

ABSTRACT

Title: **Essays in Human Rights and Education:
Accommodating Vulnerable Minorities**

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Numerous questions arise in the effort adequately to accommodate and serve minority students in public education, not the least of which are questions concerning how education decisions are made, by individuals, groups, or the state itself. This dissertation begins with the broadest, most far-reaching kinds of decisions, those made by groups (or representatives of groups) during the process of education policy formation. It then moves closer to home (and school), to the narrower kinds of decisions made by individual parents, school officials, and school-age children.

The first essay engages in a broad theoretical discussion, applicable beyond education policy, and then applies this perspective to indigenous education. It asks: How might we evaluate the degree of self-determination that indigenous peoples exercise in decisions that affect them? In order to answer this question, this chapter suggests a theoretical framework for evaluating public participation and applies it to Sámi education policy-making in Norway. The second essay engages in a similarly broad theoretical discussion, though in this case it is motivated by an education policy problem. It asks: What ought to be the role of parental consent in education decisions that affect their children? It takes as its jumping-off point three European

Court of Human Rights cases of educational discrimination against members of the Roma population, Europe's largest, poorest, and fastest-growing minority group. The final, and most applied, essay proceeds in the reverse order, beginning with an empirical question, and concluding with a discussion of the theoretical implications of the results. This essay uses quantitative methods to test whether Roma students do, in fact, have a higher drop-out rate than similarly situated non-Roma students and, finding that they do, asks why. This chapter goes on to investigate the labor market for Roma and subsequently to delve into the role of adaptive preference formation in schooling decisions (Do Roma really not "value" education, as is so often suggested?). The work closes with a short discussion of areas for future research.

ESSAYS IN HUMAN RIGHTS AND EDUCATION:
ACCOMMODATING VULNERABLE MINORITIES

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Dedication

To my husband, with his limitless patience, support, and love, and to my daughter, whose sense of timing reminded me in the best of all possible ways that that which is truly important in life cannot be measured in pages, positions, or degrees...

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Contents

Dedication.....	ii
Acknowledgements.....	iii
List of Tables	vi
I. Introduction.....	1
1. The Roma.....	6
2. The Sámi	8
3. Essay I.....	11
4. Essay II	13
5. Essay III	14
II. Agency Vulnerability and Self Determination: An Application to Indigenous Participation	17
1. Vulnerability and Self-Determination.....	23
1.1. Vulnerability of Minorities and Indigenous Peoples	27
2. Self-Determination: Substance and Process.....	33
2.1. Participation as the Key Process Aspect of Self-Determination.....	37
3. Participation: Building a Framework for Evaluation.....	39
4. Assessing Sámi Self-Determination in Norway.....	43
5. Education and Participation	48
6. Sámi Participation in Sámi Curriculum Development.....	53
6.1. Reorganizing the Sámi Education Council	56
6.2. “Reform 97” Process.....	59
6.3. “Knowledge Promotion 2006” Process.....	65
7. Conclusion	78
III. Parental Consent and Children’s Rights in Europe: A Balancing Act.....	80
1. Children and Parents as Rights-Bearers.....	84
2. The Cases	89
3. The Case for Parental Consent.....	97
4. The Case Against Parental Consent	104
4.1. Meaningful Consent: Asymmetry, Critical Agency, and Adaptive Preference	105
4.2. Parental Prerogatives and Cultural Liberty	108

5.	The Case for a Threshold.....	115
5.1.	The Deontological Justification for a Threshold	116
5.2.	The Consequentialist Justification for a Threshold.....	118
6.	Conclusion	124
IV.	Educational Attainment and School-to-Work Conversion of Roma in Romania: Adapting to Feasible Means or Ends?.....	128
1.	Introduction.....	128
1.1.	The Roma.....	132
2.	Predicting Educational Attainment: Previous Work.....	138
3.	The Data.....	140
3.1.	Descriptive statistics: education, employment, and poverty	141
4.	Educational Attainment	145
5.	Returns to Education.....	153
5.1.	Employment.....	156
5.2.	School-to-Work Conversion by Ethnic Group.....	159
5.3.	Discrimination in the Job Market?.....	164
6.	Discussion.....	168
7.	Conclusion	175
V.	Conclusion	182
VI.	Areas for Future Research	187
1.	On “Typologies” of Rights	187
2.	On Advocacy Strategies.....	189
3.	On Participation	190
4.	On Agency	193
5.	On Self-Determination.....	194
6.	Final remarks	195
	Appendix A: Crocker’s Typology of Participation.....	196
	Bibliography	198

List of Tables

Table 1. “Quality” of Participation: Entry Points and Modes of Public Participation.....	43
Table 2. Analysis of R97S Reform Process.....	65
Table 3. Analysis of KP06S Reform Process.....	76
Table 4. Summary of Entry-Points and Modes of Participation, with Quality Points (1993-2007).....	77
Table 5. Comparative Descriptive Statistics, Non-Roma and Roma (t-tests).....	144
Table 6. Explaining Primary School Completion (individuals ages 17-20 with mother in household at census time).....	151
Table 7. T-tests for Employment by Roma Status.....	157
Table 8. Effects of Roma Status on Employment.....	159
Table 9. Employment Predictors by Ethnic Group (Model 10).....	162
Table 10. Effects of Roma Status on Occupation Type.....	164
Table 11. Non-linear decompositions of employment gaps (employed and employment type).....	167
Annex 1, Table 1. Definitions of main variables.....	180
Annex 1, Table 2. Summary statistics: Full Sample.....	181
Annex 1, Table 3. Summary statistics: Sample restricted by age (17-20) and mother-in-household.....	182

I. Introduction

It is the integrity of the inner worlds of peoples—their rectitude systems or their sense of spirituality—that is their distinctive humanity. Without an opportunity to determine, sustain, and develop that integrity, their humanity—and ours—is denied. ~George Steiner¹

This dissertation investigates several ways in which individuals and groups make (or do not make) education decisions for themselves and the normative, legal, and political questions that arise in the process. States often struggle to accommodate, and adequately serve, minority students in national education systems. Sometimes these struggles arise from the desire of cultural minorities to retain some control over their children’s education (a desire that is backed up in various ways and to varying degrees by international human rights law). Other times, the struggles arise from the difficulty of ensuring the success of minority students who often come from disadvantaged backgrounds, speak a different language in the home, or face other barriers to attendance and achievement. Where such struggles are thought to stem at least in part from cultural differences, one possible—and increasingly common—response is to develop creative social policies aimed at protecting the well-being and cultural freedom of vulnerable minorities. Call these “multicultural policies,” policies that, in Will Kymlicka’s words, are “designed to provide some level of public recognition, support or accommodation to non-dominant ethnocultural groups” (Kymlicka 2007, 16).

¹*After Babel: Aspects of Language and Translation*, 53 (1992), in Wiessner (2008), 1171

The recognition that “people are unique, self-creating, and creative individuals”—in contrast to the archetypal, universal citizens in pursuit of a common good—goes back (famously) at least as far John Stuart Mill and Ralph Waldo Emerson (Gutmann 1994). Under this conception, people aspire to something like Rob Reich’s ideal of the autonomous agent, where autonomy refers to “a person’s ability to reflect independently and critically upon basic commitments, values, desires, and beliefs, be they chosen or unchosen, and to enjoy a range of meaningful life options from which to choose, upon which to act, and around which to orient and pursue one’s life projects” (Reich 2002, 92). Recognition of this individuality and autonomy (what I refer to as “agency” in the chapters that follow) is at the heart of the concept of “multiculturalism.” Charles Taylor, one of today’s most well-known identity theorists (and not the Liberian tyrant), explains the political incarnation of this philosophy simply as the demand many people make that public institutions recognize their identity or identities (Taylor 1994). These demands are particularly strong within minority rights movements. Christine Inglis tells us that “multiculturalism” (in the “programmatic-political,” as opposed to the normative, sense) refers “to specific types of programs and policy initiatives designed to respond to and manage ethnic diversity” (Inglis 1996, 16). Education programs figure prominently among such policy initiatives.

The right to education is enshrined in numerous international, regional, and state laws. It is also one of the surest ways for individuals to expand their own set of valuable capabilities and, as a source of dignity and even joy, can be inherently

valuable. Specifically, education may be one of the most powerful weapons available to combat exclusion, poverty, and abuse. It is also crucial to developing the critical agency necessary to recognize and pursue the things in life that one values and has reason to value, whether that be through individual pursuits or through one form or another of collective public participation. The role of education in encouraging such civic participation is well established. Education can increase the likelihood of individuals to vote (Blais 2000); it can help instill in individuals a sense of civic duty (Rosenstone and Wolfinger 1980); and it can be used to teach the skills of civic participation (Levine and Higgins-D'Alessandro 2010, Verba, Brady and Schlozman 1995).

Education also plays a pivotal role in identity formation. Control over the content, structure, and aims of one's education is, moreover, a powerful tool for ensuring cultural autonomy and survival. It is also an important symbolic gesture, a recognition of the value to individuals and groups of having some control over the preservation of their past, the dignity of their present, and the guiding of their future. Indigenous peoples and minorities around the world have struggled to protect, preserve, and develop their own education systems, sometimes parallel to, sometimes within the bounds of, existing (majority) education systems. They often do so against an historical backdrop of abuse, exclusion, and forced assimilation in which national education policies long have been complicit.² This is as true in Europe, with its robust human rights system, as it is elsewhere.

² By "assimilation," I am referring to a policy of diluting or erasing certain characteristics (culture, language, practices, and so on) of a minority group and replacing them with their "mainstream"

In implementing adequate systems of minority education, whether as part of national curricula and schooling systems or as autonomous or semi-autonomous systems, policy makers run up against many difficult normative and practical questions. How does one balance the aim of building an inclusive and diverse national curriculum with that of respecting minority cultures (which might include a language, religion, or set of traditions that differ from the majority population)? How does one ensure that all children receive a rich, full education that will adequately prepare them to be active players in their country's society and economy, while also allowing minorities the freedom to pursue traditional modes of education? In the case of Europe, how does one uphold the legal obligation to allow minority groups to set up and run their own schools with the equally binding legal obligation to ensure that the human rights of all individuals—including schoolchildren and their guardians—are respected? How does one ensure equal access to the avenues for, and benefits of, education for marginalized groups? Can a single national education system ever be equally valuable to all segments of society? What is the role of the state in enforcing compulsory schooling when that schooling is resisted by certain groups as irrelevant, inappropriate, or financially impossible? These are just a few of the questions with which education policy makers must wrestle.

