracies which fail to respect rights.

In summary, having examined one individual, fairly cheaply and immediately implementable mitigation policy, it seems clear that numerous rights of current persons will be harmed. Prohibiting non-essential air travel will directly and unavoidably violate rights to liberty and freedom of movement. It is also likely to result in slightly less direct (but no less serious) damage to recognition of other rights, such as the right to family life and those rights which are always threatened by increases in poverty in developing countries, such as rights to food, work, shelter and health.

Deforestation and Rights

This chapter attempts to highlight examples of blanket policies which might, if applied globally, significantly impact upon the reduction of climate change

³²⁸ It is of course possible that a comprehensive international climate change policy might include compensation for the lost income of the world's poorest people. However, such an inclusion would significantly increase the already heavy financial burden of such a programme. It seems that the supporter of rights might argue that such funds would be better spent combatting existing poverty and the damage to rights it causes than resolving problems which only emerge as a result of policies of mitigation aimed at protecting non-right-bearing future persons.

without leading to results that would automatically be considered reprehensible by followers of all moralities (if we were able to put morality aside, slaughtering three-quarters of the world's population would be a very effective way of reducing emissions). It then seeks to consider whether such policies are permissible under any form of rights-based morality. With this in mind, this section will consider the complicated issue of deforestation.

The importance of reducing deforestation as part of the fight against climate change is summarised by the Intergovernmental Panel on Climate Change:

Forests are carbon sinks in their natural state (i.e., they store more carbon than they release). Trees absorb CO₂ and convert carbon into leaves, stems, and roots, while releasing oxygen. Forests account for more than a quarter of the land area of the earth, and store more than three quarters of the carbon in terrestrial plants and nearly 40% of soil carbon. When forests are cleared, some of their carbon is released to the atmosphere—slowly through decay or quickly through burning. One estimate shows that land use change, primarily deforestation, releases about 5.9 GtCO₂ (gigatons or billion metric tons of CO₂) annually, about 17% of all annual anthropogenic GHG emissions.³²⁹

While reforestation/afforestation offers a possible means of combatting deforestation, existing research shows that intact mature forests are up to three times more effective at absorbing carbon than even mature plantations,³³⁰ and that is before we consider the decades (perhaps centuries) of less than maximally

³²⁹ Intergovernmental Panel on Climate Change, 'Summary for Policymakers', *Climate Change 2007: The Physical Science Basis—Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, p.3. Available at: <http://www.ipcc-wg1.unibe.ch/publications/wg1-ar4/wg1-ar4.html>. Last accessed: 30 June 2016. The exact amount of CO₂ emissions from deforestation has a large degree of uncertainty, with estimates ranging from 1.8 to 9.9 GtCO₂/year for the 1990s.

³³⁰ Mackey, B.G. *et al.*, 'Green Carbon: The Role of Natural Forests in Carbon Storage, Part 1, A Green Carbon Account of Australia's South-Eastern Eucalypt Forests, and Policy Implications', *The Fenner School of Environment & Society* (Canberra, Australia: The Australian National University, 2008).

effective sequestration which has to be borne before newly planted forests reach maturity.

The significance of eradicating deforestation as a one-off, theoretically achievable policy,³³¹ then, is clear – especially when we consider that experts feel that it is among the least financially costly ways of reducing CO₂.³³² In particular, as Gorte notes, “the lowest cost and largest carbon benefit of reducing deforestation is with tropical forests.”³³³

Moreover, the predominant view among writers on the subject appears to be that reducing deforestation would serve to *improve* human rights. Of course, much of this thinking presupposes that future persons have rights and focuses upon the potential benefits a reduction in climate change would have for such individuals. More interesting for the purpose of this thesis, though, is the existing discourse that reducing deforestation would, on balance, serve to better protect the rights of *current* persons. Such claims generally surround the rights claims of indigenous people, whose culture and livelihoods are frequently destroyed by large-scale, commercial logging operations (legal or otherwise). As this section will attempt to demonstrate, however, the answer to the question of whether indigenous people

³³¹ While critics may argue that the idea of a united, global ban on deforestation seems exceptionally unlikely, it remains a theoretical possibility. Indeed, it could be argued that theory is slowly becoming reality. In 2014 at a UN Climate Summit, Norway, Germany and The UK pledged to “promote national commitments that encourage deforestation-free supply chains,” and in May 2016 Norway strengthened this commitment by promising to “ban any product in its supply chain that contributes to the deforestation of rainforests through the government’s public procurement policy” (Wanshel, E., ‘Norway Is The First Country To Ban Deforestation’, *The Huffington Post* (06 June 2016). Available at: http://www.huffingtonpost.com/entry/norway-first-nation-zero-deforestation_us_57559b5be4b0eb20fa0e7b79. Last accessed: 30 June 2016.

³³² See: Kindermann, G., *et al.*, ‘Global Costs Estimates of Reducing Carbon Emissions Through Avoided Deforestation’, *Proceedings of the National Academy of Sciences*, vol.105, no.30 (2008), 10302-10307.

³³³ Gorte, R.W. and Sheikh, P.A., ‘Deforestation and Climate Change’, *Congressional Research Service* (24 March 2010), p.1. Available at: <http://forestindustries.eu/sites/default/files/userfiles/1file/R41144.pdf>. Last accessed: 24 June 2016.

would be made better off, in rights terms, by a prohibition on deforestation appears to vary on a case by case basis. And when it comes to rights claims that do not surround indigenous people, supporters of rights-based moralities seem compelled to *oppose* a blanket ban upon deforestation.

Deforestation and the Rights of Indigenous People

Since forest-dwelling indigenous³³⁴ communities are most often cited as examples of how a ban on deforestation might help to *protect* rights, it will make sense to begin by considering the *negative* impact on rights such a policy might have for people within this group. To complicate things further, sometimes these negative and positive factors can occur simultaneously. For example, while transforming previously forested areas into farmland may displace indigenous people, in doing

³³⁴ Before commencing this section it is worth noting that the very issue of who is and is not indigenous when it comes to forest-dwelling people is a particularly complex one, at least in terms of international law. The two most prominent pieces of legislation aimed at protecting the rights of indigenous people are the 1989 *International Labour Organization's Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO 169) and the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* (DECRIPS). As Lawlor and Huberman highlight, "...adherence only to ILO 169 and DECRIPS would leave out many of the relevant human rights of indigenous people and members of the many forest-dependent communities who are not technically considered indigenous." They give the example of the people of Bantu descent who have populated the rainforest in the Congo Basin for millennia, but who are still not commonly considered indigenous (Lawlor, K. and Huberman, D., 'Reduced Emissions from Deforestation and Forest Degradation (REDD) and Human Rights' in Campese, J., *et al.* (eds.), *Rights-based Approaches: Exploring Issues and Opportunities for Conservation* (Bogor Barat, Indonesia: Centre for International Forestry Research, 2009), p.279). For the purposes of this thesis it will not be necessary to go into great detail over who is and is not indigenous, sufficed to say that I feel a relatively broad approach to such a matter would be appropriate in accordance with a rights-based morality. None of us are truly indigenous. We all came from somewhere else if we look back far enough into the history of humanity. It would therefore seem absurd not to assert that communities who have lived in a forest for generations (much less millennia!) should not be afforded the protection that the special rights aimed at indigenous people are intended to provide.

so it will provide labour to poverty-stricken people (indigenous or otherwise), enabling them to provide themselves with food, shelter and other basic rights.³³⁵

There are, however, areas of indigenous rights with which a blanket ban on deforestation would more unquestionably come into conflict. As Moran notes, “...indigenous peoples...have an inherent right to land on both historical and humanistic grounds. These rights extend to intellectual property rights over the resources they have husbanded...”.³³⁶ For Nozickians, such rights would certainly extend to the right to choose what to do with that land including, if they so wish, to allow it to be deforested in exchange for economic gain. One might question whether Choice and Interest theorists would similarly assert that rights over property necessarily amount to rights to do as one wishes³³⁷ with that property. If we turn to human rights law, though, it seems that such a view is widely supported by those responsible for drawing up and implementing a far from Nozickian concept of how rights should work in practice.

While this thesis is not legal in nature, there is no reason why existing human rights law should not come to inform human rights thinking when appropriate. This seems particularly true of the core ideas of human rights declarations and treaties, before negotiation and interpretation occasionally renders their practical impact less meaningful than supporters of rights-based moralities would like. In

³³⁵ It might be argued that, at least for the indigenous people, such food and shelter was already available before their forest home which provided such things was destroyed. This, though, will not be the case in every scenario. As previously noted, the relationship between indigenous people, rights, and deforestation is complex and makes blanket statements problematic.

³³⁶ Moran, E.F., ‘Deforestation in the Brazilian Amazon’ in Sponsel, L.E., Headland, T.N. and Bailey, R.C., *Tropical Deforestation: The Human Dimension* (New York: Columbia University Press, 1996), p.161.

³³⁷ There are obviously strong limits on the idea that one may do as one wishes with one’s property (I may not throw my trees at your head). However, under a rights-based morality these limitations most obviously arise when my use of my property violates some right of yours. Since future people are not right-holders, this is not the case with deforestation.

particular, there is no obvious reason to think that the articles of the two primary pieces of legislation concerned with the rights of indigenous peoples to which I shall now refer would not be compatible with rights-based moralities.

Firstly, the 1989 *International Labour Organization's Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO 169) outlines the special rights which are held by indigenous people in relation to their traditional lands. Two articles are of particular relevance here:

Article 7: The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives ... and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

Article 14: The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. ... Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

The latter of these articles is backed up by Article 26 of the United Nations Declaration on the Rights of Indigenous Peoples (DECRIPS), which states that:

Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. States shall give legal recognition and protection to these lands, territories and

resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

It is easy to see how a prohibition upon deforestation would come into conflict with such rights. Such a policy would unquestionably directly affect indigenous peoples, and thus, under Article 7 of ILO 169, their consent for such a policy would surely be needed. More problematically, the same article would seemingly give them the right to allow their own land to be deforested if they wish in order to profit from such a policy in the name of ‘their own economic, social and cultural development.’

Similarly, in granting ‘rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy’, Article 14 of ILO 169 must surely be interpreted to include the right to deforest that land if such an action is wanted by the indigenous people who own it. This fact is made even clearer by the DECRIPS Article 26 when it states that ‘[i]ndigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess’. This is not to say that a right to property enables right-holders to do whatever they want with the land they own, but it does mean that any serious limitation of that right (i.e. prohibiting people from cutting down the trees they own) would need to be justified on some other rights-based ground. Since future persons are not right holders, the claim that the property rights of current indigenous people might be legitimately sacrificed in order to protect future persons is not acceptable under a rights-based morality.

In addition to affording indigenous people the right to profit financially from the large-scale deforestation of their lands for the purpose of profit, a rights-based morality must also afford such people the right to the kind of small-scale, subsistence deforestation which may be necessary to build dwellings or provide heating. Again, such a right cannot easily be overlooked in the name of reducing climate change.

Overall, while protecting indigenous people from illegal and unwanted deforestation of their traditional lands seems a very appropriate aim for a rights-based morality, any kind of blanket ban on deforestation would appear to be in direct conflict with the rights of indigenous people. To the extent that such deforestation forms part of the traditional culture of such people, even financial recompense for the losses suffered as a result of such a ban would not seem an adequate solution to the problem.

Of course, were harm to the rights of forest-dwelling indigenous people the only difficulty with our policy, we might take a more pragmatic approach and suggest that such people represented an exception to our blanket ban. Unfortunately for supporters of rights, however, there are many more general reasons to oppose such a ban.

Deforestation and Rights to Liberty and Property

As with so many policies which could feasibly be implemented to combat climate change, a blanket prohibition on deforestation would seem to come into direct

conflict with the right to liberty. And when it comes to such a policy, the right to liberty and the right to property become intimately connected.

First and foremost, I cannot be said to have a right to liberty in the sense discussed in the previous section if I am not at liberty to chop down trees where my doing so will not violate rights. In a certain sense, however, when it comes to deforestation, the right to liberty is less of a problem than it is with other possible policies. In the Twenty-first Century, there is very little in the way of land – perhaps especially forested land – that belongs to nobody. Most forests are in some sense owned, whether by indigenous groups, companies, private individuals or the state. As a result, my liberty, as a non-forest-owner, to chop down trees is immediately limited by the property rights of others without the need to make reference to future persons.

Clearly, though, if the property rights of forest owners were enough to stop deforestation, we would not need a general prohibition on such activity. Instead, it is those very property rights which enable people to deforest and which serve to prevent rights-based moralities from doing anything about it.

There are two plausible ways of viewing the relationship between rights to property and liberty. It might be that the right to property is inclusive of the right to liberty, so that to own something is to possess the right to do as I wish with that something provided my doing so does not violate rights. Or we could argue that the right to liberty and the right to property are entirely separate, but that since I am free to do as I wish until there is a rights-based reason for me not to, if I own X one of the strongest reasons for me not using X for purpose Y (the fact that some other person has a property right to X and wishes that I do not use X for

purpose Y) is removed. In other words, if I possess the right to property with regard to something, that right cannot clash with my own right to liberty.

The reality of this problem is noted by Gaveau, who states:

An estimated 735 million people live near remote tropical forests because agricultural land, an increasingly scarce resource remains abundant at the forest margin. In the absence of tangible benefits to conserve tropical forests, farmers seek to maximize profits by clearing protected forests for cash crops.³³⁸

Given the numbers involved, it is easy to see how quickly deforestation could occur on a massive scale as a result of economic demands placed upon farmers and farm workers alike. And yet, under a rights-based morality, there seems no obvious reason as to why owners of economically unprofitable forest land should not turn it into a business which creates the jobs needed for poor families to feed themselves and the tax revenue the government needs to meet other rights-based needs of its people, such as the provision of basic healthcare and sanitation. This is particularly true given that, while, as well as combatting climate change, forests may provide a number of other positive benefits for the society as a whole such as soil retention, waste remediation and clean water, landowners do not generally receive any financial reward for the provision of such services.³³⁹

In short, it is easy to see how a landowner might legitimately claim that a prohibition upon deforestation violates his rights to both liberty and property. It is, on the other hand, very difficult to see how the government implementing such

³³⁸ Gaveau, D.L.A., 'Three decades of deforestation in southwest Sumatra: Effects of coffee prices, law enforcement and rural poverty', *Biological Conservation*, Vol.142, Issue 3 (March 2009), 597-605, p.603.

³³⁹ Gorte, R.W. and Sheikh, P.A., *Op.Cit.*, p.26.

a policy could provide a sufficiently weighty rights-based reason for such a violation.³⁴⁰

Deforestation and Rights to Work, Food and Subsistence

A focus on the right to property as the primary reason for denying the validity of a prohibition on deforestation may seem problematic for some supporters of rights (though not for Nozickians). Firstly, a great deal of the world's forests will be owned by large, multi-national companies or extremely rich individuals, and the idea that a rights-based morality should be used to afford such entities further protection in carrying out potentially harmful activities appears to go against what many supporters of rights would see as the primary purpose of this doctrine.³⁴¹

Secondly, if property rights were the main problem here, then supporters of rights could simply demand that governments purchase large swathes of forest (perhaps through compulsory purchase, or by paying over the market value), and thereby purchase the property rights associated with that forest, thus removing the clash between the property rights of forest owners and the welfare of future persons. Unfortunately, this solution would not resolve many of the other rights-based issues which act as subsidiaries of property rights.

³⁴⁰ In truth this question is broader and more complex than I have the space or expertise to discuss here. In reality, property rights vary widely in scope depending upon what is owned, who it is owned by, the particular state in which ownership occurs and the rights which they come into conflict with. I have sought to avoid such complexities by formulating the issue as the more general right to liberty over what one might do with one's own property.

³⁴¹ Although, since this 'harm' will only affect future persons, it is conceptually difficult for supporters of rights to consider it to be a negative worthy of severe restrictions upon the rights of current persons.

Firstly, in many cases those who own the land they deforest are not large, anonymous multi-national companies. According to Vosti, “small farmers ... account for about two-thirds of rainforest destruction, by converting land to agriculture...”.³⁴² For these individuals, often living in isolated areas, cutting down trees is a necessary element of creating the farmland which provides their only opportunity for work. Therefore, any prohibition on deforestation would severely and unduly restrict the right to work of these small farmers, as well as the people they and larger farms/plantations employ.³⁴³ Moreover, in developing countries (where many of the tropical forests most key to combatting climate change are located), this employment is strongly linked to a right to subsistence, since alternative employment / state aid are not viable options.³⁴⁴

³⁴² Vosti, S., ‘The Role of Agriculture in Saving the Rainforest’, in Pinstруп-Andersen, P. and Panya-Lorch, R., *The Unfinished Agenda: Perspectives on Overcoming Hunger, Poverty and Environmental Degradation* (Washington D.C.: International Food Policy Research Institute, 2001), p.142.

³⁴³ Critics might argue that this may not amount to a restriction upon the right to work in the traditional sense. The right to work is not a right to any *specific* type of work. However, in impoverished areas where farming/logging is the only viable industry, the removal of this work stream may well amount to a *de facto* violation of their right to work simply as a result of the lack of available alternative employment. While the farm owner is under no duty to provide such employment, by removing such an employment opportunity the government causes increased levels of unemployment which benefit nobody. Even if this does not amount to a rights violation, it does make the overall rights situation of many vulnerable people considerably worse without bettering the rights situation of anybody. This does not seem like something a supporter of rights would want to endorse.