I cannot hope to do justice to all of these questions at this time. In this collection of three essays, I aim to answer, through both normative and quantitative

counterparts. The goal of assimilation, in this sense, is ultimately to make members of a cultural minority group as indistinguishable as possible from members of the majority.

inquiry, three questions that arise in the effort adequately to accommodate and serve minority students in public education. Two essays forward a theoretical argument which I then apply to a specific case of minority education; a third essay begins with empirical work and concludes with a theoretical discussion. The large pan-European Roma population (typically considered an “ethnic minority” or “national minority”), and the Sámi (typically considered an “indigenous” people) in the Nordic countries and Russia, are two examples of peoples who have struggled with education systems that have, for different reasons at different times, failed to meet their needs, with consequences for individual and collective agency. Thus, two of the essays take the Roma people in Europe as their population of interest; a third takes up the case of the Sámi in Norway.³

The first essay (“Agency Vulnerability and Self Determination: An Application to Indigenous Participation”) engages in a broad theoretical discussion, applicable beyond education policy, and then applies this perspective to indigenous education. I ask: How might we evaluate the degree of self-determination that indigenous peoples actually exercise in decisions that affect them? In order to answer this question, I suggest a theoretical framework for evaluating public participation and apply it to Sámi education policy-making in Norway. In the second essay (“Parental Consent and Children’s Rights in Europe: A Balancing Act”), I engage in

³The first essay was published in 2010 and has been presented at three international conferences and in the Maryland School of Public Policy Tuesday Forum between 2009 and 2010. The second has also been accepted for publication in 2012 and, between 2008 and 2010, was presented at one international conference and in two PhD courses and was evaluated for a comprehensive exam in quantitative methods. The third, and most recent, has not been submitted to any journals at this time but in September, 2011, it was presented at an international conference and at the Maryland School of Public Policy Development Circle.

a similarly broad theoretical discussion, although in this case it is motivated by an education policy problem. I ask: What ought to be the role of parental consent in education decisions that affect their children? I take as my jumping-off point three European Court of Human Rights cases of educational discrimination against Roma. The final, and most applied, essay (“Educational Attainment and School-to-Work Conversion of Roma in Romania: Adapting to Feasible Means or Ends?”) proceeds in the reverse order, beginning with an empirical question, and concluding with a discussion of the theoretical implications of the results. This essay uses quantitative methods to test whether Roma students do, in fact, have a higher drop-out rate than similarly situated non-Roma students and, finding that they do, asks why. This second question leads me to investigate the labor market for Roma and subsequently to delve into the role of adaptive preference formation in schooling decisions (Do Roma really not “value” education, as is so often suggested?). In the introductory pages that follow, I briefly introduce these two minority groups before offering a short overview of each chapter.

1. The Roma

The Roma are Europe’s largest ethnic minority, with about 10-12 million individuals dispersed throughout the region.⁴ They are also one of its poorest and fastest growing populations. Centuries of discrimination and marginalization have

⁴ The “Roma” are a diverse people. There is controversy over the term but I follow convention by including under this umbrella Roma, Sinti, Ashkali and others. Most official estimates put the Roma population at around 10-12 million, but many estimates are much higher, since reporting problems and a reluctance on the part of many Roma to self-identify make it unlikely that all Roma are counted as such—or at all—in censuses.

left the Roma in a vicious cycle of poverty and unemployment, furthering their exclusion as both ethnic and economic *personae non grata*. For much of the twentieth century, Roma engagement in national education systems was characterized by either assimilation or exclusion. In more recent years, the European Union has been expanding to include areas with larger Roma populations (the countries of Central and Eastern Europe), putting the Roma on the agendas of accession countries required to meet certain standards for development, human rights, and anti-discrimination policy.

Still, large numbers of Roma youth are not completing even primary school, let alone secondary school (Kosko forthcoming 2012, Open Society Institute 2007). Roma complete significantly fewer years of schooling (measured as “educational attainment”) than non-Roma, and an endless stream of government and non-profit publications report that educational outcomes for Roma remain stagnant or, at best, are improving very slowly. Moreover, these improvement rates tend to be measured mostly in terms of declining rates of failure rather than in learning outcomes (“achievement”) (Open Society Institute, 2007). Compounding both the attainment/achievement and measurement problems, Romani children continue in many countries to be segregated into separate schools or programs for the learning disabled. This practice continues despite European Court of Human Rights rulings and, in some countries, legislation prohibiting it (Greenberg 2010, Kosko 2004, United Nations Development Programme 2002, Organization for Security and Cooperation in Europe 2000).

There remains a great deal of debate about the precise reasons why Roma leave school at such an alarmingly high rate. It is likely that segregated schools are a factor in perpetuating the high drop-out rate, though no reliable statistics exist at the national level that disaggregate the Roma educational attainment rate by type of school. Connections between poor employment outcomes and educational attainment—and the preferences young people develop as a result—also remain speculative. Meanwhile, legal and ethical questions persist about the role of school officials and parents in making life-changing schooling decisions for young Roma students.

2. The Sámi

The Sámi, once (and now pejoratively) referred to as “Lapps” or “Laplanders,” see themselves as a single people spread across the territory of four nation-states (Finland, Norway, Russia, and Sweden). Finland, Norway and Sweden, in different ways, have all publicly recognized the Sámi as an indigenous people with a right of self-determination. But Norway, home to the world's largest Sámi population, is the only country with a sizeable Sámi population to have ratified International Labor Organization Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries (“ILO 169”) and thus for many years was viewed as the only country to have accorded Sámi “indigenous status” in an internationally

recognized, legally binding way.⁵ For more than a century prior to this development, from about 1869 to 1970, the Government of Norway maintained an overtly assimilationist policy toward the Sámi, using the schools as a policy tool in the effort to erase cultural and linguistic differences between the Sámi and mainstream society (Todal 2003, Corson 1995).

In 1969, the Comprehensive School Act guaranteed the right to be taught the Sámi language in school and the government began a trial program of allowing beginning instruction in the Sámi language in primary and lower secondary schools, for those Sámi students who spoke the language at home. In 1985, the Sámi won the right to be instructed in other subjects in the Sámi language (Balto and Hirvonen 2008, Todal 2003, 186-90).⁶ Two institutions had primary responsibility for the development of Sámi education during this time: the Sámi Education Council (started in 1975) and the Sámi College (started in 1989). However, the Sámi Education Council remained until 2000 under the jurisdiction of the Norwegian Department of Education. The Sámi Parliament, the Sámediggi, was established by the 1987 Sámi Act and formally launched by the King in 1989, initially with a consultative purpose, to be expanded later to include decision-making authority (Smith 1995). By 1997, the government had formally adopted a separate Sámi

⁵ Recognizing a group as indigenous through ratification of an international treaty concerning those peoples makes the state accountable for upholding the treaty's provisions, whereas other forms of public recognition—for example constitutional acknowledgment or official policy statements—carry rhetorical and symbolic, but not necessarily legal, weight.

⁶ As of 1995, Norway was home to about 25,000 Sámi speakers, a number that has presumably increased since the passing of the Sámi Language Act in 1992 (Corson 1995, 495). “In large towns like Kautokeino and Karasjok, a Sámi language is used as the everyday language by almost all Sámi. Its status and use are increasing, while the use of Norwegian by Sámi is decreasing” (Corson 1995, 449). More recent estimates are hard to come by. The *CIA World Factbook 2011* lists simply “small Sámi-speaking minorities” (CIA 2011).

curriculum that applied to all elementary and lower secondary school subjects in six predominantly Sámi counties in Northern Norway. In 2000, the Norwegian government turned over some of the control of the Sámi education system to the Sámi Parliament, at the same time transferring the Sámi Education Council to the jurisdiction of the Sámi Parliament (Todal 2003, 187-90).

There is some sense that these developments represent the “state of the art” in indigenous accommodation in education policy, but much debate remains about whether the nature and scope of Sámi participation in education decisions that affect them is in fact sufficient, and what “sufficient” even means. It is unclear whether the Sámi actually enjoy significant self-determination in education, as the government of Norway claims they do and as the Sámi appear to desire. Of course, if self-determination is a matter of degree, they might enjoy trivial or modest self-determination but not significant or sufficient self-determination.

With the above background on the Roma and Sámi, and on related issues in national educational policies to accommodate these minority communities, I turn now to a brief overview of each of the three essays that comprise this dissertation.

3. Essay I⁷

Development, understood as a process of social and economic change, can be a source of great freedom. But when individuals and groups have little or no control over that process, it can be a source of vulnerability as well. In this chapter, I focus on what I call “agency vulnerability,” the risk of being limited in our ability to control the social and economic forces that affect us. Minority individuals and groups are often the most susceptible to harm, including those forms that arise from agency vulnerability. In particular, indigenous peoples struggle against both individual and societal vulnerabilities and often have the least control over circumstances and changes that affect them. The language of human rights is frequently used to justify policies aimed at reducing vulnerability. For indigenous peoples, this often takes the form of a right to self-determination, a right in part intended to reduce “agency vulnerability.” Participation, I argue, constitutes a key component of the process (which I distinguish from substantive) aspect of self-determination. With this in mind, I propose a framework for evaluating the extent of participation of indigenous peoples in decisions that affect them.

My analytical framework combines the work of Denis Goulet and David A. Crocker. I first situate the principle of self-determination as the legal and political expression of Amartya Sen’s development-as-freedom paradigm (Sen 1999), in particular Crocker’s “agency-oriented” understanding of it. Homing in on the

⁷ “Agency Vulnerability and Self Determination: An Application to Indigenous Participation.” A revised excerpt of this chapter is currently under a “revise-and-resubmit” with the *Journal of Global Ethics*.

importance of participatory development for self-determination, I then deploy Goulet's concept of "entry points" into participatory processes (Goulet 1989), followed by Crocker's delineation of "thin" versus "thick" "modes of participation" (Crocker 2008), in order to establish the extent to which an indigenous people is in fact able to ensure for itself the development and sustainability of a society that allows its members to "lead the kind of lives they value—and have reason to value" (Sen 1999, 18). In the second part of this chapter, I apply this framework to the case of the Sámi people in Norway.

The Kingdom of Norway is often lauded as a leader in its efforts to accommodate its indigenous Sámi population. Particularly notable is its establishment of specific mechanisms for the exercise of collective agency on the part of this group. But do these mechanisms—and the way they operate in practice—actually permit the Sámi to participate significantly, if not fully, in decisions that affect them? The answer to this question goes a substantial part of the way toward answering another timely question: Do the Sámi in Norway actually enjoy significant self-determination? Here, I focus on their control of the Sámi education system, an area crucial for self-determination and one that the Sámi have identified as central to their economic, social, and cultural freedom.

4. Essay II⁸

This second essay moves the discussion from questions of group participation in education policy decisions, to questions of individual participation in private education decisions (with public policy implications). For many Europeans, the promise of an adequate—let alone rich—education remains unfulfilled. In particular, a large number of Europe’s ten to twelve million Roma citizens (“Gypsies”) never complete primary school, let alone high school (Kosko forthcoming 2012, Open Society Institute 2007). This crisis arises in part from, and also reinforces, the severe social, economic and political marginalization of the Roma people.

The European Convention for Human Rights and Fundamental Freedoms protects rights to education and freedom from discrimination, yet governments charged with discrimination in the provision of education have argued before the European Court of Human Rights that the consent of a student’s parents can be proof that an action was not discriminatory. Three recent European Court of Human Rights cases of discrimination in education against Roma raise the question of what conditions must be present for parents to give “meaningful” consent in decisions pertaining to their children and whether such consent can be meaningful when a fundamental freedom is at stake. The chapter investigates the nature and limits of parental consent and makes the case for a “threshold” above which respect for the dignity of the parents requires meaningful consent for any decision pertaining to their

⁸“Parental Consent and Children’s Rights in Europe: A Balancing Act.” This chapter is a revised version of a paper originally published in *Journal of Human Development and Capabilities*, August, 2010.

children and below which respect for the human rights of the child prohibits interference with the exercise of a right. Identifying the exact location of the threshold in any specific case requires local-level public deliberation; insisting that decisions meet those threshold conditions, and enforcing their recognition, is a job for the Court.

5. Essay III⁹

The final essay delves into the conditions and mechanisms in the context of which individual education decisions are made in the first place. It is no secret that Roma are among the least educated individuals in Europe, partly arising from, and with disastrous consequences for, Roma exclusion. But *why* do Roma complete so much less formal schooling than non-Roma? Despite the political prominence of the Roma education crisis, few empirical studies have sought to answer this question. This essay does just that and, in doing so, questions the assumption that education is something that all “have reason to value” if it is unlikely to bring clear benefits—for example future income or access to gratifying careers—especially if it also interrupts the pursuit of other valuable opportunities, such as those for present income. This is a particularly salient trade-off for many desperately impoverished Roma.

⁹ “Educational Attainment and School-to-Work Conversion of Roma in Romania: Adapting to Feasible Means or Ends?” This chapter is a revised version of a paper that is forthcoming in the *Journal of Human Development and Capabilities*.

This essay explores two questions that aim to assist the Romanian government in identifying the most effective policies for increasing educational attainment among its most disadvantaged group. Relying on 2002 census data from Romania—the country with the largest Roma population in Europe—I first test whether Romanian Roma complete primary education at the same rate as non-Roma and find that, *ceteris paribus*, Roma have 77 percent lower odds of finishing eighth grade. Next, this study seeks to explain this difference: Do Roma simply not “value” formal education? I hypothesize that the high opportunity cost of education (due to the extreme poverty many Roma face) combined with perceptions of low returns to education (due to comparatively high unemployment levels and low average wages) decreases the incentive to stay in school and can result in a rational calculus to drop out. Put another way, Roma may have less reason to value education in the face of immediate deprivation, resulting in possible preference adaptation. Logistic regressions reveal that, regardless of education, they have 57 percent lower odds of employment and two and a half times the odds of winding up in unskilled labor. I hypothesize that one omitted variable that could be driving these results might be discrimination in hiring. Another might be differences in the quality of education, with many Roma being sent to “special schools” for children with learning disabilities.

This study reveals that not only are Roma completing fewer years of schooling than non-Roma, they are less able to convert that schooling into gainful employment, forcing us to ask whether Roma might be exhibiting adaptive preferences not just regarding the feasibility of getting an education but regarding the

ends of that effort. This chapter distinguishes between adaptation to available means and adaptation to perceived ends in order to arrive at a more nuanced account of the possible psychological drivers of school-leaving, with different implications of each explanation for public policy. I first conclude that if the government wishes to increase educational attainment of Roma, it should take into account the problem of disrupted or diluted school-to-work conversion—not a controversial view but one that has not yet been backed up by rigorous empirical work. Further, my findings provide an alternative to the often heard explanation that Roma do not “value” education and instead force us to ask instead whether the education they are receiving is something that they should “have reason to value” if it does not result in an expanded capability set (including access to better job opportunities), especially given the high opportunity cost of secondary schooling.

II. Agency Vulnerability and Self Determination: An Application to Indigenous Participation

Eamiálbmogiin lea vuoigatvuohta iešmearrideapmái. Dán vuoigatvuođa vuodul sii mearridit friddja iežaset politihkalaš sajadaga ja ovddidit friddja iežaset ekonomalaš, sosiála ja kultuvrralaš gárggiideami.

~Artihkal 3,

Ovttastuvvan Našuvnnaid Eamiálbmotvuoigatvuođaid Julggaštus¹⁰

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

~Article 3,

United Nations Declaration on the Rights of Indigenous Peoples

Denis Goulet argues that vulnerability is a characteristic of both individuals and societies. “An individual is vulnerable when he is exposed to injury, societies when they have no adequate defenses against the social forces which propel them into processes of change” (Goulet 1971, 38).¹¹ Development, understood as a process of social and economic change, can be a source of great freedom. David A. Crocker has something like this in mind when he describes development as “beneficial social change” (Crocker 2008). But when individuals and groups have little or no control over that process, it can be a source of vulnerability as well.

Vulnerability, or “susceptibility to harm” (Camacho 2010, 142), has many forms. Its sources are multifaceted and intersecting. Human beings face countless threats, for example to their physical security and wellbeing, including vulnerabilities

¹⁰ Translation by the Finnish Sámi Parliament into the North Sámi language, submitted to the United Nations Permanent Forum for Indigenous Peoples:
<http://www.un.org/esa/socdev/unpfii/en/declaration.html>.

¹¹ I will elaborate on this thesis—as well as its corollary, a lack of defenses that enable a society to resist unwanted change—below.

to poverty, violence, and disease. Individual *identity* (whether simple or complex), intimately bound up with (often multiple) group identities, is also vulnerable, threatened by linguistic marginalization, cultural oppression, religious intolerance, and worse. These threats also have implications for individual *agency*, including that which is exercised in concert with one's peers.¹² Individual security, wellbeing, identity, and agency on the one hand, and group identity on the other, are connected and interdependent. A reduction in or restriction of one can greatly impact the other.

All individuals and groups are susceptible to harm, but minority groups often face the gravest constellation of such threats. Of these, indigenous groups, or "peoples," are among history's greatest losers in the processes of social and economic change—development—that have transformed the geo-political landscape in the last half-millennium. They struggle against both individual and societal vulnerabilities and often have the least control over circumstances and processes of change that affect them. The language of human rights is frequently used to justify or promote policies aimed at reducing vulnerability. Where indigenous peoples are

¹² Here, following Amartya Sen and David A. Crocker, I use the term "agency" to refer to one's ability to reflect critically upon the options one faces, to choose deliberately between them, to act on those choices, and possibly to make a difference in the world, or at least in one's own life. In his most recent book, Crocker characterizes agency this way: "Persons are agents to the extent that they are able to scrutinize critically their options, themselves decide (rather than have the decision made by someone else or external or internal force), act to realize their purposes, and have an impact on the world" (Crocker 2008, 219-220). This is very different from the use of the term in economics to distinguish a principal from an agent, in which the agent is (supposed to be) an instrument of the principal and to do the principal's bidding. Also, Crocker (like Rob Reich) describes agency (in Reich's terms, "autonomy") as a "scalar concept": one can have more or less agency (be more or less autonomous). For a useful discussion of the concept in Sen's work, see Part II of the Crocker and Robeyns chapter "Capability and Agency" in *Amartya Sen*, Christopher Morris, ed. (Crocker and Robeyns 2009). For a discussion of the role of one's "highest values or moral principles" in the exercise of agency, as well as its relationship to Adela Cortina's, Flavio Comim's, and Rob Reich's concepts of autonomy, see Crocker 2008, Chapter 7, especially footnote 12, page 249-50. See also Rob Reich (2002), Chapter 4, on "minimalist autonomy."

concerned, this most often takes the form of a right of self-determination. James Anaya, scholar and former UN Special Rapporteur on the Rights of Indigenous People, explains that “[u]nderstood as a human right, the essential idea of self-determination is that human beings, individually and as groups, are equally entitled to be in control of their own destinies, and to live within a governing institutional order that is devised accordingly” (Anaya 2008, 49-50).

Often assumed to imply that every group that considers itself a “people” has a right to its own state, the concept of self-determination has not always enjoyed broad acceptance in the post-Westphalian club of sovereign states. The “self-determination bomb” (Buchanan 2004, 332) has only recently begun to be defused by legal and political scholars and indigenous leaders who have worked to decouple the principle from the idea of a universal right of secession. Buchanan rejects as unhelpful at best and counterproductive at worst “loose talk” of a generally applicable “right of self-determination of all peoples” (Buchanan 2004, 333). He views the concept as potentially counterproductive because states continue to perceive a secession threat in any group's call for self-determination, thus squelching possibly useful discussions about other remedies for the group's concerns. He views the concept as unhelpful because there are so many ways to specify self-government arrangements made possible by the generally stated right. Instead, he prefers the term “autonomy,” which, although he admits it suffers from the same indeterminacy problem as “self-determination,” at least does not come with the secession baggage. Buchanan’s project pushes for “a coherent, practical, and morally defensible international legal

system [that] would *uncouple* secession from other forms of autonomy and deny that recognition of a group's right to autonomy within the state entitles it to opt for full independence if it chooses." Meanwhile, although he prefers the term "autonomy," he nevertheless argues that "misleading talk of *the* right to autonomy and *the* right to self-determination should be avoided" and replaced by language that recognizes "a broad range of intra-state autonomy regimes" (Buchanan 2004, 343).

Anaya recognizes the "secession" problem, but rather than scrapping what has proven to be a powerful legal and rhetorical tool for political mobilization, he simply seeks to explain the concept of self-determination more clearly, offering a conception that neither includes a universal right of succession nor seeks to prescribe specific institutional arrangements. Simply put, "self-determination means that peoples are entitled to participate equally in the constitution and development of the governing institutional order under which they live and, further, to have that governing order be one in which they may live and develop freely on a continuous basis" (Anaya 2008, 51). Thus, according to Anaya, the emphasis today is not on statehood—a claim that few contemporary indigenous groups make¹³—but on participation and freedom, twin entitlements hard won in the global indigenous movement.

¹³ According to Siegfried Wiessner, "no indigenous nation seriously raises a claim for secession other than the conditional claim by the James Bay Cree Indians, who have threatened to secede from Québec if Québec manages to secede from Canada" (Wiessner 2008, 1160). Wiessner seems to use the term "indigenous" here to refer to something like the non-European, colonized peoples that the term implies in popular culture, and not to include groups such as the Basque that are sometimes also referred to as indigenous.

If we understand societal vulnerability as Goulet does, as arising in part from a lack of control over the social processes that propel us to into change (or keep us from changing)¹⁴, then self-determination can be understood as one way to reduce (certain aspects of) the vulnerability of indigenous societies. However, indigenous peoples have struggled to have their right of self-determination recognized as the same right that “all peoples” enjoy, as per Common Article 1 of the 1966 UN Human Rights Covenants: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” Today, the accepted norm of self-determination requires governments to be set up in a way that allows “individuals and groups [to] live and develop freely on a continuous basis” (Anaya 1993, 133). Some governments have established specific mechanisms for the exercise of indigenous collective agency, but do these mechanisms—and the way they operate in practice—actually permit the people in question to participate fully in decisions that affect them?¹⁵ Put another way, do these peoples actually enjoy self-determination?¹⁶

¹⁴In my discussion on vulnerability below, I will return to this other aspect of Goulet’s idea, the recognition that societies can also be vulnerable when they are prevented from seeking to make changes they might desire.

¹⁵ Jay Drydyk, in responding to an early presentation of this paper, asked whether the meaning of “participation” for indigenous peoples ought to reflect their cultural traditions of governance, for instance the value they may or may not place on consensus, on the role of elders, etc. This paper proceeds from the assumption that, regardless of their traditional understanding of participation for internal decision-making, indigenous peoples—or any other non-elite group that desires a role in decisions made by a powerful elite—have reason to value participatory processes that privilege thicker forms of participation, that begin earlier in the decision making process, that seek consensus, and that include mechanisms for the exercise of real power by all involved. This assumption might be incorrect and it is worth pursuing this question in further research, but for now it is the basis of the discussion that follows.

¹⁶ In the discussion that follows I will defend my linkage of participation and self-determination, concepts that are overlapping but not identical.

We can try to answer this question by taking, as an illustrative example, one policy area in which self-determination is particularly important and assessing not just the structural opportunity for, but the actual enjoyment of, self-determination in this area. But we need a framework that allows us to do this. In the first part of this chapter, I attempt to develop such a framework, taking as a starting point Anaya's widely accepted conception of self-determination (above), with its focus on participation and freedom (Anaya 2008, 51). I then situate the principle of self-determination as the legal and political expression of Amartya Sen's development-as-freedom paradigm (Sen 1999), in particular Crocker's "agency-oriented" understanding of it (Crocker 2008). Distinguishing between the substance and the process of self-determination, I next home in on the importance of participatory development as the key process aspect of self-determination. Finally, I build a modest evaluative framework, deploying Goulet's concept of "entry points" into participatory processes (Goulet 1989), followed by Crocker's delineation of "thin" versus "thick" "modes of participation" (Crocker 2008). This framework allows us to evaluate whether a given group is, in fact, able to ensure for itself the development and sustainability of a society that allows its members to "lead the kind of lives they value—and have reason to value" (Sen 1999, 18). That is, it offers one possible way to determine whether a people enjoy significant self-determination with its powerful implications for their particular societal vulnerability, an existential concern for many if not most indigenous peoples.