³⁴⁴ In response to this argument, it might be contended that such problems could be overcome through the provision of adequate compensation. There are two problems with such an idea:

Firstly, the right to work is about more than just subsistence. People work not only so that themselves and their families to avoid poverty-related death, but importantly also because they wish to be the agents of their own destiny and avoid poverty on their own terms rather than relying on charity. Denying current persons this opportunity through the enforcement of a policy of mitigation aimed at protecting future persons places a harmful and unwelcome restriction upon their rights in the name of a non-rights-based goal.

Secondly, in line with arguments presented in a previous footnote and later in this chapter, it would be difficult for supporters of rights to justify the additional costs of compensation as part of policies of mitigation. They would be forced to argue that such funds would be better spent combatting existing situations where rights are not properly met rather than combatting new, highly avoidable threats to rights that only result from a desire to protect future persons.

Joint Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) specifies that, “[i]n no case may a people be deprived of its own means of subsistence”. In addition to the problem raised above, experts feel that such an article could be interpreted to mean that forest-dwelling communities cannot be denied access to the fuel wood, food and medicine the forest provides.³⁴⁵

Regardless of the legal strength of such an argument, supporters of rights-based moralities would certainly struggle to justify the removal of such basic, essential commodities from people living in poverty. Obtaining fuel wood may well involve some element of deforestation. While this one element could doubtlessly be accommodated in some way, it alone is enough to demonstrate that an *absolute* prohibition on deforestation is untenable to supporters of rights.

As National Geographic puts it, “[f]orests are cut down for many reasons, but most of them are related to money or to people’s need to provide for their families”.³⁴⁶ While it might not be an absolute necessity that a prohibition upon deforestation would violate subsistence-related rights, such a policy would certainly endanger those rights and require complex and costly intervention by governments in order to redress the balance. It is difficult to see how or why a rights-based morality could or would demand this in the name of protecting non-right-holders from future harm.

³⁴⁵ Lawlor, K. and Huberman, D., *Op.Cit*, p.281.

³⁴⁶ ‘Deforestation’, *National Geographic* (2016). Available at: <http://environment.nationalgeographic.com/environment/global-warming/deforestation-overview/>. Last accessed: 30 June 2016.

Deforestation and Development

The concept of a right to development is as complex as it is controversial. While it is by no means impossible that some supporters of rights-based moralities may wish to endorse it, it seems equally clear that others might deny its validity whilst still legitimately maintaining that the morality they follow is rights-based. This latter position seems particularly likely to be adopted if it can be argued (as this section would) that such a right stands in the way of a meaningful attempt to curb climate change.

In light of the above, this section begins by making the lesser claim that there exists a strong link between rights realisation and development. Developed countries are better able and more likely to protect more of the rights of their citizens than their developing neighbours. While the correlation between a country's wealth and the standards of rights realisation of its citizens is not necessarily direct or consistent, the reverse *does* seem to be true; rights realisation is generally poor in countries that are financially poor. A reasonable level of development and economic prosperity does seem to be a necessary prerequisite of (though not a guarantee of) societies in which rights-based moral thinking is able to flourish. Development, then, is generally seen as desirable by supporters of rights.

Unfortunately, development requires money much more urgently than it requires trees. As The World Wildlife Fund (WWF) puts it, "...it often makes more economic sense - at least in the short term - to manage forests unsustainably or clear forests for agriculture, roads and infrastructure than to conserve them or

manage them responsibly.”³⁴⁷ Many developing countries rely heavily on the jobs and taxes provided by the goods they export. In tropical areas (where the power of forests against climate change is at its strongest), such goods include soy beans, palm oil, coffee and bananas grown in previously forested land, as well as the wood they have harvested itself.³⁴⁸ Globally, there is a strong correlation between the market value of such goods and the level of deforestation in the countries that produce them, demonstrating that those activities which require deforestation are often good for a state’s economy.³⁴⁹ Prohibiting deforestation will harm the economies of developing countries, making adequate rights realisation more difficult to achieve. It is difficult to see how or why the supporter of rights should seek to justify this in the name of future persons.

Some of the development that emerges as a result of deforestation is less direct. In order to facilitate the deforestation process and ship the goods from the resultant farms, roads are built. These roads frequently provide a well-needed boost to a country’s infrastructure, enabling citizens and goods to travel more easily to and from areas which were previously impoverished by their isolation.³⁵⁰ Deforestation speeds up the development process in ways that cannot easily be priced.

As a final word on the relationship between deforestation and development, it is worth noting that a blanket prohibition on deforestation would do nothing, in and of itself, to combat illegal logging. Illegal logging is a multi-billion dollar

³⁴⁷ ‘Deforestation and Climate Change’, *WWF* (2016). Available at: http://www.wwf.org.uk/what_we_do/forests/deforestation_and_climate_change/. Last accessed: 30 June 2016.

³⁴⁸ Gorte, R.W. and Sheikh, P.A., *Op.Cit*, p.14-5.

³⁴⁹ *Ibid*, p.16-7.

³⁵⁰ *Ibid*, p.14.

industry and is prevalent throughout the developing world. In some areas it accounts for up to 90% of all deforestation.³⁵¹ A blanket prohibition on deforestation will, on its own, only serve to increase illegal logging since many of those who currently deforest within the bounds of the law may seek to continue with their business even after a ban has been put in place. The problem is that illegal logging is far more likely to occur in developing countries. Developing countries lack the resources (in terms of both money and trained personnel) to combat illegal logging, and those personnel they do have working on the problem are susceptible to bribery and corruption as a result of their low income. In stunting the development of poorer countries by removing it as a source of income, a prohibition on deforestation might serve to increase illegal (and perhaps overall) logging levels further still by removing governments of both the funds and the inclination needed to adequately combat the problem.

Therefore, in addition to considering the rights violations a prohibition on deforestation might cause in theory, we must ask whether such a policy is likely to make any actual difference to the number of trees that are lost in practice. There is nothing inherently immoral about either deforestation or the prohibition of it; rather, it is the difference each policy will make to the welfare of current and/or future persons which makes it of interest. If a ban on deforestation is largely a ban in name only it will only serve to harm the rights of honest, law-abiding citizens while doing very little to reduce the amount of emissions in the Earth's atmosphere.

³⁵¹ Sheikh, P.A., 'CRS Report RL33932, Illegal Logging: Background and Issues', *Congressional Research Service* (09 June 2008), pp.2-5.

It seems clear, then, that deforestation can provide a significant boost to the economies and subsequent development of the world's poorer countries. Coincidentally or otherwise, the majority of the world's forests are located in the poorest countries. In prohibiting deforestation we would not only violate rights, we would ask that a significant climate burden be borne almost entirely by the people who can least afford it. To do this in the name of non-right-holding future persons seems untenable under a rights-based morality. This is particularly true when we consider that less developed nations are less able to deal with the significant problem of illegal logging, meaning that a ban on deforestation might end up significantly reducing the revenues received by governments of developing countries without similarly reducing the number of trees which are actually being cut.

Overall, it seems that specific mitigation policies are likely to have a direct negative effect upon the rights of many current persons without benefitting others and are thus rendered untenable under a rights-based morality. One objection to this idea is that it might be the case that some other policy I have not had space to consider (or even an adapted version of those I have considered) could be acceptable to supporters of rights. With this in mind, I will now consider some more general connections between mitigation and rights as well as the problem of motivating supporters of rights to reduce climate change *even if* climate burdens could be met without directly violating the rights of current persons.

Indirect Damage and the Motivation Problem

The remainder of this chapter will focus upon the less direct damage to rights which would occur as a result of a fully-fledged programme of mitigation. It will demonstrate the ways in which mitigation policies will cause a general increase in poverty, and with it, a general reduction in rights realisation. It will also argue that, even disregarding the damage done to rights by a dedicated programme of mitigation and the fact that future persons cannot be deemed to be of significant moral concern under a rights-based morality, mitigation techniques are a highly ineffective way of addressing the harm caused by climate change.

Mitigation and Indirect Harm to Rights

Having discussed in the previous section the effects of specific policies upon specific rights, I now want to consider the more general negative effects of a mitigation programme on the rights of current persons. In response to some of the arguments I will make, it might be opposed that these negative effects do not amount to a *violation* of the rights in question. Therefore, opponents might argue that, as was demonstrated in Chapter 2, to the extent that the negative effects of mitigation amount only to a restriction of rights, they are not placed wholly beyond the countenance of those who follow a rights-based morality. However, I wish to contend that, even if this is the case, a supporter of rights could not coherently support a programme of mitigation which caused (even indirectly) such vast damage to (and prevented future improvement of) human rights and which did so in the name of non-rights-based concerns.

As already noted, generally speaking, levels of rights recognition bear a strong correlation to levels of development. The more developed a state becomes, the more rights its citizens enjoy and the more fully they enjoy them.³⁵² This is particularly true of economic, social and cultural rights. Thus, while talk of a specific right *to* development would seem problematic, it does not appear controversial to claim that without development there can only be limited fulfilment of rights. Indeed, such thinking is demonstrated by the inclusion of ‘progressive realisation’ clauses in many human rights documents.³⁵³

As Sinnott-Armstrong highlights, “...any steps that mitigate or adapt to global warming will slow down our economies, at least in the short run. That will hurt many people, especially many poor people.”³⁵⁴ This is because mitigation will severely impact upon humanity’s ability to develop. This will be all the more true for the developing world, where rights realisation is already low. As Humphreys puts it, “climate change mitigation efforts will reorient and fix national development paths over the long term, and these in turn will tend to set limits on the capacity of countries to fulfil basic human rights, albeit to different degrees.”³⁵⁵

In order to achieve long-term stabilisation, emissions in developing countries will need to peak by 2025 before reducing by 30%-60% before 2050.³⁵⁶ A significant element of any mitigation programme with such a goal in mind would have to be

³⁵² As noted in an earlier footnote, this reference to ‘rights’ should not be considered to refer to every right any human being could possibly be considered to hold. Clearly there may be some rights which might be less affected by the level of development in a state than others. All I mean to say is that, *on balance*, a greater number of rights of a greater number of people will be better protected in a more developed world.

³⁵³ Humphreys, S., ‘Introduction’, *Op.Cit*, p.22-23

³⁵⁴ Sinnott-Armstrong, W., *Op.Cit*, p.333

³⁵⁵ Humphreys, S., ‘Introduction’, *Op.Cit*, p.22

³⁵⁶ Humphreys, S., ‘Conceiving Justice’, *Op.Cit*, p.304

a reduction in the use of fossil fuels and the emissions they produce. However, as Humphreys notes, “since the path to economic growth and prosperity (as generally understood) has relied until now on fuels and technologies that produce these emissions, a global freeze on their usage will tend to lock-in vast wealth disparities between groups in different regions, without offering any obvious or reliable means of reducing the gap in future.”³⁵⁷

Indeed, the problem is potentially worse than this. Fossil fuels such as coal, which produce large amounts of CO₂, are relatively cheap, whereas renewable energy, which produces no CO₂, is far more expensive.³⁵⁸ Therefore, any mitigation programme which places a freeze upon (or, indeed, reduces) the use of the former is actually likely to *increase* existing wealth disparities, since developed countries will be far better able to switch to renewable energy sources than their counterparts in the developing world.

In summary, then, a full scale, global programme of mitigation would be highly likely to lead to lower levels of rights realisation in the short-medium term which could otherwise have been avoided through the increased levels of development achieved by a continued reliance on fossil fuels. This is because the development of those countries where levels of rights-realisation are low is often dependent on existing, environmentally-harmful fuel sources and activities. Removing people’s and states’ ability to use such fuel sources or conduct such activities will result in a delay to their development while alternative fuel sources / ways of conducting

³⁵⁷ Humphreys, S., ‘Competing Claims: Human Rights and Climate Harms’ in Humphreys, S., *Human Rights and Climate Change* (Cambridge: Cambridge University Press, 2010), p.41

³⁵⁸ Lomborg, B., *Op.Cit.*, p.31

their daily lives are found. This delay will also amount to a delay to greater levels of rights realisation being achieved by people living in developing countries.

Supporters of rights might argue that such an outcome, while undesirable, does not amount to a *violation* of rights – much less a violation which could be attributed to the programme of mitigation. The fact that a certain policy has ‘caused’ development to slow within a certain state is not evidence that said policy has violated the rights of those living within that state. Should the EU decide to prohibit the importation of fruit from non-EU countries, the rights of many people living in certain small developing states might suffer from the resultant economic losses. However, the right to health of a Taiwanese farm labourer does not bear a correlative duty on the EU to allow the importation of Taiwanese lychees. Similarly, if countries become wealthy more slowly as a result of a policy of mitigation, the resultant increase in the amount of time taken to reach suitable minimum levels of rights recognition cannot be said to validate the claim that such a policy is in violation of the rights of those affected by it.

While the above is true it does not represent a valid reason for supporters of rights to endorse a wholesale global mitigation programme.

Firstly, as explained earlier in this chapter, certain specific policies which emerge as part of a wholesale global mitigation problem *will* directly violate the rights of certain current individuals. I have already attempted to demonstrate that such claims could be made about prohibitions on air travel and deforestation. There is good reason for thinking the same will be true of other policies which might form part of any reasonable global mitigation strategy, such as, for instance, the prohibition of fossil fuels which produce soot (estimated to be the cause of

anything between 18% and 60% of current warming)³⁵⁹ which are most relied upon by the world's poorest people.³⁶⁰ All of these policies would need to be implemented at the national level, meaning that the states which enforce them would end up *violating* the rights of their own people. The fact that the vague concept of a global mitigation strategy (which, necessarily, fails to pinpoint which actual policies will be implemented, when and on whom) cannot be pinned down as directly violating rights is not to say that, in practice, certain elements of such a policy would not do so.

Secondly, even if a wholesale global mitigation programme could not be argued to directly *violate* rights in strict terms, given the facts presented earlier in this section, it seems fairly uncontroversial to claim that such a programme would *cause* a worsening of the human rights situation of many current persons.

This should come as no surprise. Mitigation is about sacrifice. It is about making current persons worse off than they could be in order that future persons are made better off than they would have been. If this were not the case, current persons would not be so reluctant to adopt mitigation strategies. For supporters of rights, though, a familiar problem emerges. If future persons do not hold rights, it becomes difficult to see why states should be allowed to sacrifice the fullest possible realisation of the rights of current persons in the name of protecting them. This remains the case even if that sacrifice does not, in and of itself, amount to a direct violation of rights. In short, those whose primary moral concern is with

³⁵⁹ McKinnon gives a figure of 18% (McKinnon, C., *Op.Cit*, p.97) but this figure is subject to wide variation throughout the literature, and her estimate is very much at the lower end of the scale. The higher figure was arrived at in a 2008 study by Carmichael and Ramanathan (Randerson, J., 'Scientists Warn of Soot Effect on Climate', *The Guardian* (24 March 2008). Available at: <https://www.theguardian.com/environment/2008/mar/24/climatechange.fossilfuels>. Last accessed: 26 November 2017).

³⁶⁰ McKinnon, C., *Op.Cit*, p.97

rights are not only left with no reason to endorse a programme which causes restrictions to and/or violations of the rights of current persons with the aim of aiding future persons, but, as a result of an adherence to the kind of rights-friendly ‘general welfare’ laid out in Chapter 2, are in fact compelled to stand against such a programme regardless of whether rights are directly violated by it.

Mitigation and Rights Protection

As should be clear by now, a key difficulty faced by supporters of rights in relation to climate change is the issue of motivation. For those whose primary moral concern is rights, there can be no good reason for violating, or even allowing the diminishment of, the rights of current persons through a dedicated programme of mitigation. This section considers the damaging effects of the costs of mitigation upon the motivation of supporters of rights to implement even ‘rights-friendly’ mitigation policies.

The cost of a full-scale mitigation programme is not easy to estimate. It will always be difficult to calculate the costs associated with any financial decisions large enough to affect the economies of every country on Earth. This difficulty is further magnified by the fact that no particular individual programme of mitigation has yet been agreed upon. This is because: a) different programmes will have different costs, and; b) the accuracy of predictions about cost will be negatively affected by the fact that they are *entirely* predictions and are not based upon an analysis of any existing programme.

Having said this, there is widespread agreement that any effective programme of mitigation will be expensive. For example, the policy proposed by the EU – to cut emissions to 1990 levels across the globe – would cost an estimated \$30 trillion.³⁶¹ Depending on which programme we follow, the cost is likely to be between 1-4% of global GDP in 2030, 2-6% in 2050 and 3-11% in 2100.³⁶²

For those for whom rights are of primary moral concern, spending such vast sums of money on non-rights-based concerns would seem a poor use of already limited and diminishing global resources. As Schelling puts it, “it would be hard to make the case that the countries we now perceive as vulnerable would be better off 50 or 75 years from now if 10 or 20 trillions of dollars had been invested in carbon abatement rather than economic development.”³⁶³ Lomborg demonstrates the truth of such a statement through the example of the benefit of reducing malaria rates through mitigation versus doing so through other policies:

Malaria will slightly increase through global warming, but if we really care about malaria victims we have to ask why we would ever first contemplate helping very few very slowly through climate policies. If we do Kyoto, we can avoid 70 million people getting infected toward the end of the century. If we focus on targeted policies, mosquito nets, medicine and mosquito eradication, we could save 28,000 million from malaria – or more than 400 times better. When we also realize that doing so would be 50 times cheaper, we are faced with a stark choice: every time we save one person through climate policies, we could have saved 20,000 people with smarter, simpler malaria policies.³⁶⁴

³⁶¹ Lomborg, B., *Op.Cit*, p.42

³⁶² Clarke, L. *et al*, ‘Assessing Transformation Pathways’, in Edenhofer, O. *et al* (eds.), *Climate Change 2014: Mitigation of Climate Change, contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2014), p.449

³⁶³ Schelling, T., ‘Some Economics of Global Warming’, *American Economic Review*, 82:1 (1992), 1-14, p.7

³⁶⁴ Lomborg, B., *Op.Cit*, p.167

In response to these figures, the hard-core rights supporter might seek to claim that the number of people affected by a violation of rights is morally irrelevant. Such a position, though, is by no means necessitated by a rights-based morality. Supporters of rights might well feel that the number of people helped must be of *some* moral value – or, rather, that there may be some moral value in protecting a greater number of rights - particularly when we are making a choice between protecting the rights possessed by a relatively small group of people and the *exact same* rights of a much larger group.³⁶⁵

In reality, the supporter of rights need make no reference to the number of people affected in the example provided in order to agree with the correctness of Lomborg's position. The 70 million people who will be saved from malaria by a policy of mitigation are not current right-holders; the 28,000 million who will be saved by alternative policies are, or will be at the time the cost-bearing action necessary to save them is taken. Therefore, *only* the policy of protecting current persons protects *any* rights.