In the second part of this chapter I apply the proposed framework to a specific case of indigenous participation: that of Sámi involvement in education policy-making in Norway. The Kingdom of Norway—the only Nordic state to have ratified International Labor Organization Convention (ILO) 169 Concerning Indigenous and Tribal Peoples in Independent Countries—is often lauded as a leader in its efforts to accommodate its indigenous population. Particularly notable are its language and human rights laws, and its establishment of specific mechanisms for the exercise of collective agency on the part of the Sámi. But do the Sámi in Norway participate meaningfully in policy decisions that affect them? Do they enjoy significant self-determination or exercise meaningful agency in the area of education?

1. Vulnerability and Self-Determination

The word “vulnerability” comes from the Latin for wound, or *vulnus*, and translates roughly to “the inability to defend oneself against wounds” (Goulet 1971, 38). In the literature, the term is commonly associated with susceptibility to environmental hazards, and increasingly to poverty or ill health, but here we can retain its original, context-sensitive meaning and define it more broadly, as Luis Camacho does, as simply “susceptibility to harm.” As Goulet points out, both individuals and societies can be susceptible to harm. Development—understood as human-induced social change intended to be beneficial—can bring great freedom and help to reduce both individual and societal vulnerability, but if individuals and groups have little or no control over these changes, then development can be a source of

vulnerability as well. This is especially true when development processes leave some behind or prevent them from getting ahead or preserving what they value.

Camacho, following Goulet, makes explicit the link between poverty and this conception of vulnerability, arguing that “[p]oor people experience underdevelopment as vulnerability” (Camacho 2010, 144).¹⁷ But this is also true when individual (physical, economic) well-being is improving but one lacks any meaningful control over the ends and means of those improvements. Vulnerability, then, is a concept that can be applied equally to economic and physical security and to agency. What we might call *agency vulnerability*—the risk of being limited in our ability to control the social and economic forces that affect us—can remain, perhaps acutely so, even as physical or economic vulnerability is greatly reduced.¹⁸

This is true of both individuals and societies and is a limitation on what Crocker, following Adela Cortina, refers to as being the “master of one’s own life... to be self-determining not only with respect to one’s conduct but also with respect to one’s moral commitments and beliefs” (Crocker 2008, 219). One can imagine “well-

¹⁷ There is an extensive body of literature that attempts to define economic vulnerability. Economic vulnerability, for example, might be understood as an inability to respond to economic shocks or as the condition of living for a prolonged period below a certain poverty line. The World Bank defines it as “the probability or risk today of being in poverty or to fall into deeper poverty in the future” (World Bank 2011). I will not attempt to define economic vulnerability here, as even the vague or intuitive conception is illustrative enough for our purposes. However one defines it, it constitutes one form of vulnerability among many.

¹⁸ Clearly no person or group has total control over the future or over processes of change that affect us. The point is that neither should someone else. According to Rob Reich, “[t]he sovereign or self-determined life is one in which *no outside person or force* controls a person’s destiny” (Reich 2002, 98, emphasis mine). In this sense, then, I am referring to the control that might be reasonably expected of autonomous actors, what the *Arctic Human Development Report*, in its discussion of “critical aspects of human development” for Arctic peoples, calls “fate control—guiding one’s destiny” (Arctic Human Development Report 2004, 11).

kept” slaves who enjoy outstanding health and modest material security but who are nevertheless not the authors of their own lives. They may even enjoy significant agency within limited domains (e.g, they control other slaves or make independent decisions about certain aspects of their day-to-day labor). However, they do not have control over their being bought and sold and over many aspects of how they are treated. They are not “the masters of their own lives.” The Sámi people, while nothing like slaves, nevertheless illustrate the importance of recognizing this aspect of vulnerability. The vulnerability of the Sámi to ill health, long considered their greatest source of “demographic vulnerability,” is now about the same as that of the majority population (Axelsson and Sköld 2006, 118), but evidence suggests that their agency vulnerability as a people remains.

In advancing the idea of the agency vulnerability of societies, I rely on Goulet’s useful concept of “societal vulnerability,” occurring “when [societies] have no adequate defenses against the social forces which propel them into processes of change” (Goulet 1971, 38). This might occur, for example, when an indigenous group is forced by circumstance or law to give up a valued form of livelihood. Joseph Nye points out the importance of “conservative leadership” in helping to reduce this type of vulnerability and reminds us that “preserving a group’s valued way of life can be an important form of leadership” (Nye 2008, 66-7).¹⁹

¹⁹We cannot ignore, of course, that such conservatism could be opposed to genuine progress (however understood) or could be used to maintain internal forms of domination (for example to “keep women in their place”). At the same time, it might, for example, help to conserve egalitarian values against the inegalitarian forces of free-market capitalism. Certain such forms of “progress” might in fact be anti-development, at least for societies that value socio-economic equality. David A. Crocker has argued that sometimes good “development” requires being against certain changes. The importance that

There is, however, a corollary to Goulet’s idea of societal vulnerability that is relevant for the concept of agency vulnerability: societal vulnerability can also arise when societies are *blocked* from pursuing desired change. This would be the case, for example, when an indigenous society is constrained by well-meaning national legislation intended to “preserve” traditions and culture, but which in fact excludes the group from important means of social or economic development. Agency is compromised by conditions that *block* change as well as by conditions that bring about change over which the agents have no or little control. This is the essence of *agency vulnerability*. In either case, agents are the tools of others or the victims of circumstance. I am therefore using Goulet’s concept of societal vulnerability as shorthand for any situation in which a society finds itself unable to exercise reasonable control over its social and economic future, whether that future be one in which traditions are maintained, discarded, or—more likely—some combination of the two.

The legal and political space of human rights is one place where we might seek remedies to vulnerability. Bryan S. Turner argues that vulnerability “defines our humanity” and is “the common basis of human rights” (Turner 2006, 1). Thus, if human rights are a response to human vulnerability then, in a legal sense, we can understand serious vulnerability as a rights deprivation. James W. Nickel situates the concept in this way, placing vulnerability together with rights deprivation on a sliding

Goulet places on a society’s ability to resist forces of change ought to be understood in this light, albeit with the caveats mentioned here.

scale. “Let’s say that the holder of a legal right is exceptionally vulnerable when that person’s condition or circumstances make it unusually difficult and expensive to respect or implement his or her right... Claims about exceptional vulnerability are comparative; they say that exceptionally vulnerable people are far more likely than average people to experience the violation, inadequate implementation, or nonimplementation of some right” (Nickel 2008, 258). The extent of one’s vulnerability, then, can be evaluated according to the likelihood of experiencing a rights deprivation.

While Goulet sees vulnerability as a trait of both individuals and societies, Turner sees it also as a trait of institutions (though he uses a different term, institutional “precariousness”). The link between institutional precariousness and individual (and communal) vulnerability requires us to “explore the complex interaction between our human frailty, institution building, and political or state power” (Turner 2006, 1). We might then evaluate the role of our institutions in shoring up—or perhaps worsening—that vulnerability, particularly when those institutions claim to be fulfilling the responsibilities of the state in protecting human rights, as is the case with some governments’ institutional responses to indigenous issues.

1.1. Vulnerability of Minorities and Indigenous Peoples

Quite often, it is minorities who experience the most severe, frequent, or multiple rights violations (or, following Nickel, inadequate, or non-, implementation

of rights), and thus might be said to be “exceptionally vulnerable.” Ethno-cultural minorities, in addition to a host of socio-economic deprivations, often face an additional, collective vulnerability: threats to their cultures, traditions, or ways of life. In Goulet’s terms, this may be understood as societal vulnerability. Will Kymlicka calls this cultural vulnerability of minorities their “particular disadvantage” and, along with Nickel, argues that minorities ought to (and sometimes do) have different rights than members of the majority in order to “overcome vastly different kinds of disadvantages” (Kymlicka 1992, 141). Certain types of rights are designed to target these threats. “[M]any countries give language rights or political autonomy to those who are members of vulnerable minority cultures, since these policies help rectify their particular disadvantage (i.e., their cultural vulnerability). We match the rights to the kinds of disadvantage being compensated for” (Kymlicka 1992, 141).

Such rights are sometimes formulated as group rights, those that aim to protect the range of opportunities and possible ways of being and doing that are bound up in some way with group affiliation. Language use and worship are two such rights (Nickel 2007). These rights, Nickel argues, respond to actual, not hypothetical, threats. A specific human right protects against the possibility that a specific harm will be done to an individual or group, but that harm has been identified and a corresponding right articulated because the violation has previously (frequently, preventably) occurred and because it continues to occur. In this sense, therefore, rights have a remedial character. To say that rights are at their core remedial is not to deny their protective role. Rather, it is to highlight the *historical and present* realities

presented by certain kinds of threats. In Henry Shue's terms, in order to generate a "right," such threats must be shown to be ordinary, severe, yet remediable; in Nickel's terms the threats must be "substantial and recurrent" and the corresponding rights "feasible [to implement] in a majority of countries" (Nickel 2007, 70-79). Henry Shue calls this "the notion of a standard threat" (Shue 1980, 17, 29-34).²⁰ Both Nickel and Kymlicka argue persuasively that many of the kinds of rights mentioned above address precisely such standard threats. *Group* rights are a direct response to the *particular*, ordinary, and severe, but remediable threats that minority individuals face.

In the case of indigenous peoples, whose "particular disadvantage" is intimately connected to an historic loss of sovereignty and traditional territory that continues today, the prescribed "right" is typically self-determination. Collective in nature, it responds to the societal vulnerability of certain peoples, fitting Kymlicka's, Nickel's, and Shue's requirements. A remedial right in the sense that it addresses a particular violation (the infringement of sovereignty at some earlier period), it is not a *sui generis* right, different (or narrower or lesser) somehow when applied to indigenous peoples than when applied to other "peoples." As Anaya, Buchanan, Stavenhagen and others argue, indigenous peoples are not a distinct category of peoples somehow possessing different rights than the rest of humanity. It is the recognition that they possess the *same* rights as all human beings, and that these

²⁰ Shue says that identifying such threats is a "largely empirical question" (Shue 1980, 33). For a thorough discussion of, and framework for, justifying certain rights to protect against those threats, see Nickel 2007, Chapter 5 (and references therein).

rights have been and continue to be violated, which underpins the strong claim of indigenous peoples to a right of self-determination.²¹

Nevertheless, the bearers of the right of self-determination are understood to be only those collections of individuals that might be deemed “peoples.” Anaya argues that the precise meaning of the term “peoples” thus becomes one of “threshold importance” for determining whether this right can be claimed by a particular group (Anaya 1993, 138). However, the international community lacks consensus on the meaning of the term. According to Anaya, some argue that a “people” can be identified using criteria such as ethnicity and a history of some kind of sovereignty. Others consider only the aggregate population of a state to be a “people” (Anaya 2008, 49).

Anaya contends, however, that if “self-determination” is to be understood as a human right, in contrast with a “sovereign right,” then its attribution to “peoples” must refer to something other than a statist or quasi-statist corporate entity. It must refer to a collection of human beings.

More in keeping with the human rights character of self-determination is to see the reference to ‘peoples’ as designating rights that human beings hold and exercise collectively in relation to the bonds of community or solidarity that typify human existence. Because human beings develop diverse and often overlapping identities and spheres of community—especially in today’s world of enhanced communications and interaction on a global scale—the term ‘peoples’ should be

²¹ Any discussion of the violation of individual or group liberty and its connection with the political legitimacy of states inevitably runs into the substantial literature on social contract theory. Such a discussion is beyond the scope of this paper, however. For now I will limit my argument to the claim-and-duty aspects of human rights, and will ground the legitimacy of these claims in existing international law.

understood in a flexible manner, as encompassing all relevant spheres of community and identity (Anaya 2008, 49).

While rejecting its application to a corporate entity like a state, this elucidation of the term still leaves open its application not only to ethnic groups or “nations” but also to groups of people bound by political affiliation (with or without shared citizenship).

In an earlier work, Anaya highlights the possibility, but not necessity, of invoking statehood in the identification of a “people”:

‘Peoples’ is appropriately understood as simply denoting the collective character of the human impulse toward self-determination and as affirming the value of community bonds, notwithstanding traditional categories of human organization associated with statehood or sovereignty (Anaya 1993, 162).

John B. Henriksen understands the term “peoples” as denoting those who fit specific criteria, “e.g. that they have an economic community, territorial affiliation, common history, traditions, ethnic identity, language and culture” (Henriksen 2009, 10). Former Norwegian State Secretary Raimo Valle makes a broader claim: “[w]hat constitutes a people is not defined by territorial borders, but by commonly shared history, language, culture and institutions” (Valle 2008, 39). Henriksen’s and Valle’s use of the term seems to exclude groups bound by political affiliation if they are not also bound by some kind of ethnic or cultural ties, an interpretation that I find too narrow. My own sense is that a group’s designation as a “people” requires the flexibility present in Anaya’s discussion, although a full defense of this position must await further consideration.²² Nevertheless, whatever other groups might fit one or

²² Sorting out the issue of which groups constitute “peoples” for the purposes of self-determination or autonomy rights raises complex questions that are beyond the scope of this discussion. It is an issue to which I hope to return in future research.

the other of these understandings, indigenous groups clearly fit them both. Moreover, the collective essence of Henriksen's and Valle's rendering of the concept of "peoples" appears to be in concert with a growing international consensus that is moving toward including indigenous groups among the "peoples" of the world. This has implications for the application of the several international human rights instruments that establish the right of all "peoples" to self-determination.²³

To summarize, minorities and indigenous peoples experience a "particular disadvantage" when striving to protect themselves against a range of vulnerabilities. These include not only individual physical and economic vulnerabilities but also collective cultural and "societal" vulnerabilities. Broadly speaking, lack of control over the present and future exposes societies to what I call "agency vulnerability." Indigenous societies feel this threat acutely. If human rights can be understood as a way to guard against certain forms of human vulnerability, then the right of self-determination can be understood as a protection against agency vulnerability. If rights are at their core remedial, as argued above, then the case for the right of indigenous peoples to self-determination is clear. The right responds to the violation, becoming a "hedge" against the "particular disadvantage" that that violation likely will or has created. If the precariousness of political institutions is intimately connected to our human frailty, and these are themselves the locus of the state's duty to protect and repair, then we might start by evaluating the effectiveness of state

²³ The first to establish a right of all peoples to self-determination are the two 1966 UN Human Rights Covenants (United Nations 1966[c], United Nations 1966[b]): the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) (Smith 1995). Common Article 1 of the two Covenants establishes this right.

institutions in shoring up indigenous vulnerability, that is, its mechanisms through which an indigenous people can exercise self-determination. And if participation and freedom are the essence of self-determination (an argument I will develop further below), then we might start with an evaluation of the extent of indigenous participation in political processes that affect them. Before I propose and apply a framework for such an evaluation, I will first attempt to flesh out more clearly the content of the norm of self-determination, and in so doing locate the foundation for public participation in that norm.

2. Self-Determination: Substance and Process

The norm of self-determination can be understood as consisting of two distinct (though inseparable) components: what I refer to as the “substantive aspect” and the “process aspect” of self-determination. To avoid confusion, let me distinguish my use of the term “substantive” from a few others. Anaya understands the “substance of the norm” of self-determination as “the precepts that define a standard of governmental legitimacy” (Anaya 1993, 144). He distinguishes these from remedial *measures*, or responses to violations of the norm, such as those that accompanied the mid-twentieth century wave of de-colonization (Anaya 1993, 133-4). The substance of the norm, in his sense, can be found in the “nexus of opinion and behavior about the minimum conditions of human freedom and equality for the constitution and functioning of government” that are shared by relevant international actors (Anaya 1993, 143). His meaning, then, arises from a combination of

international treaty and customary law and state and institutional practice, and refers to the organization and continuation of governing structures.²⁴ I use the term differently.

My term also differs from that which is used broadly to refer to the *normative principles* underlying or embodied in certain institutions, processes, or laws. Such is the meaning of “substance” that John Rawls (1971) and Robert Nozick (1974), for example, have in mind when distinguishing process from substance in procedural justice. A procedure is “substantive” when it is structured to some extent by free-standing normative principles. Perfect and imperfect procedural justice identify a “just” outcome (the substantive principle that we know—or believe—is just), and we identify a procedure that will unquestionably (perfect), or at least hopefully (imperfectly), achieve that outcome. Like the procedural justice theorists, I refer to the *substance* of self-determination in order to distinguish it from the *process* of exercising self-determination, but my use of the term is nevertheless different than theirs. It does not refer to norms but instead to something more like the “range” of issues over which self-determination is exercised.

Crocker identifies four key dimensions of democracy along which we might evaluate a system or a set of practices: breadth, depth, range, and control.²⁵ The “substantive aspect” of self-determination, in my sense, is akin to Crocker’s idea of

²⁴ For Anaya, the organization and continuation of the governing institutional order—what he calls the “constitutive” and “on-going” elements—together make up the substance of the norm of self-determination.

²⁵ I return to the idea of control (or influence, or ability to impact one’s world) below.

“range” in democratic decision-making, or “the *range* of questions that citizens should democratically decide” (Crocker 2008, 299). The self-determination of peoples is typically summarized as covering a “range” of questions that focus on political status and on economic, social and cultural development. These broad *substantive* categories translate in practice into a variety of policy areas in which participants must make decisions. In the case of indigenous peoples, these might include policies for cultural protection, support of traditional economic activities, natural resource management, education and schooling, and governance. In Henry Shue’s words, “the substance of a right is whatever the right is a right to. A right is not a right to enjoy a right—it is a right to enjoy something else, like food or liberty” (Shue 1980, 15). The “substantive aspect” of self-determination, then, covers the “What?”

The “process aspect,” on the other hand, covers the “How?” What I refer to as the “process aspect” of self-determination does not map onto a specific policy area and can be applied to a variety of political or social goals. It refers to the avenues through and processes by which collective decisions are made, avenues and procedures that might take any one of a number of forms in accordance with the traditions and needs of a given people at a given time. The processes and venues through which the Haudenosaunee people make collective decisions about their political future and policy aspirations might differ markedly from those through which the Sámi make their decisions. These decision-making systems might be modeled on the group’s own traditional procedures or on Western-style parliamentary

ones (or, as in the case of the Haudenosaunee, Western democracies might be modeled on theirs!). The point is not to offer a prescription for how that process ought to look, but to draw attention to the fact that there are processes at work in the exercise of self-determination and that the quality of these processes is important for the extent of self-determination a people enjoys. As in Sen's "process aspect" of development, the processes by which self-determination unfolds "cannot be seen as being—at best—among the *means* to development [or self-determination]..., but have to be understood as constitutive parts of the *ends* of development [or self-determination] in themselves" (Sen 1999, 291). In the language of Common Article 1 of the 1966 UN Human Rights Covenants, and Article 3 of the UN Indigenous Declaration, this process aspect is captured simply by the terms "freely determine" and "freely pursue" (United Nations 1966[b], 1966[c], 2007).

In addition to Common Article 1 of the Covenants and its twin in the UN Indigenous Declaration (Article 3), Declaration Articles 18 and 19, on participation and consent, address the process aspect.²⁶ Other articles laying out specific rights also allude to processes by which these rights must be fulfilled, using phrases like "in conjunction with..." and "in consultation and cooperation with the indigenous peoples concerned." These requirements have also found their way into the operating procedures of major multilateral development organizations. The World Bank, for

²⁶ "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions" (Article 18); and "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them" (Article 19) (United Nations 2007).

example, requires borrowing countries and Bank staff to engage in “free, prior, and informed consultation” with indigenous peoples who stand to be affected by a project (World Bank 2005). Thus, it is not that international treaties—or development institutions—fail to recognize the need for indigenous participation, but rather that this process aspect has not been explicitly articulated as a key component of the right of self-determination itself. As a result, while the substantive aspect gets much attention in academic and policy circles, and is most often the touchstone by which national indigenous policies are judged, the process aspect is often neglected, and with it the importance of indigenous participation in policy-making.

2.1. Participation as the Key Process Aspect of Self-Determination

If we take self-determination as the freedom of a people to do and be what they choose, then Sen’s concept of development as freedom, captured by the Capability Approach, seems promising as a freedom-centered and arguably “universalizable” (Nussbaum 2000) way of thinking about the norm of self-determination since “[f]or Sen, groups as well as individual persons can and should be the authors of their own lives” (Crocker 2008, 15). We might then think of self-determination as the legal and political expression of the development-as-freedom paradigm applied to groups. According to Anaya, “self-determination entitles individuals and groups to meaningful participation, commensurate with their interests, in episodic procedures leading to the development of or change in the governing institutional order” (Anaya 1993, 133). Thus, Crocker’s “agency-focused [version of the] Capability Approach” (Crocker 2008, 159), with its normative

emphasis on agency freedom and achievement and its practical emphasis on public participation, becomes especially relevant, encouraging us to concentrate not only on the substantive (policy-specific) aspect of self-determination but on the *process* aspect as well.

Both Goulet and Crocker argue that participation is a crucial component of any development project or approach, a view echoed in the two main international instruments for the protection of indigenous peoples—ILO 169 and the UN Indigenous Declaration—and in Anaya’s and others’ understanding of the meaning of “self-determination.” Crocker argues that development policies should be evaluated based on how much they promote, protect and restore human agency and not only on the concrete results they produce (sufficient food, higher income, etc.). A challenge for this perspective, of course, is to give an account of *mechanisms* for collective agency (Crocker 2008). Public deliberation, Crocker argues, can meet that challenge. According to Goulet,

[w]hen people are oppressed or reduced to the culture of silence, they do not participate in their own humanization. Conversely, when they participate, thereby becoming active subjects of knowledge and action, they begin to construct their properly human history and engage in processes of authentic development. (Goulet 1989, 165)

Crocker goes a step further, making the very concept of “authentic development” dependent on participation. “Authentic development occurs when groups at whatever level become subjects who deliberate, decide, and act in the world rather than being either victims of circumstance or objects of someone else’s decisions, the tool of

someone else's designs" (Crocker 2008, 339). Participation, we might say, is the very essence of the process aspect of self-determination.²⁷

3. Participation: Building a Framework for Evaluation

Like Crocker's concept of participation and Rob Reich's concept of autonomy, self-determination is a "scalar" concept. Just as Reich argues that an individual might be more or less autonomous, it is also possible for a people to enjoy more or less self-determination. Importantly, Reich distinguishes between the exercise of and the respect for autonomy. "While the extent to which people *exercise* autonomy may vary, respecting autonomy is a different matter... Governments (or people) either respect the autonomy of an individual or not" (Reich 2002, 93-4). This chapter seeks to illustrate this point as it applies to groups: while a government might on paper respect the autonomy of a minority group, the real autonomy that that group is able to exercise in practice can vary along any number of dimensions as well as over time. Thus, it is possible to evaluate the key dimensions of self-determination on scales of their own in order to arrive at a sense of *how much*, or *what degree of*, self-determination a people really enjoys. My project here is to choose but one of those key dimensions. I begin with participation.²⁸

²⁷ The role of "participation" in development has been the subject of much debate, with critics rightly arguing that its implementation can easily reproduce inter- and intra-group inequalities and structures of domination and can thus be detrimental to or at least unhelpful for the interests of women, minorities, children, and others. Crocker (2008) attempts to answer a number of these challenges in his discussion on the value of public deliberation for democracy and development. See Chapter 10, particularly his responses to the "indeterminacy" and "autonomy" criticisms.