The problem for supporters of rights, then, is not simply that certain mitigation techniques are likely to worsen rights recognition, and even directly violate rights. Even if some or all of this damage could be avoided (by, for example, a more

³⁶⁵ The fact that the rights are exactly the same in both cases, since we are protecting both groups from Malaria, makes such an argument much stronger in the specific case Lomborg raises. Were the decision one between different numbers of people *and* different rights, the supporter of rights might be more justified in claiming that numbers were irrelevant, since it is the importance of the right which really matters (although, even then, a strict following of the UNHCR would determine that all rights are held to be of equal value). It seems, then, that the supporter of rights might be better to claim that the numbers of people affected by a particular rights-friendly policy are a secondary (but important) consideration in our moral decision making, behind only the centrality of the rights themselves.

equitable distribution of the costs of mitigation which meant that wealthier nations bore the brunt of the costs so that fewer people were reduced to situations where their basic rights were at risk), mitigation remains an unacceptably poor use of public funds if our goal is greater rights realisation. As Lomborg puts it,

In the battles over whether we should cut 4% or 96% [of current emissions], we might easily forget that in the short and medium term we can help real people much better through alternative policies... we can cut diseases, malnutrition, and lack of access to clean drinking water and sanitation, while improving the economy with much cheaper policies that will have much greater impact.³⁶⁶

Of course, in the long term, this focus on ‘real’ (current) people will lead us ever closer to tipping points beyond which life for future persons will become unbearable. However, supporters of rights cannot let such a fact influence their decisions over the best ways of spending finite, dwindling resources. If rights are our primary concern, and if future people cannot be said to possess rights, then it is difficult to see why a policy of mitigation should be given any priority at all given the vast number of problems many current people face in seeing even their most basic rights realised – problems which could be (but are not currently) solved at a fraction of the cost of mitigation.

Conclusion

This chapter has sought to demonstrate that the fact that rights-based moralities cannot afford appropriate weight to future persons is not simply an unfortunate

³⁶⁶ Lomborg, B., *Ibid*, p.216

ethical oversight which matters only in the lecture hall. Rather, it greatly impedes the practical ability of supporters of rights to effectively combat climate change in reality. As Caney correctly highlights, "...a human rights approach requires us to adopt a discriminating approach to the impacts of climate change and would not, therefore, take into account all the impacts of climate change. From a purely human rights approach, only those effects that violate rights should be taken into account."³⁶⁷ If rights cannot exist (or be violated) before a person comes into existence, then Caney's assertion means that supporters of rights would have no motivation to mitigate climate change, but only to adapt to it (and even the latter approach holds certain difficulties).

Indeed, it is not simply that there is no good rights-based reason for mitigating against climate change, but that there are, in fact, several good rights-based reasons for *not* doing so.

Firstly, even if mitigation caused no actual damage to rights, the supporter of rights would still find it exceptionally difficult to justify spending trillions of dollars safeguarding future persons against the ill-effects of climate change when that money could be spent protecting greater numbers of rights among a greater number of current right-holders.

Secondly, mitigation *does* cause actual damage to rights. By significantly reducing the use of fossil fuels, any large scale mitigation policy will also significantly reduce economic growth and concretise existing inequalities, causing rights realisation to take a retrograde step, particularly in the developing world.

The demands of progressive realisation will be greatly reduced for those countries

³⁶⁷ Caney, S., 'Climate Change, Human Rights and Moral Thresholds', *Op.Cit.*, p.86

which are actually worse off than when they signed up to treaties promising to protect the rights of their people.

Thirdly, some of those policies most crucial to an effective programme of mitigation directly violate and/or unduly restrict the rights of current persons.

Under a rights-based morality, then, it seems that not only can a programme of mitigation not be endorsed, it must, in fact, be vehemently opposed. Such a position is problematic. Ultimately, it is mitigation and mitigation alone that will stop humanity from reaching the tipping points which will lead to the deaths of billions of future people. Supporters of non-rights-based moralities might well question whether the fact that the specific identity of such persons is as of yet undecided should entirely remove such beings as objects of our moral concern. Similarly, one might hold that the many non-human animals and even plants that will die and possibly even become extinct as a result of climate change are worthy of greater moral consideration than rights-based moralities are able to offer. Many people, then, would consider the safeguarding of both future persons and other species to hold enough moral weight to be worthy of certain sacrifices among current persons. Even rights-based sacrifices. This is not a position available to supporters of rights. The next chapter, then, considers whether there might be rights-based solutions to climate change which do not rely solely upon the sacrifice of rights in the name of future persons for their justification.

CHAPTER 6: RIGHTS-BASED RESPONSES TO CLIMATE CHANGE

Introduction

Thus far this thesis has sought to highlight the fact that future persons cannot be said to have rights and the severe limitations this places on rights-based moralities in their attempts to provide viable answers to questions of *why* we should take action to prevent climate change and *which* actions we might permissibly take. This chapter attempts to investigate whether such difficulties might be circumnavigated through a rights-friendly focus upon the current and future wellbeing of current persons in order that rights-based moralities might offer a viable solution to climate change without the need to appeal to future persons at all.

The chapter begins by recapping the dangers associated with tipping points. It goes on to highlight the substantial timespans involved with both climate change and implementing an effective programme of mitigation. As a result of such timespans, it is argued that reducing emissions levels in the name of protecting against tipping points amounts to mitigating against climate change for the sole purpose of protecting future persons from climate-related harm. Mitigating against tipping points thus falls beyond the purview of rights-based moralities. With this in mind, the chapter moves on to examine the extent to which action against climate change can be justified without recourse to the worst-case scenario.

Firstly, the relationship between rights-based moralities and adaptation techniques is examined. A wide variety of principles for determining who ought to meet the financial costs associated with adaptation are explored and the plausibility of each for Interest Theorists, Choice Theorists and Nozickians is considered. Ultimately, it is argued that both Interest- and Choice-based theories of rights are able, through a combination of the Polluter Pays Principle and the Ability to Pay Principle, to provide a strong explanation of who ought to meet adaptation burdens and why. Nozickians, on the other hand, are not similarly able to justify imposing the costs of adaptation upon current persons.

Next, the issue of mitigation in the name of current persons is examined. Here, the situation with regard to adaptation is reversed. The section highlights that, since it is possible to prevent the harm climate change will cause to current persons through adaptation alone, Interest and Choice theorists are unable to provide any good reason for the lowering of emissions levels. Indeed, following such theories is likely to lead to an *increase* in emissions. The section goes on to show that, as a result of the Lockean proviso, Nozick would be forced to outlaw those emissions which caused climate change which came to violate the rights of current persons in the future. Therefore, Nozickian rights-based moral systems not only safeguard current persons from the worst ills of climate change, but also inadvertently provide future persons with similar protection due to the fact that the substantial lifespan of greenhouse gases means that both groups are similarly affected by the same emissions and thus are similarly protected by a reduction in emission levels.

The chapter concludes that Interest-based, Choice-based and Nozickian theories of rights, if universally adopted, would each significantly reduce levels of climate-related human suffering in comparison with the current status quo. Despite this, it is argued that each theory is so dangerously lacking in ability to simultaneously justify both mitigation and adaptation that anybody with a genuine concern for the welfare of both future and current persons (let alone non-human animals or the Earth in general) would be better to abandon rights-based moral systems altogether.

Tipping Points

Much of the concern surrounding climate change is (understandably) focused upon the catastrophe that will ensue under the worst case scenario, i.e. if and when we reach one or more tipping points.

As noted in Chapter 1, the term ‘tipping point’ refers to specific climatic events which will result from climate change. These events will cause rapid and dramatic changes to the Earth’s environment which will prove extremely harmful to human beings (and most other species) living at the time. The speed and extent of these changes will mean that it will no longer be practically possible to mitigate against further climate change to any significant degree. It will also be impossible to adapt to such rapid and drastic climatic changes in a manner that would offer sufficient protection against the harms they will cause. McKinnon presents the following simplified summary of some of the more frequently mentioned tipping points:

...the shutdown of the Atlantic conveyor (which distributes heat to Western Europe) as a result of melting ice caps, possibly causing another ice age; rapid and large rises in sea level (again caused by massive melting of ice sheets and glaciers) fit to swamp London, Sydney, New York, Tokyo and most of the US seaboard, as well as low-lying Bangladesh, and many (probably already doomed) small island states; the melting of the permafrost in Siberia, causing the release of huge stores of methane (a greenhouse gas twenty times more potent than CO₂) from the peatlands below (present estimates are that the melting permafrost is releasing 100,000 tons of methane a day, which has a warming effect greater than all the US's daily greenhouse gas emissions); a rapid decrease in the Earth's albedo as a result of melting ice and decreased snow cover, causing a drastic reduction in the Earth's capacity to reflect sunlight back into space, and leading to runaway warming.³⁶⁸

This section demonstrates that, while the prospect of tipping points and the irreparable harm they will do provides followers of most moralities with a solid justification for the enforcement of climate burdens, the same cannot be said for supporters of rights.

There are three key issues surrounding tipping points which impact upon their ability to justify and frame our approach to resolving climate-change (particularly if such an approach is rights-based):

1. It is extremely unclear *when* they will occur.
2. It is not absolutely certain *whether* they will occur at all.
3. If and when they do occur, we cannot be sure *how much* damage they will do.

³⁶⁸ McKinnon, C., *Op.Cit*, p.48

The third of these issues is the least problematic for supporters of rights-based moralities. It is certainly the case that there is a large amount of disagreement over how bad reaching a single tipping point would be for human kind. It could be that we lose billions of lives, or it could be that the death toll is more accurately measured in the thousands. This uncertainty, in and of itself, is not a significant difficulty for supporters of rights. The certainty with which we are able to predict that the numerous rights of numerous individuals will be harmed by climate change is, in principle, sufficient to warrant the implementation of measures to reduce climate change and thus avoid reaching a tipping point.³⁶⁹

I say ‘in principle’ because, for reasons already highlighted, if the damage that will be caused by reaching a tipping point only affects future persons, it does not amount to a violation of rights and thus cannot justify the kind of restrictions upon the rights of current persons that would be necessary to quell climate change for the purpose of avoiding a tipping point. For tipping points to be of moral concern to supporters of rights, they would need to occur within the lifetimes of current persons.³⁷⁰

This brings us to the questions of when and if tipping points will be reached. Firstly, the scientific community is far from reaching a consensus that tipping points will be reached *at all*. While the majority of experts agree that tipping points will eventually occur if humanity continues to pump emissions into the atmosphere at the current increasing trajectory for long enough, some suggest that

³⁶⁹ Although, if protecting the greatest number of rights is our aim, in situations of finite resources it may be the case that these resources would be better spent on other activities (e.g. malaria vaccines, clean water) than reducing climate change. However, given the likely seriousness of tipping points and the extraordinary amount of resources in the world, in reality it would seem that, if protecting rights is the key element of our morality, we ought to be able to protect against both tipping points *and* non-climate-related harms.

³⁷⁰ For an explanation of why this should be the case, see Chapter 3.

humankind is likely to run out of fossil fuels and/or naturally move over to green energy sources long before climate change reaches a level sufficient to cause a tipping point to be reached.³⁷¹ Ultimately, then, regardless of our moral leanings, when faced with the possibility of tipping points we must weigh up: the chances of one ever being reached; the level of harm that would ensue if one was reached; and the damage done to people's lives by the actions we take in order to try to avoid such an event. McKinnon feels that, when faced with such moral mathematics, we should adopt what she labels the 'Strong Precautionary Principle,' which she defines as follows: "When evidence or information is insufficient to establish the nature and/or probability of harms caused by an activity, policy makers are *required* to act in order adequately to protect people and other entities from these possible harms."³⁷² She feels that "the strong precautionary principle is justified with respect to many climate change catastrophes because the worst consequences of not taking precautionary action are worse than the worst consequences of taking precautionary action."³⁷³ Such a position is one that is adhered to by other scholars in the field.³⁷⁴

This is a position that many of us would agree with. Supporters of rights *cannot*. Supporters of rights are unable to assign appropriate moral weight to future persons. As such, it must be current persons which are their key objects of moral concern. The problem is that, while it is unclear exactly when a tipping point will be reached, the idea that its occurrence or otherwise within the next century could be dictated by the actions of current persons is difficult to pay credence to.

³⁷¹ Tol, R., 'The Economic Effects of Climate Change', *The Journal of Economic Perspectives*, Vol. 23, No. 2 (Spring, 2009), 29-51, p.44

³⁷² McKinnon, C., *Op.Cit*, p.54

³⁷³ *Ibid*, p.56

³⁷⁴ Howarth, R.B., *Op.Cit*, p.339

In March 2016 the global average surface temperature moved to 1.5°C beyond pre-industrial levels, with average temperature in the northern hemisphere briefly moving above the recognised ‘tipping point’ level of 2°C above pre-industrial levels.³⁷⁵ While this is certainly alarming, it must be remembered that the global average surface temperature must go 2-2.5°C above pre-industrial levels and remain there for some time (nobody knows how long, but certainly years, perhaps decades) before tipping points become an immediate threat. Given that it has taken 250 years to reach for global average surface temperatures to reach 1.5°C above pre-industrial levels, it is reasonable to expect that, even with emission levels booming globally, it will take a great many decades before we cross the 2-2.5°C threshold and several more before tipping points are reached.

All in all, then, while it is not impossible that current persons will witness a tipping point, there is a strong chance that they will not. Therefore, for supporters of rights, mitigating against climate change in the name of preventing a tipping point means imposing severe restrictions upon the rights of current persons in order to safeguard against an event which, in all likelihood, will not come to pass within the lifetimes of any of those same current persons.

Such a fact need not, of itself, represent an insurmountable obstacle. In line with McKinnon’s logic, supporters of rights might want to claim that, given the potentially catastrophic damage to the rights of current persons that could occur if even a single tipping point was reached within their lifetime, the restrictions upon

³⁷⁵ Holthaus, E., ‘Our Planet’s Temperature Just Reached a Terrifying Milestone’, *Future Tense* (12 March 2016). Available at: http://www.slate.com/blogs/future_tense/2016/03/01/february_2016_s_shocking_global_warming_temperature_record.html. Last accessed: 01 November 2016.

their rights in the present necessary to safeguard against such a catastrophe are warranted even if the risk of its occurrence is small.

Unfortunately, in focussing upon current persons as the appropriate object of moral concern, supporters of rights promptly run into a much greater difficulty. As highlighted in Chapter 1, there is a time-lag of at least thirty years before the emissions we produce today begin to affect the climate, which they do by combining with existing emissions which remain in the atmosphere from the pollution of (at least) the previous 150 years. Additionally, it would take a significant amount of time before emission levels could be safely and significantly reduced, even if every government earnestly committed to such a target in the immediate future (which is itself highly unlikely). As a result, it seems impossible that implementing a wholesale mitigation programme would do anything to prevent a tipping point being reached if that tipping point was already so temporally close that its arrival would affect the lives of current persons.

Imagine that, following current pollution trends, we will reach a tipping point in a century.³⁷⁶ We must deduct from this figure, 1) the 30-50 years it takes for our emissions to take effect (once those emissions are produced, we cannot take back the harm that will emerge from them) and 2) the decades that will occur between the point at which reaching a tipping point becomes inevitable and the moment when that tipping point actually occurs. Once we do this we are left with an inordinately small amount of time to convince every government in the world to agree to a widespread programme of mitigation, to enforce that programme, and

³⁷⁶ Note that to do so is to consider a fairly unlikely best case scenario for supporters of rights in this situation. If tipping points are much further than a century away they will not affect current persons and thus will not be of concern to supporters of rights. On the other hand, the nearer they are to the present, the less time we will have to combat them.

(ideally) to replace existing technologies to an extent which prevents a mitigation programme from amounting to a widespread and systematic violation of the most basic rights of billions of people. If tipping points will occur within our lifetime then it is already too late for us to stop them.

For tipping points to remain preventable (which they probably are) they must be set to occur so far into the future that no current persons will be their victims.

Therefore, any restrictions upon the rights of current persons taken in the name of preventing tipping points would be restrictions imposed in pursuit of a non-rights-based good.

In short, either tipping points will not affect current persons, in which case they are of no concern to the supporter of rights, or they unavoidably will, in which case mitigation becomes a wholly unjustified infringement upon the rights of current persons with no benefit for anyone else. In light of this, it seems the threat of tipping points does little³⁷⁷ to inspire action against climate change among supporters of rights.

Such a conclusion seems problematic in terms of theory; the inability to assign moral value to future persons might well be viewed as a weakness of rights-based moralities. In terms of practice, though, the fact that such moral systems are unable to use tipping points as a *reason* to combat climate change does not, in and of itself, render them incapable of combatting climate change at all and

³⁷⁷ Little, but not nothing. It would appear to be the case that, was reaching a tipping point within current lifetimes considered a reasonable possibility by supporters of rights, they could legitimately demand that current persons take adaptation-related actions in advance of that tipping point to reduce the harmful effects it will have upon current persons in the future. However, as this chapter will show, this argument does not rely on tipping points in order to remain justified and is therefore more appropriately based on more predictable and definite climate-based harms.

incidentally protecting future persons from tipping points in the process. If rights-based moralities can provide good reasons for meeting climate burdens based upon duties to *current* persons, then – because the pollution which will harm current persons is the same pollution that will harm future persons – they might simultaneously (albeit accidentally) lead us to implement policies that will ultimately safeguard future persons.

This chapter shows that this is not the case under Interest- or Choice-based approaches to rights (although such theories still offer coherent reasons for taking certain actions which will undoubtedly reduce climate-related harms in the short-medium term). As counter-intuitive as it may seem, however, a Nozickian approach appears to provide good reasons for thinking that mitigation might be justified through reference to current persons.

Adaptation and Rights: Who Pays the Price?

Issues surrounding the moral relevance of future persons and the duties placed upon current persons as a result of tipping points pose important questions for any moral theory seeking to provide an adequate response to the problem of climate change. Another such question concerns who (if anybody) ought to meet the costs involved in adapting to climate change. Such costs will be substantial. They are also unpredictable and increasing as our knowledge of climate change increases. In 2007, a study by Oxfam projected that the developing world would need to spend \$28bn a year by 2030.³⁷⁸ By 2016, UNEP were estimating that this figure

³⁷⁸ UNFCCC, 'Investment and Financial Flows to Address Climate Change' (2007), p.368

to be anything between \$140-300bn per annum, rising to \$280-500bn by 2050.³⁷⁹

The broadness involved in such estimates emerges as a result of the significant uncertainty over which adaptable effects of climate change will come to occur and when as well as similar uncertainty over the financial markets (predicting the worth of a US dollar in 2050 would be hard enough without taking into account the effect of widespread and potentially extremely harmful climate change might have on global financial markets).

Caney puts forward three plausible answers to the question of who might be considered the relevant cost-bearers when it comes to adapting to climate change: The Polluter Pays Principle (in various guises); the Beneficiary Pays Principle; and the Ability to Pay Principle.³⁸⁰ This section will examine each of these approaches in turn, considering whether they might be acceptable to proponents of any of the rights-based moralities that this thesis seeks to explore. The section concludes that Nozickians/Libertarians struggle to justify *any* of the principles that Caney lays out, while a mixture of the Ability to Pay Principle and the Polluter Pays Principle is the route most obviously suggested by adherence to Interest- or Choice-based theories.

Polluter Pays Principle

The Polluter Pays Principle (PPP) is perhaps the most famous and most obvious approach to deciding who ought to be charged with meeting climate burdens and

³⁷⁹ UNEP Newscentre, *Op.Cit*

³⁸⁰ Caney, S., 'Cosmopolitan Justice, Responsibility, and Global Climate Change', *Op.Cit*

is “one that has been affirmed in a number of international legal agreements”.³⁸¹

Essentially, it states that those who pollute ought to be the ones to meet any costs associated with that pollution.

Caney explains that there exist several different versions of the PPP. Firstly, the micro-version states that “if an individual actor, X, performs an action that causes pollution, then that actor should pay for the ill effects of that action.”³⁸² This can be contrasted with the macro-version, which asserts that “if actors X, Y, and Z perform actions that together cause pollution, then they should pay for the cost of the ensuing pollution in proportion to the amount of pollution that they have caused.”³⁸³ He notes that

[t]his distinction is relevant because the micro-version can be applied only when one can identify a specific burden that results from a specific act. It is, however, inapplicable in cases where one cannot trace the specific burdens back to earlier individual acts. Now climate change clearly falls into this category. If an industrial plant releases a high level of carbon dioxide into the air, we cannot pick out specific individual costs that result from that particular actor and that particular action. The macro-version can, however, accommodate the causation of such effects. Even if one cannot say that A has caused this particular bit of global warming, one can say that this increase in global warming as a whole results from the actions of these actors. Furthermore, note that the macro-version can allow us to ascribe greater responsibilities to some. Even if it does not make sense to say that we can attribute a specifiable bit of global warming to each of them, we can still say that those who emit more carbon dioxide than others are more responsible than others. In principle, then, if one had all the relevant knowledge about agents’ GHG emissions, it would be possible to make individualistic assessments of just how much each agent owes.³⁸⁴

³⁸¹ *Ibid*, p.125

³⁸² *Ibid*, p.125

³⁸³ *Ibid*, p.125

³⁸⁴ *Ibid*, p.125

One problem with the PPP is the fact that, due to the significant amount of time GHGs remain in the atmosphere, many of the emissions which cause climate change both now and for decades to come are the result of the pollutant activities of the now deceased. The PPP, even its macro-version, struggles to determine who ought to pay for this. As a result of this difficulty, the collectivist-version of the PPP emerges. Caney outlines this position as follows:

...if we take a collectivist approach, we might say that since Britain (the collective) emitted excessive amounts of GHGs during one period in time, then Britain (as a collective) may a hundred years later, say, be required to pay for the pollution it has caused, if it has not done so already. To make this collective unit pay *is* to make the polluter pay.³⁸⁵

If we take a collective approach to the PPP, then, it seems we have one plausible way of assigning all the climate burdens necessary to adequately combat climate change. It is also worth noting that this kind of collective approach is not alien or even particularly controversial for many of us. Under international law it is quite clearly the case that states are responsible for paying reparations in relation to the crimes of previous regimes. This remains the case even if the current regime stood in firm opposition to the policies to which such reparations relate. The most obvious example of this would be the billions of pounds paid out in the form of reparations by Germany to the victims of the Nazis,³⁸⁶ but there have also been many others. Such payments can be to both other countries and to individual

³⁸⁵ *Ibid*, p.129. In principle, the collectivist position could be applied to other entities such companies as well as countries.

³⁸⁶ As recently as 2015 Greece demanded almost €279bn in reparation for the crimes of the Third Reich (Khan, M., 'Greece demands €279bn from Germany in Nazi war reparations', *The Telegraph* (07 April 2015). Available at: <http://www.telegraph.co.uk/finance/economics/11518862/Greece-demands-279bn-from-Germany-in-Nazi-war-reparations.html>. Last Accessed: 01 January 2017.

victims from within the violating state. For example, the Chilean government has paid out over \$1.6bn in pensions to victims of the Pinochet regime as well as establishing a specialised health care programme for survivors of violations.³⁸⁷

There are, however, problems with a collectivist approach.

By assigning climate burdens on a collective basis we demand that individual current persons ultimately pay the costs, not only of their own pollution, but of that of millions of other people whom they have never met for no other reason than the fact that they inhabit the same land as their forefathers. In terms of justice, this is problematic. These problems increase when we consider that the current residents of nations who have polluted significantly in the past may currently be living in impoverished circumstances with low levels of rights fulfilment. The problems of such individuals are likely to be exacerbated if their states are further weakened economically by the demands of adaptation burdens.

For supporters of rights, the idea that people ought to pay the cost of fixing the damage to rights that results from their actions is far from controversial. It is, however, less clear in the relatively individualistic world of rights that current persons ought to pay the price for the sins of their forefathers. For Nozickians, such an idea would seem preposterous, and would clearly amount to a violation of rights under any circumstances, since their libertarian position states that the wrongs of others are no responsibility of ours.³⁸⁸ And in cases where following

³⁸⁷ 'Reparations', *International Center for Transitional Justice*. Available at: <https://www.ictj.org/our-work/transitional-justice-issues/reparations>. Last accessed: 01 January 2017.

³⁸⁸ Nozick does advocate the use of compensation, but his interpretation of it would, if anything, appear to endorse the opposite point of view. Far from claiming that individuals should pay for harms caused to the rights of others, Nozick instead suggests that it might, under certain limited circumstances, be permissible to limit the rights of some to take certain actions (he gives the

the PPP will further damage the already low levels of rights fulfilment among the global poor – despite the fact that there exist sufficient numbers of current persons who could adequately meet the necessary climate burdens without causing similarly significant harm to their rights – the notion of a collective version of the PPP becomes wholly untenable under any form of rights-based morality.³⁸⁹

Beneficiary Pays Principle

In light of the various difficulties with the PPP, scholars such as Shue and Neumayer endorse various versions of an alternative approach known as the Beneficiary Pays Principle (BPP). Loosely stated, the BPP asserts that the individuals who have benefited from pollution ought to be the individuals who are

example of the right of the epileptic to drive) provided we compensate the victims of the prohibition for this loss of freedom (Nozick, R., *Op.Cit.*, p.110-111). The Nozickian would view the situation between polluter and victim as a clash of rights. If the exercise of the polluter's right to pollute harms the rights to health/life/etc. of some current person other than the polluter may find that particular exercise of his/her right prohibited and may or may not be entitled to compensation for that prohibition. However, if the harms done by climate change are indeed *harms* to the rights of current persons - as opposed to the mere "risky activities" that might legitimately be prohibited and compensated (*Ibid*, p.56) – they are automatically outlawed for anyone who believes in Lockean rights. One cannot be fully compensated (i.e. made no worse off than one otherwise would have been (*Ibid*, p.57)) for the fact that their state is now under water, but they have been moved elsewhere as part of an adaptation programme.

These issues are discussed in greater detail elsewhere in this chapter and in Chapter 5. For now, the point is to recognise that a Nozickian idea of compensation in no way suggests that individuals should compensate others for harms which they have done nothing to cause. As Nozick puts it, "...the state may not use its coercive apparatus for the purpose of getting some citizens to aid others..." (*Ibid*, p.ix).

³⁸⁹ Critics might object that climate burdens would, in the first instance, fall upon states. Therefore they might argue, as Caney appears to, that 'the state' in some sense exists as an entity which is separable from the individuals that make it up. This is, in and of itself, a conceptually difficult argument for supporters of rights-based moral systems which are founded upon a deeply-held conviction surrounding the sanctity of the individual. However, given that human rights treaties are addressed at states, such a conceptual difficulty is not necessarily insurmountable. The greater problem with the idea that the 'polluter' in the PPP be a state is not the fact that it is the individual members of that state who did nothing to pollute who must pay for the pollution, but the notion that they can be asked to do so *even if* doing so will lower their levels of rights recognition (possibly even taking them below an acceptable minimum).

responsible for meeting its associated climate burdens associated, regardless of how much they contributed to the pollution themselves. Under the BPP, if the current inhabitants of industrialized countries have benefitted from a policy of fossil-fuel consumption and that policy contributes to a process that harms others, then they are not entitled to consume fossil fuels to the same degree. Their standard of living is higher than it otherwise would have been, and they must pay a cost for that.³⁹⁰

In addition to reducing their own emission levels, beneficiaries of pollution are also placed under a duty to meet the adaptation burdens that others face as a result of that pollution.³⁹¹

It is worth noting that, while developed in response to the problems with the PPP, the BPP is not an adjustment of that principle, but an abandonment of it.³⁹² In moving the cost-bearing responsibility from the polluter to the beneficiary, the BPP moves away from assigning blame and demanding retribution to a system where those who are made better off are called upon to aid those made worse off.³⁹³ In doing so, it removes both the problem of what to do about the emissions of the dead and the injustice associated with worsening the lives of many of the global poor yet further by charging them for emissions which have done little to improve their current status. Of course, one might argue that a similar injustice ensues when proponents of the BPP demand significant climate burdens from individuals who have done little to contribute to climate change purely on the

³⁹⁰ Caney, S., 'Cosmopolitan Justice, Responsibility, and Global Climate Change', *Op.Cit.*, p.128

³⁹¹ *Ibid*, p.128

³⁹² *Ibid*, p.128

³⁹³ Although in many cases the cost-bearer will be the same under both systems as the individual who pollutes will also benefit from that pollution.

basis that they have benefitted from the harmful policies of others; policies they had no choice in and may have been vehemently opposed to.³⁹⁴

For Nozickians, this injustice is enough to rule out the BPP as a viable option. In insisting upon infringing on my rights just because I have benefitted from actions over which I had no control, the BPP is no better than the PPP and must be paid similarly little credence.

For supporters of most Interest- or Choice-based theories, though, the apparent injustice of paying for harms I have done nothing to cause is not, in itself, of tremendous concern. Provided we add the caveat that the beneficiaries of pollution have benefitted to such a level that they are able to meet the climate burdens associated with that pollution without causing damage to their own rights, the BPP is an acceptable way of delineating who should meet climate burdens.

³⁹⁴ Such a scenario raises interesting questions about what constitutes opposition and whether and how one's level of opposition affects the level to which they might justly be held accountable for their forefathers' pollution. It is easy to voice disapproval at our ancestors' pollution and argue that we would, given the choice, have foregone the benefits that came from it rather than allowing other current persons to be harmed. However, in order to be taken seriously, it seems that those who benefitted from their ancestors' pollution should at least do their best not to inflict similar harm upon others by, for example, avoiding using planes etc. Moreover, it seems questionable whether individuals (particularly supporters of rights) who were *genuinely* opposed to the pollutant actions of previous generations would really find so unjust the idea that they ought to pay an affordable sum to protect others from the harm those actions caused. This is not to say that such a position would be theoretically incoherent – the Nozickian would certainly be against the idea that they might be compelled to pay for the sins of others while recognising that they were indeed sins – but, in practice, one wonders whether genuine objectors to previous pollution would also be genuine objectors of the PPP (although Nozickians who were opposed to the previous generations' pollution would certainly object to the PPP's mandatory enforcement and would regard any subsequent adaptation payments as supererogatory).

For more on these issues, and on the morality of benefitting from injustice more generally, see: Haydar, B. and Øverland, G., 'The Normative Implications of Benefitting from Injustice', *Journal of Applied Philosophy*, Volume 31, Issue 4 (2014), 349-362; Parr, T., 'The Moral Taintedness of Benefitting from Injustice', *Ethical Theory and Moral Practice*, Volume 19, Issue 4 (2016), 985-997; Butt, D., 'On Benefitting from Injustice', *Canadian Journal of Philosophy*, Volume 37, Issue 1 (2007), 129-152.

There remain, however, several significant problems with the BPP from even Interest or Choice Theory perspectives.

Firstly, as will be discussed throughout this chapter, if future persons are not of moral concern, and if the rights of current persons can be safeguarded through adaptation alone, it is unclear why even the beneficiaries of pollution ought to be asked to make sacrifices in the form of mitigation burdens.

Secondly, under the rights-friendly version of the BPP noted above it may be difficult to justify imposing climate burdens upon individuals who have benefitted only marginally from the pollution of others. In such cases, climate burdens may have a significant negative effect upon their levels of rights-fulfilment. There seems no reason, under a rights-based approach, why such a negative effect would have to be so significant as to reduce the beneficiaries of pollution to a level of rights fulfilment equal or below that of the victims of climate change before it became impermissible.

Finally, as a more general version of the above objection, who is to pay for the harm associated with the many emissions from which no current persons have benefitted at all?

It seems, then, that a particularly stringent version of the BPP could theoretically be adopted by those supporters of rights who are not Nozickians. However, in light of the numerous and substantial difficulties noted above, such individuals might want to consider an alternative approach.

The Ability to Pay Principle

A key problem with the BPP and PPP for supporters of rights is highlighted by Caney:

Even if climate change were not anthropogenic, there remains a human right not to suffer from its effects as long as humans could do something to protect the victims from such effects and as long as the duties imposed were not excessively onerous.³⁹⁵

Proponents of the PPP and the BPP might contend that, since climate change *is* anthropogenic, this fact is irrelevant. For supporters of rights, however, Caney's assertion is of great relevance. It highlights the fact that, under rights-based moralities, the main concern is to stop the harm resulting from rights violations; the causes of that harm are of concern only to the extent that they demonstrate how to combat it. The problem with climate change is not the activities which produce emissions; these are predominantly mundane, morally-neutral actions taken without malicious intent. The problem is the damage climate change does to rights. Thus, to the extent that it is possible for that damage to be avoided, it is not unreasonable to investigate the notion that the best solution to the problem might not be to attack its perceived cause.³⁹⁶

Caney outlines the Ability to Pay Principle (APP) in the following way:

³⁹⁵ Caney, S., 'Cosmopolitan Justice, Responsibility, and Global Climate Change', *Op.Cit.*, p.136. Caney (correctly) follows these words with the sentence "[a]lthough such duties would be adaptation-related, not mitigation-related." I will explain why this must be the case in due course.

³⁹⁶ I do not mean, by the term 'perceived', to suggest that emissions do not cause climate change. Rather, as I will argue in more detail later, if we focus on the effects of climate change as being the harm it causes to the rights of current persons, one might argue that such effects have multiple causes. An increased number of deaths from malaria are caused by increased temperatures which increase mosquito numbers, but these deaths might equally be attributed to the inability of the victims to afford vaccinations.