²⁸ Future research might examine dimensions such as depth or control and build upon the framework suggested here in order to do just that.

Evaluating the space for indigenous peoples' participation in political processes that affect them requires a framework. Goulet offers several ways in which "nonelite participation" might be classified. One of these is according to the moment at which it is introduced. "At any point in the sequence, a nonexpert populace may 'enter in' and begin to share in its dynamics." In order from earliest to latest, these moments, or "points of entry," are: "initial diagnosis of the problem or condition; a listing of possible responses to be taken; selecting one possibility to enact; organizing, or otherwise preparing oneself, to implement the course of action chosen; the several specific steps entailed in implementing the chosen course; self-correction or evaluation in the course of implementation; and debating the merits of further mobilization or organization" (Goulet 1989, 167). The quality of the participation, Goulet argues, depends upon the initial point of entry of non-elite participants. "Therefore, if one wishes to judge whether participation is authentic empowerment of the masses or merely a manipulation of them, it matters greatly when, in the overall sequence of steps, the participation begins" (Goulet 1989, 167).

Although Crocker applauds Goulet's emphasis on non-elite participation, especially that which is not compromised by manipulation or co-optation, he argues that Goulet is not entirely correct in suggesting that "the quality of the participation depends on its initial point of entry" (Goulet 1989, 167)—though to be fair Goulet says that this "matters greatly," not exclusively—and he criticizes Goulet for not adequately emphasizing other aspects of the "process" aspect of participation (Crocker 2008, 344). He points out that there are various "modes" of participation

that could still exist in each, or at least the first six, of Goulet's seven categories. Whether these modes are thicker or thinner forms of participation, Crocker argues, also affects the quality of the process. He adds to Goulet's typology by distinguishing *how* a group's non-elite members participate, especially in the group's decision-making (Crocker 2008, 342). Crocker's seven modes of participation are (i) nominal, (ii) passive, (iii) consultative, (iv) petitionary, (v) participatory, (vi) bargaining, and (vii) deliberative (Crocker 2008, 343-4).²⁹ (See Appendix A for his explanations of each.) "The further we go down the list, the 'thicker' is the participatory mode in the sense of more fully expressing individual or collective agency" (Crocker 2008, 344).

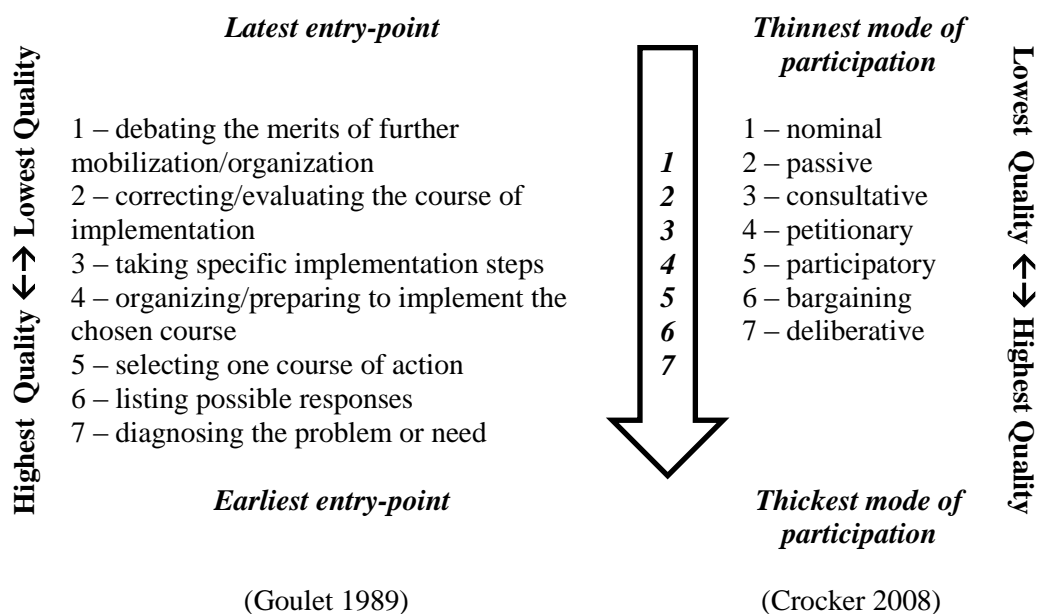
Below I offer a framework for evaluating non-elite participation along both Goulet's and Crocker's dimensions. Because of the centrality of participation to the process aspect of self-determination, this framework is particularly helpful for analyzing this aspect of the self-determination of indigenous peoples. We begin by asking at which point or points the group (through its representatives or in some other way) enters the group decision-making process. We then assess the "thinness" or "thickness" of their role in decisions affecting them.³⁰ The later they enter the

²⁹ "Negotiation" is not a category Crocker uses, given its ambiguity: there may be thinner and thicker forms of negotiations, with the thickest forms merging with deliberation.

³⁰ There are, of course, other dimensions we might consider, such as the inclusiveness of the participatory arrangement with respect to the breadth of group membership (see Crocker 2008, 342), or the degree of control over resources necessary for implementation of decisions (see Gaventa and Valderrama 1999). Crocker also highlights the importance of several other of Goulet's dimensions of participation, including the "originating agent" (does non-elite participation originate from below, from above, or from the outside?) and the normative role and scale of participatory processes. Also, both Crocker's and Goulet's scales might be challenged for having omissions (or requiring subtractions), but I am not going to challenge them here except to show that, used together, they

process, and the thinner their role, the less we are able to say with confidence that they exercise their agency and, thus, that they are able adequately to defend themselves against forces that propel their society into change. That is, the less robust is indigenous participation in relevant policy decisions, the more vulnerable is their society. Table 1 offers a visual representation of this framework. On Crocker’s

Table 1. “Quality” of Participation: Entry-Points and Modes of Public Participation



scale, the higher the number, the thicker is the participation. For convenience (though somewhat counter-intuitively), I have also numbered Goulet’s sequence of entry points from one to seven: the higher the number, the *earlier* the non-elite entered the process. This way, on both scales, a higher number represents a higher “quality” of participation. In the analysis below, I thus refer to these as “quality points.”³¹

provide a helpful lens for evaluating public participation. As a “buildable” framework, my proposal—as with each of theirs—would benefit from the inclusion of additional dimensions.

³¹ Of course, neither of the two “scales” were ever meant to be used empirically to “measure” the quality of participation. I use the numbers as an easy way to conceptualize where on each scale the various processes fall. These judgments, while assigned numerical values for conceptual convenience, are qualitative, not quantitative.

Together, these complementary tools offer a far more complex picture of the process aspect of indigenous self-determination than what we might achieve by simply asking whether or not a central government appears to have devised mechanisms for indigenous self-determination, or even by using one of these two metrics alone to evaluate those mechanisms. This framework, of course, can be applied not only to indigenous participation in policy-making, but to any number of political processes in which we are interested in evaluating the degree of agency enjoyed by a non-elite population in decisions that affect them. To illustrate how this framework might be applied in practice, I will now turn to the case of the Sámi, an indigenous population in Norway.

4. Assessing Sámi Self-Determination in Norway

The Sámi, once (and now only pejoratively) referred to as “Lapps” or “Laplanders,” see themselves as a single people spread across the territory of four nation-states (Finland, Norway, Russia, and Sweden). Finland, Norway and Sweden, in different ways, have all publicly recognized the Sámi as an indigenous people with a right of self-determination. But Norway, home to the world's largest Sámi population, is the only country with a sizeable Sámi population to have ratified ILO 169 and thus for many years was viewed as the only country to have accorded Sámi “indigenous status,” presumably with all of the rights associated therewith, in an internationally binding way. Later, all three Nordic states signed the UN Declaration on the Rights of Indigenous Peoples, affording the Sámi protections for their

language and culture and for their way of life with its close connections to the land. As a declaration and not a convention, however, the document is not generally considered to be legally binding, though this is disputed.³² Moreover, the exact understanding of “self-determination” contained in the two documents varies, and with it, state practice.

The UN Indigenous Declaration guarantees explicitly the right to self-determination, as laid out in Article 3 and as captured by Common Article 1 of the 1966 UN Human Rights Covenants. Articles 4 and 5 of the UN Indigenous Declaration also capture aspects of the right of self-determination. Specifically, Article 4 establishes the right “to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions” (United Nations 2007). According to Henriksen, “internal” self-government can be understood as pertaining *exclusively* to the Sámi and “local” as pertaining *predominantly* to the Sámi. Buchanan argues that “[t]o be self-governing, a group must exercise some independent political control over some significant aspects of its common life. With regard to at least some matters of importance, it must wield political power in its own right, rather than merely power

³² Although the official position of most states is that the declaration is not binding, this is not an uncontested view. Though it deserves a much longer discussion, suffice to say here that many legal scholars argue that the UN Indigenous Declaration is an expression of existing international customary law and contains numerous statements understood as “general principles of international law,” both of which are considered binding on states that are not “persistent objectors” (Wiessner 2008, 1165) which insofar as the provisions in this Declaration are concerned, the Nordic countries are not. See also Stavenhagen’s work on the role of the Declaration as a “binding” state action plan for implementing indigenous peoples’ human rights, and for examples of its use since 2007 as a reference document in legal and political decisions (Stavenhagen 2008).

delegated by a higher political unit and subject to being overridden or revoked by the latter” (Buchanan 2004, 333).

By contrast, although ILO 169 has been interpreted by some as promising self-determination, the term never appears in the document itself. Instead, the convention emphasizes a right to be consulted, which, as a weaker right, many scholars today interpret as something better described as “co-determination.” So what does the Norwegian state understand to be its obligations? When Norway voted in favor of adopting the UN Indigenous Declaration, its explanation for its decision reveals the extent of Sámi self-determination it is willing to countenance. Norway’s explanation of the vote that Ambassador Løvold cast at the UN Annual General Assembly on 13th of September, 2007, reads:

The recognition of the right to self-determination referred to in this Declaration requires that indigenous peoples have full and effective participation in a democratic society and in decision-making processes relevant to the indigenous peoples’ concerns. Several articles in the Declaration specify how the right to self-determination may be exercised. The Declaration emphasises that the right to self-determination shall be exercised in conformity with international law. Consultation with the peoples involved is one of the measures outlined in the Declaration. As a State party to International Labour Organisation’s Convention No 169, concerning Indigenous and Tribal Peoples in Independent Countries, Norway has implemented the consultation requirements specified in that Convention. Self-determination is furthermore exercised through the Sámi Parliament, which is an elected body with decision-making and consultative functions within the framework of the applicable legislation. The Government has also signed an agreement with the Sámi Parliament in which it sets out procedures for consultations between the Government and the Sámi Parliament (United Nations 2007, document A/61/PV.107, 22)

Norway, then, seems to understand Sámi self-determination to be exercised through consultations between the State and the Sámi Parliament, and limited to the understanding of applicable law in the ILO Convention. In its 2007-2008 White Paper on Norwegian Sámi Policy (Report No. 28 to the Storting³³), the government further clarifies its understanding of the content of the Sámi's right of self-determination "as a right to influence" and "the right to participation and empowerment." Sámi autonomy is explicitly limited to "cultural and linguistic autonomy" (Report No. 28, 2007-2008, to the Storting on Sámi policy, Chapter 2.3.6, quoted in Henriksen 2009, 16-7).