The most advantaged can perform the roles attributed to them, and, moreover, it is reasonable to ask them (rather than the needy) to bear this burden since they can bear such burdens more easily. It is true that they may not have caused the problem, but this does not mean that they have no duty to solve this problem.³⁹⁷

Such an approach seems, in principle, to be well-aligned with most interpretations of Interest- and Choice-based approaches to rights. Human beings have rights because they are human beings. We³⁹⁸ owe duties to other human beings which are correlative to these rights. Supporters of rights might coherently assert that these correlative duties include positive duties.³⁹⁹ The exact point at which one is excused from meeting one's positive duties to others will vary across different interpretations of Interest and Choice Theory, but where Individual A is able to meet the rights of Individual B at little or no cost to his/her own rights s/he has an obligation to do so regardless of whether the rights of Individual B need protecting as a result of his/her (Individual A's) actions. The idea that we ought to take action to protect against violations of the rights of current persons *before*

³⁹⁷ Caney, S., *Ibid*, p.136

³⁹⁸ As noted elsewhere in this thesis, under rights-based moralities, it is states who are most obviously and directly the bearers of those duties correlative to the rights of individual citizens. In practice, however, such systems are required to (albeit less straightforwardly) demand that such duties place limits on the behaviour of individuals. For example, even under the Nozickian minimal state, the duty upon governments to protect us from torture by others means that those governments must prohibit individual citizens from performing acts of torture on one another, effectively meaning that those individual citizens are themselves placed under a duty not to torture which is correlative to the rights of their potential victims. Moreover, even a Nozickian would allow that governments are placed under some positive duties to ensure that those who torture are arrested, tried and punished. Since systems of justice like this are paid for through taxation, it seems even these positive duties ultimately fall upon individuals.

³⁹⁹ This is not to say that supporters of Interest or Choice theory *must* endorse positive duties in order to remain coherent. It seems possible that one could endorse such a theory without the need to simultaneously endorse positive duties. However, the purpose of this chapter is to try to discover whether it is possible to derive a moral system which is both legitimately rights-based and effective in combatting climate change. With this in mind, it is enough to say that supporters of both and Interest and Choice theory might coherently endorse rights-based moralities which place individuals under positive duties to help others and that such an interpretation of these theories of rights will offer an improved chance of enabling adaptation burdens to be met.

those violations occur (flood defences, for example, need to be built before the floods they protect against arrive) also does not seem alien to Interest- and Choice-based approaches to rights. The funding of police forces and hospitals are justified, in large part, by the future violations of rights they will guard against. This need for supporters of rights to take action in advance of potential violations is demonstrated by the recent focus of human rights law on the “Ruggie Principles”, developed by UN Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, which outline that protecting against violations of human rights should be placed on a par with respecting human rights and remedying their violation.⁴⁰⁰

The APP would mean that individuals are placed under a duty to meet adaptation burdens simply because they can. What constitutes an ability to pay (without causing significant damage to the rights of those meeting such burdens) would need to be closely examined. However, given the amount of wealth in the world and the number of people who live lives of standards far beyond the bare minimum required by rights, it does not seem that even the upper figure needed to pay for adequate adaptation would be prohibitive. The APP, then, seems to provide an effective, rights-friendly way of ensuring that current persons are protected from the ills of climate change through adaptation.

The APP, though, does have some downsides when taken in exclusivity.

In terms of justice, it seems problematic to assert that the level to which an individual contributes to climate change should have no bearing upon how much

⁴⁰⁰ Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, UN Doc A/HRC/17/31 (21 March 2011).

that individual pays towards guarding against the effects of their emissions. To a certain extent this is reasonable; we may wish to contend that the costs associated with subsistence emissions not be met by those members of the global poor who create them and that these, along with the emissions of past persons, be met by current individuals who can reasonably afford such burdens. However, it seems difficult to justify a situation in which A, who has become very wealthy from a better than carbon-neutral venture producing wind farms, is required to pay more towards the costs of adaptation than B, who has become moderately wealthy by building a carbon-heavy coal-fired power station.

Were this purely a matter of justice, such an anomaly might be overlooked as falling outside the purview of a rights-based approach. The problem, however, is that if the cost of pollution is not met by the polluter even when that polluter benefits greatly from said pollution, the APP provides little incentive not to pollute. Therefore, when taken in isolation, the APP would not seem to be maximally effective in terms of reducing the harms of climate change. Indeed, in the longer term, it might actually serve to *increase* emission levels by lowering their costs when compared to the BPP or PPP.

Such problems might be somewhat assuaged through the adoption of a rights-friendly combination of the APP and the PPP.

Internalising the Externality

The key problem with the APP, when taken in isolation, is that it would in a certain sense serve to re-enforce and even legitimise one of the key existing problems with climate change.

As Tol observes, climate change currently represents “the mother of all externalities.”⁴⁰¹ An externality is a term used by economists to describe the benefits or costs of a particular activity which fall upon third parties rather than those individuals who conducted the activity. The relationship between climate change and externalities is summarised by Broome:

...because of climate change, people rarely pay the full cost of what they do. Almost all economic activities and almost all consumer activities cause greenhouse gas to be emitted. This gas adds a little bit to global warming, so it does harm around the world. The harm it does is among the costs of the activity, but the person who causes the gas to be emitted does not pay this cost. It is borne by all the people who suffer the harm.

In economists’ terminology, it is an ‘external cost’ of the activity. Economists contrast it with the activity’s ‘internal costs,’ which are the ones that are paid by the person whose activity it is. The emission of greenhouse gas is known as an ‘externality’ because it has external costs.

Externalities always waste resources. People emit greenhouse gas even when the benefit they get from doing so is less than the cost of doing so, because they do not pay all the cost.⁴⁰²

The adoption of the APP would represent an improvement upon this situation. It would mean that the external cost of emissions would no longer arrive solely in the form of a harm borne by those who suffer climate change’s ill effects. Instead,

⁴⁰¹ Tol, R., *Op.Cit*, p.29

⁴⁰² Broome, J., *Op.Cit*, p.39-40

at least some of these external costs would be financial in nature – arriving in the form of adaptation burdens – and would be met by large numbers of people who could afford to meet them without causing themselves significant harm.

The problem is, under the APP, there would remain no incentive for people to reduce their emissions. Indeed, its adoption may serve to *increase* emissions levels. If we do not have to pay the full cost of our emissions *and* we know that, due to adaptation burdens being met by others, no harm will come to current persons as a result of those emissions, we are left with little reason not to pollute.

Such a problem can be at least partially met through Interest- and Choice-based approaches to rights.

The APP emerges from the idea that we have duties to protect the rights of others regardless of whether we placed those rights in jeopardy ourselves. This, though, is not the only type of duty we have under Interest- and Choice-based approaches. It is commonly recognised that we have a duty not to cause harm to the rights of others if we are reasonably able to avoid doing so. The right to health of others might place me under a duty to pay taxes to help cover the treatment of diseases I have done nothing to cause, but it also places me under a duty not to deliberately infect others with disease for my own pleasure. Indeed, this latter duty might be viewed as more primary.

With regard to climate change, then, it would not seem illegitimate under an Interest- or Choice-based system to demand that the polluter pays an additional tax upon his/her emissions to ensure that the cost of adapting to those emissions is met in order that it can legitimately be claimed that such emissions are no longer

harmful to rights.⁴⁰³ This is known as a Pigovian tax and is designed to internalise the external costs of the activity so that the full cost of the action is paid by the actor and not unjustly levied on some other individual.⁴⁰⁴

There will, of course, be situations where this is not appropriate. As earlier noted, charging polluters the full cost of their actions when those actions relate to subsistence activity seems unduly harsh and would actually serve to further damage the rights of the global poor in the present. Similarly, there is no obvious reason why a rights-based morality should insist that current polluters must also pay the adaptation burdens associated with past emissions which continue to affect the climate, particularly when those emissions were produced by the now dead. Under such circumstances, the APP would seem an effective way of delineating who should meet these leftover adaptation burdens.

Conclusions on Adaptation and Rights-based Moralities

It seems that a non-Nozickian rights-based approach to the issue of which individuals ought to meet adaptation burdens would be best realised from a fusion between the APP and the PPP. Perhaps the fundamental principle of rights-based moralities is that we ought not cause avoidable harm to the rights of others. Due to their focus upon current persons, Interest- and Choice-based theories are, to a certain extent, able to simply circumvent the effects of emission-producing actions not by reducing emission levels, but by eliminating the harm those emissions

⁴⁰³ This and other related issues lead to problems with the ability of Interest and Choice Theorists to endorse programmes of mitigation, and actually lead to an increase in overall levels of climate change. These issues will be examined in greater detail later.

⁴⁰⁴ For an introductory explanation of Pigovian taxes, see: Salaniè, B., *The Economics of Taxation* (Cambridge, Massachusetts: The MIT Press, 2011), p.153-161.

cause to current persons. In this way, by including the cost of adapting to the effects of climate change in the price of emissions, the PPP means that those emissions cease to be harmful to the rights of other current persons even in the future. When it comes to the emissions of the very poor and the deceased, the secondary duty of supporters of rights to protect the rights of others regardless of who caused the threat comes into play. The APP explains that wealthier individuals should be charged with meeting these remaining costs.⁴⁰⁵ Such an approach, however, is not open to Nozickians. As noted in Chapter 2, Nozick plainly rules out the idea of taxing individuals for the purpose of protecting the rights of others. He states that

...there is no *social entity* with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits others. Nothing more. What happens is that something is done to him for the sake of others. Talk of an overall social good covers this up. (Intentionally?) To use a person in this way does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has. *He* does not get some overbalancing good from his sacrifice, and no one is entitled to force this upon him – least of all a state or government that claims his allegiance (as other individuals do not) and that therefore scrupulously must be *neutral* between its citizens.⁴⁰⁶

For Nozick, taxation of the kind required to meet adaptation burdens would be akin to forced labour and would thus plainly represent a violation of the rights of current persons in the present. Under a Nozickian rights-based morality, there is no legitimate way of enforcing the kind of adaptation regime necessary to

⁴⁰⁵ Such a policy has significant implications for an Interest-/Choice-based approach. These will be discussed in great detail in the next section.

⁴⁰⁶ *Ibid*, p.32-33

safeguard the rights of current people from climate-related harm. As the next section will demonstrate, however, the more favourable attitude of Interest- and Choice-based approaches to adaptation does not render such theories ideal solutions to climate change, just as Nozickians' prohibition upon adaptation burdens does not render their approach implausible.

Mitigation and Rights: Are They Mutually Exclusive?

For many people, the question of how we ought to combat climate change is primarily concerned not with how we might adapt to the effects of our emissions, but rather with how we might reduce the number of those emissions. If climate change is a problem, they would argue, we should surely aim to tackle that problem at its cause. For supporters of rights-based moralities, though, the question of whether we should mitigate against climate change and why is not so straightforward and the answer will vary significantly according which rights-based morality one follows.

The costs of mitigation are more difficult to pin down than those associated with adaptation. Some mitigation techniques will have a potentially knowable financial burden. For example, researching, developing and implementing green energy in place of traditional fossil fuels will incur a cost which, at least in the short-term, will be greater than maintaining existing energy regimes. Other areas of mitigation unavoidably impose burdens upon current persons which have costs that go beyond the financial realm. While cars might possibly be powered by green energy, this option is not currently compatible with modern aviation and shipping. In this and many other areas, mitigating against climate change will

mean making significant changes to our ways of life which will reduce the number of options which are open to us, often to a point which amounts to a significant restriction upon our ability to fully enjoy our rights.⁴⁰⁷

Given these significant costs, supporters of any moral system must provide good reasons for the imposition of mitigation burdens upon current persons. For supporters of rights-based moralities this issue is particularly complex.

Interest Theory, Choice Theory and Mitigation

As this chapter has already demonstrated, when it comes to adaptation burdens, supporters of Interest and Choice Theory are able to justify combatting the ill-effects of climate change through reference to the well-being of current persons. Since current persons will now and in the future see their rights harmed by climate change, those who can afford to pay are placed under a duty to meet the costs of making those adaptations which are necessary to prevent such harm from occurring *before* it occurs and to remedy any harm which is already occurring. Moreover, because the emissions we produce today will, in future, come to contribute to climate-related harm to the rights of current persons, it is reasonable⁴⁰⁸ under an Interest- or Choice-based approach to charge polluters for the cost of making the adaptations necessary to prevent any harm to rights from occurring.

⁴⁰⁷ For greater detail on such arguments, see Chapter 5.

⁴⁰⁸ Within certain boundaries – see adaptation section.

This successful approach to adaptation, though, does nothing, in and of itself, to reduce the amount of emissions being released.⁴⁰⁹ Taken in isolation, it leaves us in a situation where emission levels continue to rise, causing significant damage to non-human species and pushing us closer to the tipping points which will cause irreparable harm to future persons. Worse than this, following an Interest- or Choice-based approach might actually lead to an *increase* in the speed at which emission levels rise. There are two reasons for this:

Firstly, Interest- and Choice-based approaches are market solutions. They prescribe that our pollutant actions are permissible provided we: a) pay the full costs of those actions (i.e. we internalise the externality) and, b) agree to meet the costs of those pollutant actions of others which they cannot be reasonably expected to meet themselves (either by reason of their poverty or death). The problem with such an attitude is that it legitimises the production of emissions. Our emissions are not inherently wrong, but, rather, are deemed so because of the harm they cause. Under Interest/Choice Theory, that harm must be harm to the rights of current persons. Therefore, if we are able to avoid said harm through adaptation, there ceases to be any problem with those emissions. And if the

⁴⁰⁹ This is not to say that increasing the cost of emissions to cover the costs of adaptation will not ultimately cause some sort of reduction in emission levels. It could be that this increased cost changes the preference structure of consumers by, for example, encouraging people to take less environmentally harmful (and, thus, cheaper) trains instead of internal flights. There is, however, no guarantee that this increased cost would be enough to encourage people to significantly reduce their emissions – indeed, as this section goes on to explain, it may have the opposite effect. Moreover, global financial markets are highly complicated and it might be that market forces mean that, even with the full costs of the resultant emissions included within the price, highly pollutant actions remain at least comparatively cheaper than environmentally friendly alternatives. If the cost of a (less convenient) train option was currently twenty per cent less than an internal flight over the same journey, any increase in the cost of that flight might be mirrored by the train provider even if they were not similarly burdened with an adaptation levy. There is good reason to suspect that private companies set their prices based on what they believe they can get people to pay, rather than some sort of rigorous structure of making a certain percentage profit. If the price of environmentally harmful actions increases, there is every chance that the price of their environmentally friendly alternatives will also do so.

morality we follow tells us that our pollutant actions are acceptable, any guilt we might have felt over them is removed. As a result, supporters of Interest/Choice Theory may no longer see *any* need to take even the smallest mitigating action against climate change.

This point can be better demonstrated through the work of Gneezy and Rustichini, who conducted an experiment in which they demonstrated that mothers at a kindergarten were *more likely* to be late picking up their children after a fine for lateness was introduced than before said fine existed.⁴¹⁰ In relation to such an outcome, they state that “[w]hat this field study teaches us, we believe, is that the introduction of the fine changes the perception of people regarding the environment in which they operate.”⁴¹¹ They summarise their analysis of their findings as follows:

Parents may have interpreted the action of the teachers in the first period as a generous, nonmarket activity. They may have thought: ‘The contract with the day-care center only covers the period until four in the afternoon. After that time, the teacher is just a nice and generous person. I should not take advantage of her patience.’ The introduction of the fine changes the perception into the following: ‘The teacher is taking care of the child in much the same way as she did earlier in the day. In fact this activity has a price (which is called a “fine”). Therefore, I can buy this service as much as needed.’ Parents feel justified in their behavior by a social norm that states, approximately: ‘When help is offered for no compensation in a moment of need, accept it with restraint. When a service is offered for a price, buy as much as you find convenient.’⁴¹²

⁴¹⁰ Gneezy, U. and Rustichini, A., ‘A Fine Is a Price’, *The Journal of Legal Studies* 29, no. 1 (January 2000), 1-17, p.1

⁴¹¹ *Ibid*, p.3

⁴¹² *Ibid*, p.13-14

It is not difficult to see the relevance of Gneezy's and Rustichini's work to an Interest/Choice Theory-friendly approach to adaptation. Currently, most polluters feel some guilt about their pollution and attempt to curb it (with varying levels of success and/or volition). However, if I am paying the full price of my pollutant activity, this guilt is removed. Thus, if I enjoy driving around without purpose, using petrol I could very easily have saved, why should I not do so if the cost of my pollution is built-in to the price of the petrol?

The problem is the idea that including adaptation burdens in the price of emission-producing activity amounts to paying the full cost of that activity is a fallacy.

Firstly, the increased levels of climate change that emerge as a result of our new, guilt-free emissions mean that runaway climate change will arrive sooner and may harm greater numbers of future persons than it otherwise would have. This is a cost. If it is a cost which is deemed irrelevant by a moral system, we must question the validity of that moral system.

Secondly, even from a rights-based perspective, there seems to be something fundamentally wrong in commodifying the suffering of others. Can it really be the case that *any* moral system can think it ethically acceptable to knowingly and avoidably cause major and unwanted disruption to the lives of other current persons (by, say, forcing them to move from their now-submerged small island state) as long as we are willing to meet the costs associated with that disruption?

While it is true that rights-based moralities might demand that people be compensated for past violations they have suffered, the idea that one might knowingly purchase this suffering in advance for the sake of convenience seems

obscene.⁴¹³ Regardless of whether or not adaptation burdens are met, the climate change we cause in thirty years through today's emissions *will* violate the rights of current persons. If my house (and indeed my entire nation) is permanently submerged under water as a result of the emissions of others, then the fact that I am compensated for my loss does little to change the fact that my right is violated. I may have been very attached to my home and even more so to my entire country and my way of life, which is now irrevocably changed. It seems exceptionally callous to say that it is okay for you to knowingly violate my fundamental rights provided you are willing to pay the relevant amount of compensation.