These statements are consistent with the views expressed by then Norwegian State Secretary Raimo Valle in his statement to the 2008 Gáldu conference on Sámi self-determination. According to Valle, the UN Indigenous Declaration outlines measures for governments to "create conditions so that the Sámi people themselves can protect and maintain their own culture, their own language, and their own way of life," and that one such measure is "consultations with the peoples concerned." This measure, he says, is implemented through "procedures for consultations between the state authorities and the Sámi Parliament" and the basis for these is ILO Convention 169 (Valle 2008, 40).³⁴ While he emphasizes "consultations," he does point out that in certain matters "relevant exclusively to the Sámi," powers are devolved completely to the Sámi Parliament. For matters that the government does not deem pertain

³³ The Norwegian Parliament

³⁴ A 2005 Royal Decree formally established the Sámi's right to be consulted, requiring the Sámi Parliament and the State to arrive at a negotiated agreement on Sámi issues. As of 2005, the government of Norway has obligated itself to use this procedure, formulating its interaction with the Sámi Parliament as one of negotiations between equal partners.

exclusively to the Sámi, there are measures for “decision and co-decision powers.” He is also very clear that the government views these measures as ensuring “influence” on policy areas “important for the Sámi Society.” Even in areas that many others argue ought fall exclusively under indigenous control—such as agriculture, reindeer husbandry, fisheries and resource management—he states the government position as agreeing that “Sámi *influence* is necessary” (Valle 2008, 41, *emphasis mine*).

We can surmise from these several official statements that the government understands self-determination to mean complete Sámi control over matters “relevant exclusively to the Sámi” and “consultation” with the Sámi to ensure “influence” over other matters that affect them. But who decides which matters warrant Sámi control versus mere influence? Numerous statements by the Sámi Council and the Sámi Parliament (the *Sámediggi*) indicate that the Sámi feel that full self-determination requires, among other things, complete control over the Sámi educational system, sometimes referred to simply as the Sámi School.³⁵ Does the Norwegian government’s emphasis on “influence” meet that standard? How strong should we assume that influence to be? I will return to these questions in the analysis to come.

³⁵ The *Sámediggi* is the name of the Sámi Parliament in Northern Sámi, the most widely spoken of all Sámi languages. In Lule Sámi it is called *Sámedigge*; in Southern Sami, *Saemiedigkie*; and in Norwegian, *Sametinget*.

5. Education and Participation

The Sámi, through formal and informal channels, have highlighted the importance of many of the policy areas discussed above as being among those that constitute the substance (or “range,” in Crocker’s terms) of self-determination (such as cultural protection, support of traditional economic activities, natural resource management, education and schooling, and governance). In particular, the political goal of full self-determination in education has been stated by all of the Sámi institutions within and across borders, including the Nordic Sámi conferences, the Sámi Parliamentary Council, the Sámi Council (which includes organizations from Finland, Norway, Russia, and Sweden and was the voice of the Sámi people until the establishment of the joint Parliamentary Council, a role that it to some extent maintains), and each of the Sámi Parliaments (Balto and Hirvonen 2008, 106). The “Sáminization of education”—the integration of Sámi culture and traditions into schools—has been a central objective of Sámi political efforts for much of the last century, according to Sámi scholars Asta Balto and Vuokko Hirvonen (Balto and Hirvonen 2008, 104). In the Norwegian Sámi Parliament’s 2002-2005 Plan of Action, it states “In the development of Sámi society, it is important for the Sámi to have the right to decide for themselves about the content and form of education at all levels” (*Sámediggeplána 2002-2005*, in Balto and Hirvonen 2008, 112). As with Drèze and Sen’s understanding of democracy (Drèze and Sen 2002, 24-5), education has *intrinsic*, *instrumental*, and *constructive* value for Sámi self-determination. Control over the Sámi education system also carries powerful *symbolic* value.

The *intrinsic* value of education—that aspect that is valuable in its own right and not simply for what other ends it might bring about—is difficult to separate from the kind of instrumental value captured by the comments of the Committee on Economic, Social, and Cultural Rights (CESCR) on Article 13 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR): “a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence” (Committee on Economic, Social, and Cultural Rights 1999). While joy is certainly an important possible consequence of an educated mind, there is an argument to be made that even if education is painful to acquire and the rewards of an enlightened mind go unnoticed by us, it is nevertheless valuable in some way. (I will not try to argue whether something can be intrinsically valuable if its positive consequences go unrecognized, or if there are none. Suffice to say there is substantial support for the view that education is inherently valuable.) Also, as a right unto itself, regardless of its ability to forward other objectives, educational freedom is protected under international law in instruments such as the ICESCR (United Nations 1966[c]), ILO 169 (International Labour Organisation 1989), the European Framework Convention for the Protection of National Minorities (Council of Europe 1995), and the UN Indigenous Declaration (United Nations 2007), among others.

Education also has extraordinary *instrumental* value to both individuals and society, as a means to good ends. Broadly speaking, in the wording of ICESCR Article 13, education contributes “to the full development of the human personality

and the sense of its dignity” (United Nations 1966[c]). It is also instrumentally valuable to society as a whole. Education can “strengthen the respect for human rights and fundamental freedoms... [and] enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further... the maintenance of peace” (United Nations 1966[c]). Its ability to enable and encourage public participation is especially important for self-determination. It can create a better informed population and enhance an individual’s ability to reason critically, part of Reich’s criteria for individual autonomy, which he argues a liberal state must teach “for, like the political virtues, autonomy is not inborn and is not supported by all reasonable ways of life” (Reich 2002, 48). Finally, it has also been shown empirically not only to increase the likelihood of voting (Blais 2000), but also to engender a sense of civic duty (Rosenstone and Wolfinger 1980), and to teach the skills of civic participation (Verba, Brady and Schlozman 1995, Levine and Higgins-D’Alessandro 2010).

Moreover, education plays a *constructive* role in the enjoyment or exercise of self-determination, much in the same way that democracy, by Sen’s account, plays a constructive role in value formation. Sen (1999) uses this term to highlight the importance of a “good” (democracy) in creating or shaping other valuable goods (the values and priorities of the society). Rob Reich argues that his concept of

minimalist autonomy understood as self-determination encompasses both evaluative capacities and a real ability to act on one’s evaluations, if necessary adopting new commitments, changing one’s values, altering previous desires, or revising old beliefs from a spectrum of meaningful possibilities. (Reich 2002, 105)

The constructive value of education lies in its ability to help us—individually as well as collectively—to accomplish these adoptions and revisions. It enables members of a group to learn about, investigate, deliberate upon, and choose from among those elements of their history, traditions, language, and culture that they deem valuable and, therefore, worthy of preserving or developing. It may contribute to the construction of *altogether new* values or priorities, or, more likely, it may contribute to the evolution of existing values and priorities, which in time can come to look quite different from those held by members of the same group a generation or more earlier. While similar in meaning to the instrumental value of a good (and perhaps even a form of it), it is useful to think of the constructive value of education in this more specific way, as potentially creating or developing (or establishing justifications for preserving) norms and social goods that a society has reason to value. If by virtue of their right of self-determination indigenous peoples are to “freely determine their political status and freely pursue their economic, social and cultural development” (United Nations 1966[b], 1966[c], 2007) then education can have important constructive value toward that end.

Finally, and here I go beyond Sen, self-determination in education also has powerful *symbolic* value, as an expression of a people’s ability not only to capture and preserve its past, but to guide its destiny. Politically speaking, as Henriksen argues, full Sámi control of their education system would help to demonstrate growing acceptance for the idea nominally accepted by the government and promoted by the Sámi that Norway is a state founded on the territory of two equal peoples.

Sámi self-determination in education is one way for the government of Norway to recognize and show its respect for that equality (Henriksen 2009, 22).

Although my own research has been limited by language barriers, Balto and Hirvonen (2008), in their article on Sámi self-determination in education, point out that few rigorous analytical studies of Sámi self-determination in education have been done in any language. The analysis I present in this section is based on several articles as well as a handful of reports by scholars, state and indigenous policy makers, and representatives of international rights bodies. These reports were given at a series of workshops organized by Gáldu—The Resource Centre for the Rights of Indigenous Peoples, and collected into two issues of *Gáldu Čála—Journal of Indigenous People's Rights* (No. 2/2008 and 2/2009). However only one of these—the report by Balto and Hirvonen—discusses in detail the decision-making *processes* (though it is actually the institutional arrangements that are the focus of their own analysis). I will thus rely heavily on their research and reporting on one institutional reform (the reorganization of the Sámi Education Council) and several phases of two large education reforms (R97 and Knowledge Promotion 2006) to piece together the ways in which several far-reaching decisions on Sámi education have been made.

In their report, Balto and Hirvonen also analyze the extent of self-determination in Sámi education, devising a ranking system similar to Crocker's, and drawing broadly similar (though in some cases harsher) conclusions than those I draw below. Their framework is less nuanced than Crocker's, however, and does not

benefit from the addition of Goulet’s “entry-points” scale. Also, they concentrate on the extent to which the legal-institutional set-up allows for Sámi participation, whereas I use their descriptions of the participatory processes in specific cases to assess the quality of Sámi participation in practice, legislation notwithstanding.

Because this case study is meant to provide an illustrative example of how my proposed framework can be used to evaluate the process aspect of self-determination (and to reveal the added value of doing so), I will take the details offered in Balto and Hirvonen’s account at face value. A definitive analysis of Sámi participation in education policy-making would require additional—and more diverse—resources. Likewise, an investigation into the full extent of Sámi self-determination in Norway would benefit from an extension of my analysis to other kinds decisions, policy areas, and processes. Thus, the case study that follows should be viewed as an illustrative exercise only, laying foundations for future research, and not as offering a conclusive account of Sámi self-determination in Norway.

6. Sámi Participation in Sámi Curriculum Development

For more than a century, from about 1869 to 1970, the Government of Norway maintained an overtly assimilationist policy toward the Sámi, using the schools as an important policy tool to this end. By “assimilation” I mean something like what sociologist Milton M. Gordon, in his seminal work on the assimilation of immigrants into American society, calls “Anglo-conformity”: “a consciously

articulated movement to strip the immigrant of his native culture and attachments and make him over into an American along Anglo-Saxon lines... an attempt at ‘pressure-cooking assimilation’” (Gordon 1961, 269). Of course, such efforts can be and historically have been applied to indigenous and other homeland minorities as much as to immigrants. Gordon does not use the term “assimilation” on its own, but rather notes that it “is a blanket term which in reality covers a multitude of sub processes,” including what he calls “behavioral assimilation” and “structural assimilation.”

The first refers to the absorption of the cultural behavior patterns of the ‘host’ society... There is a special term for this process of cultural modification or ‘behavioral assimilation,’ namely, ‘acculturation.’ ‘Structural assimilation,’ on the other hand, refers to the entrance of the immigrants and their descendants into the social cliques, organizations, institutional activities, and general civic life of the receiving society.” (Gordon 1961, 279)

While structural assimilation might have been one aim of Norway’s early Sámi policies, the education system was primarily used to accomplish acculturation, or “behavioral assimilation.”³⁶ Of course, some degree of acculturation may be, and often is, sought by individuals themselves; not all acculturation is forced assimilation and much happens without state orchestration. Some acculturation, however, is orchestrated by the state, and there are certain legitimate aims of the state that may be assisted by some form of acculturation (witness the French republican tradition which, while not without its flaws, has merit). However, the type of acculturation that members of a dominant group force on members of a non-dominant group, a kind of forced behavioral assimilation directed toward diluting or eliminating difference, is another matter entirely. Norway’s early Sámi policies

³⁶ Some argue that repression of ethnic and cultural minorities is simply the collateral damage of majoritarian democracy. Robert Dahl, however, argues that assimilation is one strategy states *consciously* employ to manage “the potentially adverse political consequences of cultural diversity” on democratic governance (Dahl 1998, 149-153). In this case, efforts to make the Sámi people more “Norwegian” might have been consistent with the “collateral damage” thesis or with Dahl’s “conditions that favor democracy” thesis. Though evidence suggests the latter, this essay does not attempt to trace the historical roots of Norway’s Sámi policies.

amounted to just such forced assimilation, and re-education strategies figured prominently among its tools.