Despite this, it is not clear that this callousness is enough to automatically rule out the suggested approach to adaptation according to Interest or Choice Theorists.

As Chapter 5 made clear, asking people to meet climate burdens – *especially* mitigation burdens – will often amount to a violation of their rights. This violation must automatically be considered impermissible if demanded in the name of non-right-holding future persons. It does not follow, however, that such violations should automatically be considered permissible if made in the name of other current persons. Certainly the relatively few people whose homes (states?) are submerged within our lifetime will have their rights violated, but if such violations can be compensated, it is not immediately clear that millions (perhaps billions) more people should have their rights restricted and/or violated in the present (through, for instance, severe restrictions on air travel) in order to protect

⁴¹³ Critics might object that it is not the suffering which is purchased but the ability of others to avoid it, but this does little to address the problem. In creating a situation in which other current persons are forced to take dramatic evasive action in order to avoid death, we knowingly remove them of precisely the kind of choices that choice-based theories of rights are designed to protect. It seems reasonable to similarly assert that the victims of climate change have a fundamental interest in not letting others take actions which will fundamentally impact upon their life choices.

against future violations. This amounts to a clash of rights. And in such a clash, it is not obvious that the future rights of a lesser number of current people should prevail, particularly when such rights are a) more compensable, and b) might occur anyway as a result of pre-existing emissions.⁴¹⁴

There is one further, unrelated reason for thinking that an Interest-/Choice-based approach to adaptation might actually serve to increase emission levels. It is important to remember that those who adopt a rights-based approach to morality do so in all walks of life, not just in relation to climate change. This means that they would also advocate the protection of rights from non-climate related harms. There is an undeniable link between poverty and sub-standard levels of rights-fulfilment.⁴¹⁵ Whether through a direct attack on the former or an unavoidable commitment to the latter, Interest-/Choice-based theories of rights, if rigidly adhered to on a global scale, would lead to a significant increase in the minimum living standards of the world's poorest people.

The relationship between the level of emissions a country produces and its level of development complex. According to The Center for Global Development, 63% of current emissions are produced by developing countries, as opposed to 37% in the

⁴¹⁴ Due to the length of time our emissions remain in the atmosphere, severely lessening emissions in the present will only *lessen* the climate-related harms faced by current persons in thirty years. Such harms will not be removed entirely and, for some victims, our new lower level of emissions will make no difference at all – it does not matter whether my country is submerged under 10 or 100 feet of water. In any case, the effects of climate change are unlikely to be so gradualist. If reaching, say, 3°C above pre-industrial mean surface temperature is enough to flood Bangladesh and such a temperature is already unavoidable, to drastically reduce the emissions of current persons to prevent temperatures from reaching 3.2°C above would be to pointlessly sacrifice the rights of people living in the present.

⁴¹⁵ I do not mean to over-simplify this link. Many areas of rights do not demonstrate such a direct relationship. The civil and political rights of relatively wealthy citizens of oil-rich Gulf States often go unrealised. However, when it comes to economic, social and cultural rights, the correlation between wealth and rights recognition is a strong one.

developed world.⁴¹⁶ Such statistics would, at first glance, appear to refute the notion that more development leads to more pollution, but on closer inspection there are two reasons for thinking that these figures support my argument.

Firstly, the areas counted as ‘developing’ include India, China, Africa and South America as well as significant parts of the rest of Asia. Such countries may produce 63% of global emissions, but the people producing those emissions number 81% of the global population.⁴¹⁷ In terms of per-head emissions, then, poorer people are far less environmentally harmful than their wealthier counterparts.

Secondly, the term ‘developing’ means different things for different countries at different times and might be used to describe countries with significant variance in levels of economic prosperity and rights- realisation. During the period from the start of the industrial revolution in 1850 up until 2011 the same developing countries now responsible for 63% of global emissions were responsible for just a third of this figure.⁴¹⁸ While comparative rises in population in developing countries are partly responsible for this increase, it is also demonstrative of the fact that the level of development in so-called developing countries has increased significantly in recent years and that such development goes hand-in-hand with increased emission levels. As Busch notes,

[h]istorically, growing wealth has been closely tied to increasing industry, energy usage, and carbon emissions....The industry, energy, and wealth that were long the preserve of a handful of

⁴¹⁶ Busch, J., ‘Climate Change and Development in Three Charts’, *Center for Global Development* (Washington DC, 18/08/2015). Available at: <http://www.cgdev.org/blog/climate-change-and-development-three-charts>. Last accessed: 20 September 2016.

⁴¹⁷ *Ibid*

⁴¹⁸ *Ibid*

developed countries are finally expanding rapidly in the developing world, and that's a very good thing. But this welcome economic growth has a dangerous side effect—carbon emissions.⁴¹⁹

By tackling poverty and thereby increasing development, Interest-/Choice-based moral systems, if implemented globally, would increase the level of economic empowerment of billions and would simultaneously increase the number of emissions each was able to produce.

Overall, Interest- and Choice-based theories not only fail to provide a reason to mitigate climate change, but might actually encourage an increase in emissions by legitimising pollution (provided we are willing to meet adaptation costs) and increasing the pollutant capacity of people in the developing world. Such results are not anomalies or idiosyncrasies. Theories of rights aiming to better protect the interests or choices of right-holders must give the welfare of those right-holders absolute priority over non-rights-based concerns, such as the welfare of future persons. By these standards (and not only by these standards), such theories can be judged to offer an improvement upon the status quo. They not only provide strong reasons as to why we ought to adapt to climate change, but also provide a coherent framework by which we might judge which individuals should meet such costs and when. They provide an appealing solution to the short-term problems of climate change. Unfortunately, this solution comes at the cost of increasing the likelihood of catastrophic and irreversible climate change.

⁴¹⁹ *Ibid*

Nozick and Mitigation

Until this point many readers may have questioned why this thesis has placed the same level of focus upon Nozick's controversial theory of rights as it has on more widely accepted theories based upon Interest or Choice. There are two reasons for this.

Firstly, as highlighted in Chapter 2, the purpose of this thesis is to explore whether rights-based moralities *in general* are able to provide adequate responses to climate change in light of the inability of future persons to possess rights under *any* rights-based system. Any conclusions drawn by the thesis will therefore only be adequate if the widest possible range of rights-based moral systems are considered, and that includes a libertarian perspective. In order to give more focus to the libertarian perspective, this thesis has opted to concentrate on the work of Nozick, who puts forth a theory which is both undeniably rights-based and undeniably different from other rights-based systems.

The second reason for a focus upon Nozick's work is that the theory of rights he puts forward is the only such theory which is potentially capable of preventing catastrophic climate change through an insistence upon mitigation. This section will explain why this might be the case.

Needless to say, nowhere in *Anarchy, State, and Utopia* does Nozick address the issue of climate change. As a result, the Nozickian attitude to the problem must be derived from the general principles he sets out.

As should be clear by now, supporters of rights are unable to assign rights to future persons and must therefore focus upon current persons as the key objects of

their moral concern. With this in mind, a preliminary question arising in relation to Nozick's theory is whether the amount of time that occurs between cause and effect during violations of rights should have any bearing on our moral decision making.

If the action I take today causes harm to another currently existing individual, is the fact that said harm will not occur for another thirty years of any moral significance? There is nothing within Nozick's work to suggest that it should be. In fact, Nozickians are firmer on such a point than Interest/Choice theorists. In terms of theory, there is no reason that supporters of any rights-based morality would view the time between cause and effect to be of ethical significance. In practice, however, as this chapter has demonstrated, this gap in time has a profound effect on the approaches of Interest- /Choice-based theories as it affords current persons the opportunity to take action to safeguard the potential victims of their emissions from harm through programmes of adaptation. Those emissions therefore cease to amount to violations of current persons' rights and thus become permissible. As already noted, adaptation is not an option for Nozickians, so they must accept that *if* it can be shown that pollutant actions amount to a violation of rights of current persons, the time at which the violation occurs is irrelevant.

The second question Nozickians must ask themselves is whether, given the collective nature of climate change, my producing emissions as an individual amounts to me violating the rights of other (current) individuals? And, if so, which of my emissions might be permissibly prohibited?

Perhaps the most important substantive ethical idea Nozick puts forward in *Anarchy, State, and Utopia* is what he labels "the libertarian constraint", an idea

which “prohibits aggression against another”.⁴²⁰ As Hunt explains, this effectively means that “...force can only be justified as an appropriate response to unprovoked force, or as such a response to some other act that is wrongful in the same sort of way that force is wrong, such as fraud.”⁴²¹ For Nozick, the libertarian constraint is a constraint on aggression against each other⁴²² and one of the key justifications of the minimal state is to protect citizens against the undue use of force by others.⁴²³ If we accept that the time between cause and effect is not of moral significance provided the effect is still felt by current persons, the question becomes whether our emission-producing actions constitute undue force?

Not *all* of our emission-producing actions can be legitimately banned under *any* moral system. Subsistence emissions cannot be outlawed by any theory which purports to be concerned with human wellbeing. This fact is not of great significance since current persons can be restricted to a subsistence level (and, indeed, something far above it) without their emissions reaching the cumulative levels necessary to cause climate-related harm.⁴²⁴ It does, however, highlight that producing emissions is not something which can be as straightforwardly labelled an act of aggression as other actions (e.g. physical violence) which Nozick may have had in mind while penning his theory. This leads to significant potential difficulties with a Nozickian demand for mitigation.

⁴²⁰ Nozick, R., *Op.Cit*, p.33

⁴²¹ Hunt, L.H., *Anarchy, State, and Utopia: An Advanced Guide* (Chichester: Wiley-Blackwell, 2015), p.11

⁴²² Nozick, R., *Op.Cit*, p.33

⁴²³ *Ibid*, p.ix

⁴²⁴ Due to the large number of GHGs remaining in our atmosphere as a result of past emissions, some climate-related harm may still arise in the short-medium term, but, under a Nozickian system, it would seem difficult to claim that the existence of this unavoidable harm would be sufficient to ask that current persons effectively end their own lives in order to avoid marginally adding to it through their minimal subsistence emissions.

Nozickians - unlike Interest/Choice theorists – cannot subvert any future harm their emissions do to current persons by implementing adaptation techniques to prevent such harm before it occurs. For Nozickians, *if* my emission-producing action amounts to a violation of the rights of others, I am placed under a duty not to take it. The problem is that, due to the stringently individualist nature of Nozick’s theory, it is not immediately clear that its proponents *can* claim that *any* of my emission-producing actions amount to a future violation of the rights of current persons.

As highlighted in Chapter 2, Waldron explains that Nozickians are not typically concerned with the actions of others. If *you* violate the rights of others then *you* fail to follow the rules of Nozickian morality and *you* have done something wrong. Provided *I* have done nothing to violate rights, *I* have fulfilled my moral duty and am under no obligation (aside, perhaps, from funding the protective government of the minimal state) to prevent you from violating the rights of others, even if I am able to do so at little or no cost to myself.⁴²⁵ While non-Nozickians might be uncomfortable with such a conclusion, under ordinary circumstances such reasoning does not seem incoherent from a Nozickian perspective. Unfortunately, the circumstances surrounding climate change are far from ordinary.

My normal, everyday emission-producing actions⁴²⁶ harm nobody, in and of themselves. As Sinnott-Armstrong puts it, “...global warming will not occur unless lots of other people also expel greenhouse gases. So my individual act is

⁴²⁵ Waldron, J., *Op.Cit.*, p.204

⁴²⁶ i.e. almost every action it is possible to think of except, perhaps, catastrophically harmful actions such as starting forest fires or detonating nuclear weapons.

neither necessary nor sufficient for global warming.”⁴²⁷ As a result, the rampant individualism demanded by Nozick’s theory leads to questions over what effect the communal, cumulative nature of climate change has on our ability to claim that my emission-producing actions harm others.

If they are to justify a demand for mitigation, Nozickians must provide satisfactory responses to two key questions:

1. If I am not responsible for the rights-violating actions of others, can I be held accountable for my own rights-violating actions given that they are only rights-violating when taken in tandem with the similar acts of others?
2. Can I be prohibited from taking certain actions even though those actions are not, in and of themselves, harmful and when taken in the correct quantities will not violate rights?

The answers to these issues centre upon how we interpret Nozick’s implementation of the Lockean proviso.

Locke essentially argues that individuals acquire property rights by taking an unowned object which was available in nature and mixing their labour with it.⁴²⁸

The extent to which such activity is permissible is limited by the proviso that there be ‘enough and as good left in common for others’.⁴²⁹ Locke explains his reasoning by noting that:

⁴²⁷ Sinnott-Armstrong, W., *Op.Cit.*, p.334

⁴²⁸ Locke, J. and Shapiro, I., *Two Treatise of Government: And a Letter Concerning Toleration* (New Haven, Connecticut: Yale University Press, 2003), p.133 (§32)

⁴²⁹ Kirzner, I.M., ‘Entrepreneurship, Entitlement, and Economic Justice’ in Paul, J. (ed.), *Reading Nozick: Essays on Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1981), pp.383-411, p.402

[no man, through] ...his appropriation of any parcel of land, by improving it [caused] any prejudice to any other man, since there was still enough, and as good left; and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his enclosure for himself: for he that leaves as much as another can make use of, does as good as take nothing at all. Nobody could think himself injured by the drinking of an-other man, though he took a good draught, who had a whole river of the same water left him to quench his thirst; and the case of land and water where there is enough of both, is perfectly the same.⁴³⁰

In other words, Locke feels that it cannot be wrong to claim property rights over something you have mixed your labour with provided that, after you have done so, there remains enough unowned property that everybody else can do the same if they wish. This is because to do so would be to exercise your natural rights without causing harm to others. Nozick determines that this proviso “is meant to ensure that the situation of others is not worsened.”⁴³¹ He goes on to note that there are two ways in which one may be made worse off by another’s appropriation: “first, by losing the opportunity to improve his situation by a particular appropriation or any one; and second, by no longer being able to use freely (without appropriation) what he previously could.”⁴³² Nozick asserts that only the first, weaker, proviso need apply to “any adequate theory of justice in acquisition”.⁴³³

In order to illustrate how the Lockean proviso operates in practice, Nozick gives the example of the only waterhole in a desert. He states that the Lockean proviso prevents one from appropriating this waterhole and charging whatever one will for

⁴³⁰ Locke, J., and Shapiro, I. *Op.Cit*, p.114 (§33)

⁴³¹ Nozick, R., *Op.Cit*, p.175

⁴³² *Ibid*, p.176

⁴³³ *Ibid*, p.178

water. This remains the case regardless of when one acquired the waterhole (i.e. possibly *before* it became the *only* waterhole in said desert) or what caused the other waterholes to dry up.⁴³⁴ Importantly, he notes that “the theory does not say that owners do have these rights, but that the rights are overridden to avoid some catastrophe.”⁴³⁵

Taking the waterhole scenario in mind, Ryan concludes that “Nozick seems to grant, in this case, that the manner in which a holding is acquired is not definitive in determining whether that holding may be privately owned. Certain considerations (for Nozick, those contained in the Lockean Proviso) simply exclude certain types of holdings from private ownership.”⁴³⁶

When it comes to issues surrounding Nozick and mitigation, then, we need to examine the ways in which clean air is and is not like the only waterhole in the desert. Is there a duty not to ‘worsen the situation of others’ by not leaving ‘enough and as good’ emission-free air to prevent them from being harmed by climate change?

Certainly, the period of time between cause and effect does not seem to be of great concern. The harm I caused by owning the only waterhole in the desert need not have occurred at the time at which I acquired the waterhole. Similarly, the damage from my emissions need not harm others at the moment I produce them. If my emissions harm my contemporaries, it is not important when that harm occurs.

⁴³⁴ *Ibid*, p.180

⁴³⁵ *Ibid*, p.180

⁴³⁶ Ryan, C.C., ‘Yours, Mine and Ours: Property Rights and Individual Liberty’, in Paul, J. (ed.), *Reading Nozick: Essays on Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1981), p.334

What seems more difficult is establishing that I fail to leave ‘enough and as good’ emission-free air through my pollutant acts. Climate change is caused by the collective pollution of a great many current persons. Thus, it is hard to claim that the particular amount of emission-free air I use up through my non-essential activities is the *last* of the emission-free air.

But can this really matter? If there were only two waterholes in the desert and two different people acquired them simultaneously, would it really be the case that *neither* person was under a duty not to keep all of the water for themselves simply because the other also could (but did not) opt to share the water from their own well? Surely we are all placed under an equal duty to ensure that ‘enough and as good’ of a particular resource remains for others not to be made worse off in the relevant manner.⁴³⁷ Therefore, the Nozickian might claim that we each have a legitimate quota of emissions (the amount below which, if we all produced them, climate change would occur) and that to exceed said quota would be to violate the Lockean proviso and thus be impermissible.

Objections to a Nozickian solution to climate change

The individualist objection

In objection to the above argument that the Lockean proviso affords Nozickians a way of preventing catastrophic climate change, critics might argue that the fact

⁴³⁷ In fact a Nozickian approach is further strengthened because, for Nozick, the fact that many of the harmful emissions were produced by past persons is irrelevant. Just as the fact that my waterhole is rendered the only water source due to a drought I did nothing to cause is considered unimportant, the fact that my emissions are only harmful because others (including the now dead) have also polluted has no impact upon the course of action morality requires me to take.

that it cannot be shown that my specific emissions failed to leave enough and as good for others means that I cannot be prevented from producing them under the Lockean proviso. There is no evidence that I, personally, used up the last of the resource of clean air so that there was not enough left for others to be protected from climate-related harm. Indeed, it is categorically the case that I did *not* do so; this resource is *simultaneously* used up by me and billions of others. If this is of relevance then the Lockean proviso cannot be implemented and Nozick's theory of rights does nothing to demand either adaptation or mitigation. There are, however, two good reasons for thinking this is not the case.

The concept of 'joint enterprise' is well-recognised. It states that if the participation of more than one person is needed for a harmful act to occur, each of the participants may be held equally responsible for the outcome. Cassese explains the idea as follows:

...in most national legal systems... [and] in international criminal law all participants in a common criminal action are equally responsible if they (i) participate in the action, *whatever their position and the extent of their contribution*, and in addition (ii) *intend to engage in the common criminal action*.⁴³⁸

While the production of emissions is not currently a criminal offence, it is not difficult to see the relevance of joint enterprise when it comes to climate change. If it is immoral to harm the rights of others through our actions, then, if we look at the number of emissions necessary to cause climate change as one giant and extremely harmful 'super-action', the participation of individuals in said 'super-

⁴³⁸ Cassese, A., *International Criminal Law* (Oxford: Oxford University Press, 2003), p.181-2. It is worth noting that Cassese goes on to explain that the level to which an individual participated in the crime, while not of relevance to his/her guilt, may be taken into consideration in sentencing.

action' is immoral regardless of the fact that it could not have occurred without the participation of many other people.

As for the second condition put forward Cassese, only through an extraordinarily generous application of the principle of double effect could we assert that individual polluters do not *intend* to cause harm through the actions they choose to take in full knowledge of the harm that *will* result from said actions. Indeed, the principle of joint enterprise specifically states that all participating in the joint enterprise may be held responsible for *any* crimes committed as part of that enterprise providing those crimes were *foreseeable* and the parties to the joint enterprise *willingly* took the risk that they would occur.⁴³⁹ Following the same logic with regard to moral rights, if individuals willingly pollute knowing that their pollution is likely to join with that of others to cause future harm to the rights of current people, their actions may be deemed immoral under the principle of joint enterprise.

There is nothing about the manner in which Nozick focuses upon individuals which prevents him from applying the principle of joint enterprise. This fact is alluded to in the very first sentence of *Anarchy, State, and Utopia*, which reads: "Individuals have rights, and there are things no person *or group* may do to them (without violating their rights)."⁴⁴⁰ The very fact that Nozick mentions the possibility of rights being violated by a group *qua* group (as opposed to a number of separate individuals) – something he *only* does with regard to potential violators of rights, not their potential victims – is suggestive of an implicit assumption in favour of joint enterprise when it comes to rights violations.

⁴³⁹ *Ibid*, p.187

⁴⁴⁰ Nozick, R., *Op.Cit*, p.ix (my emphasis)

This implicit assumption is further underlined by Nozick's focus upon the state as the primary potential violator of rights. While one might coherently follow a Libertarian/Nozickian view of rights which maintains that individuals can violate the rights of other individuals (unlike under human rights law), it is certainly the case that states are also able to violate human rights. This is indicative of the kind of thinking that lies behind the principle of joint enterprise. To claim a 'state' is responsible for an action is, in reality, to claim that a large group of individuals are jointly (though not necessarily equally) responsible for that action. It is hard to imagine one person committing a state-sponsored genocide. Ordinarily, genocide involves a great many people: some to do the killing, some to give the order, some to organise the plan, some to transport the victims to their death, etc. Even if we treated each death within the genocide as a separate, state-sponsored killing, each would be a killing for which multiple individuals (under the guise of 'the state') were jointly responsible. In focusing upon what states can and cannot do in relation to the rights of their citizens, then, Nozick implicitly accepts the principle of joint enterprise.

Given that Nozick's minimal state emerges naturally from the state of nature without violating individuals' natural rights, it stands to reason that, if states are able to jointly violate rights, so must individuals be able to do so. Nor can such a claim be overcome through an insistence that only states can violate rights, because individuals can doubtlessly act in conjunction with others to commit the type of actions which it is the purpose of states to protect other individuals from. If multiple individuals all choose to take certain actions in full knowledge that others will do the same, then if said actions *in total* violate the Lockean proviso it follows that each individual has contributed to that violation.

Secondly, it must be remembered that Nozick's reason for the inclusion of the proviso is the avoidance of 'catastrophe' (which, for him, under the right circumstances, might be constituted by the death of a single current person). Indeed, Paul notes that Nozick insists on the proviso *solely* for this reason. He argues that, rather than naturally emerging from Nozick's theory, Nozick's Lockean proviso represents an "exception to his view of property rights which is introduced for no reason other than the fact that it saves the theory from unpalatable implications that it seems to have."⁴⁴¹ And if Nozick introduces the proviso purely in order to avoid his theory leading to catastrophe, why would he not allow such an exception to stretch to cover jointly-taken actions, the consequences of which will severely damage the rights of vast numbers of current persons?

The problem of determining 'my share'

As earlier noted, the application of the Lockean proviso in the context of climate change would involve the development of a quota of emissions each human being would be allowed to safely produce without harming the rights of other current persons once those emissions began to affect the climate. It is worth noting that, in practice, establishing exactly what such a quota might amount to (i.e. deciding what constitutes 'my share' of emissions) would be no easy task.

Firstly, we would need to determine the total cumulative amount of emissions that might be produced by mankind in any one year without causing future harm to current persons. This would doubtlessly be a highly complex equation, the

⁴⁴¹ Hunt, L., *Op.Cit*, p.190

outcome of which highly-qualified, right-thinking people would likely disagree over. It would be made more complicated by the issue of whether and how we factored in the ongoing effects of the emissions of past persons.

Secondly, even if this cumulative total could be arrived at, difficult questions would remain with regard to how it ought to be divided. Should it be split evenly across every person on Earth (and thus get progressively smaller in parallel with population growth)? Or should those individuals in developed countries whose lives (and levels of rights realisation) would be dramatically negatively affected by the imposition of such a quota be allowed a larger share of the safe emissions total than people living in remote tribal communities who would never reach their fair share anyway? Or should we look at things the other way around and consider that people with higher past emissions be awarded lower permissible levels of emissions in the present in order to guard against the potential future harm they have already contributed to?

Whilst such questions are not easily answered, I am not convinced that they truly amount to an objection to my application of the Lockean proviso. The practicalities of any real-life, globally co-ordinated effort to prevent catastrophic climate change will be immense no matter which programme of mitigation we follow or why. The fact that a Nozickian approach is also plagued by such difficult questions regarding its practical application should not, then, be seen as damaging its validity in terms of theory.

Rights to property and their effect upon 'my share' of emissions

In response to the previous criticism, the Nozickean might legitimately argue that the idea of an emissions quota is neither alien nor unreasonable as a potential means for avoiding catastrophic climate change. As a result, the practical difficulties associated with such an idea are far from unique to Nozickians and are thus weakened in their status as reasons not to employ a theory of climate ethics centred around the Lockean proviso. There exists, however, a series of secondary difficulties in relation to the emissions quota system as framed in this chapter that does seem to emerge as a result of the Nozickian system of rights from which said quota system emerged.

As has already been noted, Nozickians endorse a range of rights which are held extremely strongly in terms of both the negative duties they impose on others and the limitations upon the positive duties that can be asked of their holders. Among the rights Nozickians feel we have are property rights. It is these extensive property rights which render the morality of an emissions quota more complex under a Nozickian system of rights than it might be if proposed by other moral theories.

Consider the following scenarios:

Person A inherits a large swathe of land under which there are enormous reserves of coal. Person A thus sets up a coal mine and coal-fired power station. This provides employment and affordable energy to a local community which previously had neither while simultaneously making Person A very wealthy and producing an enormous amount of additional emissions.

Person B inherits a large swathe of land in the desert upon which she builds a significant number of solar panels. These panels, while still producing a significant amount of emissions, provide affordable energy to the local community, removing their reliance on fossil fuels and thus reducing their overall emission levels. They also make Person B very wealthy.

Person C inherits a large swathe of densely forested land. The forest removes significant amounts of GHGs from the atmosphere, but makes no money. Person C thus adopts to fell all of the trees and sell the timber. She does this in a traditional way so that the actual cutting of the trees produces only minimal levels of emissions well within her personal quota.

How should we judge the exercise of property rights of these three people in accordance with Nozick's Lockean proviso?

If all of the emissions of the power which comes from the coal mine are attributed to Person A then she undoubtedly exceeds her emissions quota. However, attributing all of these emissions to Person A would surely absolve all of the individuals who actually used the power (and without the demand of whom no coal would have been mined and burned) of responsibility for their emissions. On the other hand, if the end-consumers are held responsible for the individual emissions they make by using the coal power where before they had no power, then Person A has not exceeded her emissions quota despite having caused a great deal more emissions than would otherwise have existed.

The situation of Person B is even more complicated. If all of the emissions associated with the building and maintaining of the solar panels are attributed to her then she will have exceeded her emissions quota and thus violated the rights

of others despite having actually caused a reduction in the overall emissions levels of the communities. This, of course, might be seen as an indicator that it is the emissions of the end-user of the power that should count, as opposed to those of the producer of the power. There are, however, two problems with such an idea. Firstly, it means that Person A is under no duty not to build her coal-fired power station, which causes a significant increase in overall emission levels. Secondly, Person B is left with the same personal emissions quota as everybody else despite significantly reducing overall emissions levels. This seems unjust in terms of theory and, in practice, does little to encourage a reduction in climate change when even actions which produce large-scale reductions in emissions are not incentivised.

The problems raised in relation to the situations of Person A and Person B are complex and require careful consideration if a solution is to be reached. However, this remains the case regardless of which moral system one follows in attempting to mitigate catastrophic climate change. Whilst the range of answers to the questions raised will undoubtedly be limited by adherence to a Nozickian rights-based moral system, there are still answers available. The problems raised above, then, are not problems with a Nozickian morality *per se* and, as such, should not be seen as evidence against the argument that Nozickians provide us with a very plausible and coherent reason for reducing our emissions (i.e. the harm they will cause to current persons in the future). This is not necessarily the case with the

scenario of Person C, which seems to present a set of difficulties which arise specifically due to the nature of a Nozickian system of rights.⁴⁴²

Person C has strongly-held property rights to her land and all the trees within it. Under a Nozickian morality, she is under no duty to restrain her own rights in the name of improving (as opposed to avoiding violating) the rights of others. While she has a negative duty not to deliberately infect me with malaria, she has no positive duty to pay for the drugs to treat an infection I have obtained from a third party. To demand that she do so would be to violate her property right to her own wealth. Similarly, while she may not produce a level of emissions which would cause the future violation of my rights, she is under no duty whatsoever to take positive action to help absorb her own emissions and (especially) those of others by maintaining an unprofitable forest on her land.

The fact that Nozickians are unable to provide any moral reason not to deforest certainly constitutes a black mark against their ability to effectively combat climate change. It does not, however, remove their theory of such an ability altogether. If there is less forest covering the Earth's surface, the total amount of cumulative emissions humanity is able to produce without causing harm to current persons in the future will also be lessened. Therefore, the less forest, the fewer emissions each individual might permissibly make without harming the rights of others. Obviously, there might eventually come a point where humanity has wiped out so much forest while rising to such vast population levels that the quota of emissions available to each person is less than they require to live a minimally good existence. Such a fact might be seen as good reason for searching for a

⁴⁴² This is not to say that the problems I shall go on to highlight are *only* faced by Nozickians, but that such problems do not plague *the majority* of other moral theories.

moral theory which handles the climate change problems better than Nozick's by insisting individuals lower their emissions *and* avoid deforestation. It is not, however, evidence that Nozick's theory does not still represent a valid option for tackling climate change which is not only better than any other rights-based morality, but is also an improvement on the status quo. Currently, there is, in reality, little to restrict either deforestation *or* the number of emissions individuals produce.

A Nozickian approach, then, provides good, rights-based reasons for mitigating climate change. Since Nozickians cannot allow enforced programmes of adaptation, they are instead forced to claim that, at the point where an emission-producing action causes future harm to the rights of current persons, that action becomes immoral and can be justly prohibited. They are therefore able to demand that current persons reduce their emissions. What is more, since those emissions which will harm current persons cannot be separated from those that will harm future persons, Nozickians inadvertently endorse a programme of mitigation which will protect both groups and, in so doing, create a situation where humanity is safeguarded from reaching tipping points in the long-term.

In summary, provided that Nozickians are able to delineate which of our emission-producing actions can be said to violate the rights of current persons in the future, they can legitimately demand that we not take those actions. As a result, a Nozickian morality leads to a reduction in emissions which ends up safeguarding both current and future persons from climate-related harm.

Conclusion

This chapter has shown that, while rights-based moralities put forward solutions to climate change which are far from ideal, their enforcement might nonetheless represent a significant improvement upon the status quo.

Interest-/Choice-based theories provide us with a strong reason for implementing a comprehensive programme of adaptation (the prevention of future violations of current persons' rights) and are even able to clearly and coherently delineate who should meet the costs of such a programme. Given the vast numbers of current people who will both now and in future suffer severe damage to their rights as a result of climate change, universal adherence to an Interest-/Choice-based rights-based system would have a significant positive impact which cannot be casually overlooked. Moreover, in insisting upon adequate adaptation to climate change, supporters of such theories increase the time available to humanity to replace fossil fuels with green energy before a tipping point is reached.

However, while an effective adaptation programme may indeed give us more time to mitigate climate change, Interest-/Choice-based theories afford us no *incentive* to do so. If current people are the object of our concern, and if we are willing to meet the adaptation burdens necessary to prevent our emissions from causing harm to their rights in the future (and are also willing to pay to prevent emission-related harm we did not cause), then all our emission-producing actions cease to be immoral. As a result, it seems likely that overall emission levels will continue to rise (and may end up rising at a faster rate). This continued rise in emission levels will eventually lead to us reaching one or more environmental tipping points, at which point adaptation will cease to be a viable means of protecting

rights. Ultimately, then, following Interest-/Choice-based systems will lead to tremendous suffering for billions of future persons. For most of us, such an outcome is so distasteful as to render such approaches to climate change unacceptable, regardless of the increase in well-being they provide for current persons. Indeed, it might even be argued that, by increasing overall levels of climate change, such approaches are *less* desirable than the status quo.

When it comes to Nozickian systems, this situation is reversed. Under such systems the welfare of future persons is safeguarded against the worst ills of climate change (albeit inadvertently), but the cost that would need to be borne by current persons in order to achieve such a result will, for those of us who do not adhere to Nozick's world view, prove unduly burdensome.

Nozick's insistence on the sanctity of rights is to be commended and potentially enables supporters to end climate change. To the extent that our emissions are harmful to the rights of current persons in the future, those emissions become impermissible and may be legitimately outlawed by governments of the minimal states Nozick endorses (although defining which of our emission-producing actions might be deemed harmful and thus justly prohibited will be no easy task). And because the emissions we produce effect the climate for centuries, those that will harm future persons cannot be separated from those that will harm current persons. As a result, in prohibiting emissions which will come to harm current persons we unavoidably and simultaneously prohibit emissions which would otherwise have harmed future persons.⁴⁴³

⁴⁴³ As earlier noted, Nozick's theory does not similarly prohibit deforestation and thus does not necessarily sufficiently safeguard future persons from climate change, but it certainly represents an improvement on the status quo.

Taken in isolation, then, the strength of the status Nozick ascribes to rights might be seen as a positive. Severe problems emerge, though, when such strong status is applied to such a broad range of rights. To adopt a Nozickian morality is to accept that we bear no moral responsibility for the severe suffering of others that we have not caused. This means abandoning tax-funded healthcare and social services, so that those individuals who cannot afford to meet their most basic needs such as food, clean water and healthcare are left to suffer. Adopting a Nozickian approach means allowing billions of lives to be made substantially worse by refusing to protect them from harms we have not (by Nozick's logic) caused, while simultaneously safeguarding them and others from those that we would have caused had we polluted. This is not a compromise that most people (including those sympathetic to rights) can happily accept.

Ultimately, people who harbour deep concerns about climate change might, if pushed, reluctantly accept that any of the rights-based theories examined throughout this thesis represent an improvement upon the current situation.

Interest/Choice theorists provide us with theories that would significantly improve the lives of current persons at the cost of the suffering of billions of future people.

Nozickians, on the other hand, endorse a scenario in which the world's most vulnerable people will be made severely worse off, but which is capable of providing a strong, coherent reason for preventing emissions-related harms which, by pure happenstance, serves to protect future people from climate change.

Despite the significant advantages of rights-based theories, the tremendous drawbacks they come with would lead most of us to want to thoroughly investigate whether an alternative, non-rights-based moral system might provide us with a solution to climate change which enables the welfare of both current and

future persons to be adequately safeguarded both now and in the future, from all threats, climate-related or otherwise.

CONCLUSION

The issue of climate change has not proved a welcome addition to the geo-political dialogue for either politicians or the general public. Citizens and governments alike are often unenthusiastic about implementing wide-ranging and unpopular measures which may prove expensive and highly disruptive in the name of protecting temporally and geographically remote others. During the process of writing this thesis, this attitude seems to have become stronger and more pervasive even among legitimate leaders of wealthy, developed, liberal democracies. One of Theresa May's first acts as UK Prime Minister was to rename the Department for Energy and Climate Change, the Department for Business, Energy and Industrial Strategy. She then appointed Andrea Leadsom as Environment Secretary – a woman whose first question in her previous role as Energy Minister was “Is climate change real?”⁴⁴⁴ Similarly, US President-elect Donald Trump (who has repeatedly described climate change as a ‘hoax’)⁴⁴⁵ has appointed notorious climate skeptic Scott Pruitt as head of the country's Environmental Protection Agency and promised to ‘cancel’ November 2016's Paris climate deal.⁴⁴⁶

⁴⁴⁴ Johnston, I., ‘Climate change department closed by Theresa May in “plain stupid” and “deeply worrying” move’, *The Independent* (14 July 2016). Available at: <http://www.independent.co.uk/environment/climate-change-department-killed-off-by-theresa-may-in-plain-stupid-and-deeply-worrying-move-a7137166.html>. Last Accessed: 15 December 2016.

⁴⁴⁵ Dennis, B., ‘Trump taps climate-change skeptic to oversee EPA transition’, *The Washington Post* (11 November 2016). Available at: https://www.washingtonpost.com/news/energy-environment/wp/2016/11/11/meet-the-man-trump-is-relying-on-to-unravel-obamas-environmental-legacy/?utm_term=.ffa8c1de74d8. Last Accessed: 15 December 2016.

⁴⁴⁶ ‘Trump picks climate sceptic Pruitt for environment chief’, *BBC News* (08 December 2016). Available at: <http://www.bbc.com/news/world-us-canada-38247085>. Last Accessed: 15 December 2016.

In the face of such opposition, proponents of specific moral systems who are concerned about climate-related harm need to work hard to delineate exactly why climate change is wrong and what ought to be done to combat it. The fact that climate change is real, is worsening, is harming many current people and will also harm countless future people is undeniable. It is equally undeniable that, regardless of the uncertainty surrounding the timings, tipping points will at some point occur and will be immensely damaging to the welfare of people living at the time. In light of this, it would seem that any adequate moral system ought to be capable of protecting both current and future persons from climate-related threats to their wellbeing. The best way of doing this would be to provide clear justifications and demands for the implementation of extensive programmes of both adaptation and mitigation.

This thesis has sought to demonstrate that rights-based moral systems not only struggle to provide adequate reasons as to why current persons ought to reduce their emissions, but in fact actively prohibit states from imposing meaningful mitigation programmes.

The emissions we produce today will not even *begin* to affect the climate for 25-50 years. Additionally, even if all the world's governments unilaterally decided to begin implementing drastic programmes of mitigation today, it would be many decades before any substantial reduction in emission levels was realised. This is particularly true if, as supporters of rights would demand, such mitigation was carried out in a manner which avoided severely harming the basic rights of millions (by, for example, depriving them of existing attainable fuel sources before environmentally-friendly alternatives were available). As a result of these

factors, it becomes clear that the vast majority of those who will benefit from mitigation will be future persons.⁴⁴⁷

As Chapters 3 and 4 demonstrated, future persons are not capable of possessing rights. This does not, in itself, cause an insurmountable problem for supporters of rights. Since rights-based moralities are political moralities (i.e. they are primarily about relationships between states and their citizens), it is entirely plausible that their followers might adopt other moral philosophies to define those elements of their behaviour which fall outside the scope of rights. I might, for example, feel a duty not to treat non-human animals cruelly, and perhaps even to provide funds to charities aiming to prevent others from committing such cruelty, without thinking that non-human animals have rights. Importantly, though, the non-rights-based beliefs I hold must always be secondary to rights if I am truly to follow a rights-based morality. The state, even if it follows my views, may not violate the rights of its citizens in order to protect animals from cruelty. Similarly, to the extent that I am under a duty to furnish the state with taxes so that it may meet the rights of others (thus facilitating my own personal correlative duties to those rights), I may not relinquish any element of this duty in order to provide the animal charity with the funds I feel morally required to provide.

Under a rights-based morality, rights at least hold primary moral status – indeed some would view morality as being derived from rights. While they might think it *good* that both states and individuals take certain supererogatory actions,

⁴⁴⁷ This is not to say that current persons would not benefit from mitigation. Implementing mitigation programmes would probably slightly lessen both the level of harm current persons faced as a result of climate change and the number of current persons facing such harm. It would also probably slightly prolong the period before such harm arose. However, as Chapter 5 sought to demonstrate, current persons will be significantly more effectively and efficiently protected by programmes of adaptation than those of mitigation.

supporters of rights feel that they and their states *must* meet the duties they hold which are the correlatives of rights. As a result, when non-rights-based ideals clash with rights-based moral duties, it is always the latter which prevail.

Unfortunately, as Chapter 5 showed, seemingly all policies of mitigation - and even of adaptation - will harm current persons' rights in some way. Moreover, such programmes come with significant financial costs, meaning that supporters of rights who endorse positive duties (which they would need to do in order to justify effective programmes of adaptation) would need to find a very good reason as to why government finances were being spent combatting climate change while the rights of millions went unmet in ways which could be successfully combatted with money. Since future persons do not possess rights, they cannot provide supporters of rights with an appropriate justification for introducing the type of mitigation and adaptation programmes which would be necessary to effectively combat the negative effects of climate change.

Rights-based moralities, then, must justify any serious attempt to combat climate change and its effects through reference to the rights of current persons. As Chapter 6 demonstrated, such an approach has highly variant results depending upon which rights-based morality we follow.

For Interest/Choice theorists, the time delay involved in the climate change process means that we are able to pay for and implement the adaptation techniques to guard against the harm that would otherwise be caused by our emissions. Doing so ensures that we do not fail in our duty not to harm the rights of other current persons when we pollute. This represents a significant improvement on the current reality of climate change, where the costs of our

emissions arrive in the form of widespread rights violations and are predominantly borne by individuals who can least afford to protect themselves against them and who have done little to exacerbate the climate change process.

Indeed, if it is an improvement in the status quo we are looking for, we could endorse a stronger version of Interest/Choice theories under which states (and, indirectly through taxation, their citizens) are placed under a duty to protect the rights of current persons even if the harm to those rights was caused by some other party. Under these strong versions of Interest/Choice theories, states would be placed under a duty to adapt to those climate-related harms which emerge from the emissions of past persons and the subsistence emissions of current persons. Since the effect of these latter emissions cannot be easily separated from the effect of the luxury emissions of current persons,⁴⁴⁸ this stronger version of the policy would seem preferable.

Unfortunately, as explained in Chapter 6, the short-term improvement that would be witnessed as a result of following Interest-/Choice-based theories comes with an immense cost when it comes to climate-related harm to future persons. If the moral system we follow tells us that it is current persons that should be our concern, then, if we follow a system of adaptation under which the price of our emissions includes the cost of stopping current persons from being harmed by those emissions, there ceases to be any significant reason *not* to pollute. It

⁴⁴⁸ If sea levels rise by two metres, but only one metre can be attributed to the luxury emissions of current persons, it would not make sense to demand that current persons pay for a one metre wall. And, in reality, climate change can rarely be measured from such a gradualist perspective. Rather, it is more likely to be the case that the luxury emissions of current persons would be *entirely harmless* if it were not for the subsistence emissions of others and the emissions of past persons but that, since these other emissions do exist, the luxury emissions of current persons do cause harm. If this harm is to be adapted to, then current persons must meet the costs associated with *all* harmful emissions – you cannot half vaccinate somebody against malaria.

therefore seems likely that the amount of emissions the current generation is producing would *increase* under a unilaterally enforced rights-based morality based on Choice/Interest theories.

In short, following a Choice-/Interest-based system would lead to a dramatic upturn in the well-being of current persons both now and in the near future, but would make the prospect of the widespread, drastic and irreversible harm caused by tipping points a larger and more immediate threat.

Supporters of rights who are uncomfortable with such a conclusion are forced to turn to the kind of Libertarian approach put forward by Nozick, which leads to near polar opposite conclusions about where the costs and benefits of a rights-based approach to climate change should fall.

As outlined in Chapter 2, followers of Nozick are stringently against the idea that rights should have positive duties as their correlatives. The state may not ask that I pay taxes in order that the rights of others be better met. Therefore, the idea that I might be forced to meet adaptation burdens associated with avoiding harm to others becomes untenable. However, Nozick's adoption of the Lockean Proviso means that current persons are forced to leave 'enough and as good' for other current persons (i.e. a healthy enough environment so that they are protected from the worst ills of climate change). Since Nozickians are unable to endorse the adaptation programmes necessary to make an environment artificially 'healthy' - by, for example, building sea walls - they are instead forced not to exceed their designated quota of emissions in order that they cannot be said to have caused future climate-related harm to the rights of current persons. As a result of this

policy of mitigation in the name of current persons, future persons are incidentally also better protected against the harms of tipping points.

Overall, whether one favours current or future persons more heavily, there is a rights-based morality which is able to offer an improvement on the current situation when it comes to climate change.

If it is current persons one holds to be of primary moral concern, then Interest-/Choice-based theories provide a solid reason to adapt to the worst ills of climate change and ensure that the costs of doing so are justly distributed. More than this, they also demand that we go some way to protecting others from non-climate-related harm to their rights by safeguarding them against the violations of others, and by meeting the costs of adapting to those harms to their rights which cannot straightforwardly be attributed to the behaviour of any other individual (by, say, providing healthcare and housing for those otherwise unable to afford such things).

On the other hand, if future persons are our concern, we might adopt a Nozickian position which safeguards them from the catastrophic consequences of the Earth reaching an environmental tipping point as well as asserting that current persons have incredibly extensive and stringently observed sets of rights. The downside to such a position is that the positive duties which are, in practice, needed by the vast majority of the world's inhabitants if they are to fully enjoy the type of things we normally feel them to have rights to are actively prohibited by a Nozickian system, which outlaws taxation for such purposes. Of course, when it comes to future persons, such limitations are acceptable. The damage to rights that will be caused by tipping points will be so prolific that, for its victims, no amount of free

healthcare or education will be able to reverse it. When faced with catastrophe, prevention is the only option – there is no cure.

The problem is that many people (myself included) have great sympathy for the type of values Interest-/Choice-based theories endorse whilst simultaneously feeling that future persons are worthy of such significant moral concern that their protection might warrant some relatively stringent restrictions upon the activities of current persons.

It seems that many people might find the basic tenets of the human rights doctrine to be morally appealing without holding those rights to have anything more than an instrumental value. Such persons might feel that everyone should be free to believe what they wish, to be free from torture, to have enough food, etc. Indeed, they might hold these basic moral goods to be of such importance that, in addition to not actively preventing others from achieving them, we are also duty-bound to take positive action to help others to achieve them. An Interest-/Choice-based theory would appear to represent a good way of articulating, delineating and justifying these beliefs. If we have a fundamental interest in not being tortured (which Choice theorists would argue stems from the fact that we are not free to make choices unless we are free from torture), it seems reasonable to argue that included within this is a fundamental interest in having states take positive action to prevent others from torturing us by, for example, providing police forces and justice systems.

Adopting an Interest-/Choice-based theories, however, would prevent us from assigning what many of us would see as appropriate levels of moral value to future persons; the kind of moral value which would enable us to make significant

demands of current persons in the name of protecting future persons from climate change. As this thesis has explained, the only alternative if we hold rights to be of ultimate value is to adopt a Nozickian viewpoint through which future persons can be safeguarded (albeit inadvertently). Adopting such a viewpoint, however, removes from us the kind of extensive positive duties which made rights-based moralities so appealing in the first place.

In light of all this, one might legitimately question the extent to which anybody *should* hold rights to be of ultimate moral value. Rights-based moralities are not like religions. We do not generally believe in rights because God says we have them,⁴⁴⁹ or because rights are in some sense inherently good. Rights, rather, are tools for expressing the basic moral views we hold and for articulating what ought to be done to protect those views and by whom. And if the tools we employ for realising our key beliefs about right and wrong are unable to accommodate some of those key beliefs, surely it would be more appropriate to disregard these tools than to draw the conclusion that it is our beliefs which are the problem.

It seems, then, that if no rights-based morality is able to accommodate basic rights, positive duties and the well-being of future persons, perhaps this speaks of a significant flaw with rights-based moralities. In light of this flaw, it might be more appropriate to abandon rights-based moralities in favour of some other system which better enabled us to protect both current and future persons from the biggest threat to their welfare in history.

⁴⁴⁹ Although Perry offers something like an exception to this rule, arguing that the morality which justifies human rights can be derived from religious arguments. See: Perry, M., *Toward a Theory of Human Rights: Religion, Law, Courts* (Cambridge: Cambridge University Press, 2007), pp.7-13.

Before we risk throwing the baby out with the bath water, though, greater examination will be needed of the alternatives to rights-based systems.

As this thesis has demonstrated, the problems climate change gives rights-based moralities primarily stem from the inability of those moralities to assign significant moral status to future persons. Future persons cannot possess rights and, therefore, rights-based moralities cannot adequately protect future persons.

The question, then, is whether any non-rights-based systems are able to find appropriate ways of assigning moral worth to future persons whilst simultaneously enhancing the welfare of current persons both by prohibiting harm to them and by demanding that positive action be taken to protect them from harm at the hands of others and/or nature.

For example, what moral status should utilitarians assign to future persons? If they are considered to be human and thus hold the same status as currently existing persons then, because their number will always outweigh the number of people who are currently alive, the welfare of future persons would seemingly *always* need to be placed before that of current persons. If, on the other hand, future persons are considered inhuman, then their welfare ceases to play *any* role in our moral calculations, and utilitarians are left in much the same position as supporters of rights.

I do not propose to provide any remotely conclusive revelations about the relationship between utilitarianism and rights. Rather, I mean to highlight that in focusing upon a single moral doctrine's approach to climate change (that of rights-based moralities), this thesis unavoidably ends up highlighting the failures of that particular doctrine in isolation without holding up any (let alone all)

alternative moral systems against which the relative strengths and weaknesses of rights-based systems might be compared and contrasted. A comprehensive analysis of all moral systems would be required before we could conclude that rights-based moralities should be disregarded on the basis that they are unusually and unduly incapable of accommodating the welfare of both current and future persons. Such an analysis might conclude that similar problems are faced by *all* overarching moral systems and thus afford us no reason to reject systems of rights in particular on the basis of their universally shared inability to simultaneously and adequately safeguard current and future persons from climate-related harm.⁴⁵⁰

I expect that further investigation would reveal that there does exist a universal (or at least universalisable) moral system out there that is capable of providing good reasons as to why its followers ought to protect both current and future persons from climate-related harm. Rights-based moralities are incapable of fulfilling such a role. In light of this fact – and given the extent of the climate change problem – one must seriously question whether rights are an appropriate way of speaking of morality at all. Perhaps, instead, the role of rights would be more appropriately viewed as being an exclusively legal one, with a primary universal function of enshrining in law those values we hold dear which and which we derive from an entirely unrelated moral system (or – ideally – from an overlapping consensus on such values derived from a range of different moral systems).

In terms of an original contribution to research, this thesis has sought to investigate the overall relationship between moral rights and climate change. Few

⁴⁵⁰ One way of avoiding such a problem could be to adopt a so-called ‘deep ecology’ position, where one holds non-human entities to hold a similar moral status to human beings, thus removing at least some of the inherent difficulties which emerge from an anthropocentric system of moral belief. Again, there is not room to pay adequate attention to such theories here.

existing scholars have paid close attention to the area of moral (as opposed to legal) rights and the ways in which they effect and are affected by the climate change process. Those that have done so tend to assume rights to be a positive tool for combatting climate change. This is because they automatically consider future persons to possess rights. Similarly, those scholars who do focus on the moral status of future persons through the non-identity problem tend not to do so in the context of the ability of such persons to hold rights. Perhaps the foremost original contribution to research this thesis has made, then, is to demonstrate that the present non-existence of future persons and, subsequently, the non-identity problem prohibit future persons from possessing rights, which in turn leads to inherent difficulties for supporters of rights when it comes to justifying reductions in the welfare of current persons taken in the name of protecting future persons from what amounts to non-rights-based harm.

Additionally, the application of Nozick's work to the problem of climate change is not a move I have come across during my research in this area. I feel that this is an area which would benefit from further investigation from scholars who are more intellectually gifted than me. In particular, the idea that the Lockean Proviso that we leave 'enough and as good' for others might provide a powerful reason for limiting our emissions seems something which warrants deeper consideration than I have been able to give it. This is especially true when we consider that such a proviso need not only be applied within a Nozickian framework, and might therefore provide good reason for protecting against future violations of the rights of current people through the release of undue levels of emissions (and thus inadvertently protecting future persons from those same emissions) without the

need to endorse a rights-based morality with such great disregard for positive duties.⁴⁵¹

⁴⁵¹ Chapter 6 of this thesis asserted that it is largely an inability to allow positive duties which prevents Nozickians from making adaptations to safeguard against the harm which results from their emissions. This fact, when paired with the Lockean Proviso, means that Nozickians must reduce their emission levels. However, it seems possible that the inability to make adaptations due to a prohibition on positive duties is neither a necessary nor sufficient factor in such a calculation. If we are indeed bound by a Lockean Proviso to leave enough and as good clean air for other current persons to use throughout their lives, there is no reason to believe such a duty to have been met through adaptation techniques which, while reducing harm, actually serve to further *decrease* the level of clean air which is available to current persons in the future. It is therefore plausible to suggest that other scholars might seek to use the Lockean Proviso to provide a firm grounding for their objections to emissions without simultaneously endorsing a controversial Nozickian system of morality.

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