The tide began to turn in the late 1960s, however, and in 1969, the Comprehensive School Act guaranteed the right to be taught the Sámi language in school and the government began a trial program of allowing beginning instruction in the Sámi language in primary and lower secondary schools, for those Sámi students who spoke the language at home. In 1985, the Sámi won the right to be instructed in other subjects in the Sámi language (Balto and Hirvonen 2008, Todal 2003, 186-90). Two institutions had primary responsibility for the development of Sámi education during this time: the Sámi Education Council (started in 1975) and the Sámi College (started in 1989). However, the Sámi Education Council remained throughout this period under the jurisdiction of the Norwegian Ministry of Education. The Sámi Parliament, the Sámediggi, was established by the 1987 Sámi Act and officially inaugurated by the King in 1989 (initially granted only general “counseling powers,” it was expected that its decision-making authority would be developed in time) (Smith 1995). By 1997, the government had formally adopted a separate Sámi curriculum that applied to all elementary and lower secondary school subjects in six predominantly Sámi counties in Northern Norway. In 2000, the Norwegian government turned over some of the control of the Sámi education system to the Sámi Parliament, at the same time transferring the Sámi Education Council to the jurisdiction of the Sámi Parliament (Todal 2003, 187-90).

6.1. Reorganizing the Sámi Education Council

A full account of the development of the Sámi education system is beyond the scope of this chapter, but let us take as an example an effort by the Sámi Parliament, the Sámediggi, to influence the reorganization of one of the two institutions that had primary responsibility for the development of Sámi education during late twentieth century: the Sámi Education Council, started in 1975 and remaining until 2000 under the jurisdiction of the Norwegian Department of Education.

In 1993 the Sámediggi, undertook a study (*Utredningomorganiseringav den Sámiskeutdannings-sektoren*) with the aim of developing a proposal for a complete reorganization of the Sámi education system, including a new division of authority. In particular, the study examined how the tasks of the Sámi Education Council might be transferred to the Sámi Parliament. The committee, whose chair was head of the Sámi Education Council, proposed a new administrative model to this end, giving the Sámi Parliament, among other things, power of attorney and supervisory authority. The goal was to confer real influence, not just administrative burden, on the representative Sámi body, which adopted the proposal a year later. However the proposal was not taken up by the Norwegian Parliament (the Storting). When the matter arose again five years later, and the Norwegian Parliament voted to finally transfer the Sámi Education Council to the Sámi Parliament, the report of the committee was not included with the other relevant documents. The suspicion was that the report had not been read or considered by the Norwegian Parliament (Balto and Hirvonen 2008, 105). Balto and Hirvonen claim that the committee's “radical”

proposals to increase Sámi self-determination were never promoted or even publicly discussed.

At first glance, we might say that the Sámi “entered” the process, according to Balto and Hirvonen’s account, very early, somewhere around the “initial diagnosis of the need” or “a listing of possible responses.” According to Goulet’s scale, this would mean that the “quality of the participation” was high; an Olympic judge might give it a 6 or 7 (out of 7). However, the “participation” was entirely internal, taking place only within the Sámediggi. Balto and Hirvonen speculate that the report that arose from the Sámi deliberations on the matter was never even read by the decision-makers. It would therefore be more accurate to say that this possible early entry point was closed, or at least that the would-be participants’ gestures for entry at this stage were ignored. The Storting, meanwhile, engaged in its own process, on its own schedule, without any apparent involvement with or input from the Sámediggi. Given that the decision-making power lay entirely with the Storting, we cannot argue that the Sámi really “entered” this process at any point before actual implementation of the transfer, and perhaps entered even later, at the self-correction/evaluation stage. This, then, earns the process about 2.5 quality points on the Goulet scale.

Turning to Crocker’s “modes of participation,” if we consider *how* the Sámediggi participated, we can classify this process as “consultative participation,” where “[n]onelites participate by giving information and their opinions (‘input,’ ‘preferences,’ and even ‘proposals’) to the elite. The nonelite neither deliberate

among themselves nor make decisions. It is the elite who are the ‘deciders,’ and while they may deign to listen to the nonelite, they have no obligation to do so” (Crocker 2008, 343). It is important to note that Crocker’s “consultative participation” is weaker than what is meant by “the right to consultation” in ILO 169 and the UN Indigenous Declaration. That “right” is more akin to Crocker’s “petitionary participation,” in which “[a]lthough it is the prerogative of the elite to decide, the nonelite have a right to be heard and the elite have the duty receive, listen, and consider if not to heed” (Crocker 2008, 343).³⁷ In the case of Sámi participation in efforts to reform the educational decision-making system, it does not appear that the Norwegian Parliament felt any duty to take the Sámi proposals into account. This form of participation earns about 3 quality points out of 7 on the Crocker scale. Although this is but one of what were undoubtedly numerous decision-making processes concerning the organization of the Sámi education system at the time, this episode nevertheless provides evidence of a limited role for the Sámi in at least some of the education policy-making that affects them. It also provides an example of the usefulness of considering *both* Goulet’s entry-points and Crocker’s modes of participation, either of which alone can lead us to different conclusions, or to miss important nuance.³⁸

³⁷ Here, Crocker is indebted to James W. Nickel, who emphasizes the importance of a citizen *right* to petition the government, where the government has a corresponding *duty* to “receive and consider” those petitions. This is distinct from consultative participation, in which citizens rely on the good will of the government to hear them out. (Nickel 2005, 211)

³⁸ As discussed above, there are other important dimensions of participation as well, highlighted by Crocker, Goulet, and others. See footnotes 28 and 30.

6.2. “Reform 97” Process

While work was underway to determine the proper role and “home” for the Sámi Education Council, the Norwegian Ministry of Education also began a significant overhaul of the national curriculum. Balto and Hirvonen (2008) report on two large curriculum reforms that the government of Norway undertook over a fifteen year period from 1992-2007: Reform 97 and Knowledge Promotion 2006. Each of these consists of a section on national curricular reforms and a section on reforms of the Sámi curriculum. The Sámi sections are known, respectively, as the Sámi Curriculum for 10-year Compulsory Education (R97S) and the Sámi Curriculum for Knowledge Promotion in Primary and Secondary Education and Training (Knowledge Promotion 2006S).

R97S was a major step forward for Sámi self-determination in education, as the first dedicated Sámi curriculum adopted in any Nordic country to have equal status with the national curriculum. It is mandated for use in Sámi areas (in which the Sámi Language Act has force) but is also open to be used outside the Sámi administrative zone (Balto and Hirvonen 2008, 113). While the final product does represent significant accommodation for Sámi needs, the Sámi can hardly be said to have enjoyed full participation in the process by which it was developed. When the reform process was launched in 1992, then Minister of Education Gudmund Hernes intended the Sámi curriculum to be simply the Norwegian state curriculum, adapted to Sámi needs. (This was so despite the fact that several separate syllabi for Sámi education already existed in the 1987 model curriculum, “M87,” for compulsory

schooling.) Because the Sámi School would remain subsumed under the Common School, with some adjustments, the Ministry did not perceive a role for the Sámi institutions in the curriculum reforms and thus did not inform the Sámi Parliament when the reform process began in 1992 and involved neither the Sámi Parliament nor the Sámi Education Council (despite the SEC's still being under the jurisdiction of the Ministry of Education at the time). Asta Balto was the director of the SEC at the time, and reports having attended the Ministry's reform planning conference and having lobbied for the creation of a separate Sámi curriculum. Her call, made on behalf of the SEC, was dismissed, though she personally was appointed to the committee in charge of writing the statement of principles for the general curriculum (no such task was undertaken for a Sámi curriculum and the Sámediggi considered the result a setback from the M87 model). Dissatisfied, the Sámediggi demanded an altogether separate Sámi curriculum, developed by Sámi institutions themselves, a demand grounded in the Sámi Act and Norway's signature of ILO 169 (Balto and Hirvonen 2008, 113). Finally, in 1995, three years after the national reform process began, the Sámi Education Council (still under the auspices of the State) was invited to submit syllabi for a handful of subjects, based on the M87 model.

Analyzing this reform process is complicated by its being comprised of multiple steps, each of which might be evaluated differently. At the point at which the Sámi began participating in the decision-making, the course had already been chosen, the tasks identified; all that remained was for the substance to be fleshed out within the parameters defined by the state. The Sámi (or at least the SEC) entered

this process quite late, at the “implementation phase,” earning 3 out of 7 quality points on the Goulet scale. Crocker, however, argues that any one of a number of “modes” of participation could exist in each of Goulet’s “sequential moments,” or at least in the earliest 6. A group might nominally be invited to join a process quite early but not engage in any robust participation until much later. Analyzing this reform process illustrates this point clearly. From their point of entry forward, each of the several steps of the reform implementation can be evaluated as separate processes according to Crocker’s “modes of participation.”

The first part of the implementation stage was the Sámi Education Council’s drafting of the Sámi syllabi. The Ministry pre-selected the syllabi that the Sami were permitted to revise for the new curriculum, and the revisions were to be based on the existing M87 model. It is unclear whether the Ministry of Education was obliged to accept the Sámi syllabi or whether it had veto power over these submissions, but the SEC did have the opportunity to deliberate and act (on the goals and within the means laid out by the Ministry, its supervisory agency). Thus, assuming the Ministry did not have complete veto power over the Sámi proposals—or no such power that it was willing to exercise—we can tentatively describe the “mode” as “participatory implementation,” a 5 out of 7.³⁹ “Elites determine the goals and main means, and nonelites implement the goals and decide, if at all, only tactics. In this mode nonelites do more than listen, comment, and express. Like soccer players they also make and enact decision, but the overall plan and marching orders belongs to the coach”

³⁹ I am making certain assumptions about this process in order to fill the gaps in the information available to me at the time of this analysis. Thus, let me again emphasize the illustrative nature of this exercise.

(Crocker 2008, 343). (That the SEC remained under the jurisdiction of the Ministry at the time makes this a generous assumption.)

In this example, the importance of using at least two measures to determine the quality of Sámi participation again is clear: the mode by which the Sámi participated in developing the syllabi was moderately robust, but their actual influence was limited by the late stage at which they entered the process. More robust Sámi participation at least would have given the Sámi a voice in the deliberations over the subject areas open to adaptation. Full self-determination would have allowed the Sámi—through its own representative institution, the Sámediggi—to determine at the outset which subjects required a separate Sámi curriculum.

The next part of the implementation stage began that same year with an expansion of the Sámediggi's role in drafting the curriculum for the Sámi School. Luckily for Sámi demands, a change of government in Norway brought State support for a wholly separate Sámi curriculum, and the Sámi role in the reforms was expanded to include shaping the “principles” (learning objectives) section of the curriculum (finished in late 1996) and writing most, but not all, of the subject syllabi to be used for Sámi schools (finished early the next year and ready for use by the start of the 1997 school year). Though it is unclear from Balto and Hirvonen's report whether this work was conducted by the SEC or by the Sámediggi, the Sámediggi nevertheless considered that through R97S they had obtained their goal of winning a separate curriculum. The Sámi curriculum was given a formal status equal to that of

the Norwegian curriculum, which also included some Sámi content developed by the Sámediggi itself. It would apply to all pupils in the Sámi Administrative Area (not only to Sámi pupils and not only in schools where Sámi children were the majority).

However, Balto and Hirvonen's account of the actual events reveals little about the nature of the Sámi *participation* in shaping the R97S under the new government. Did the Sámediggi deliberate with the Ministry of Education over which additional syllabi ought to come under Sámi control or was this decision made ahead of time by the government and only the final implementation left to the Sámi? Was the government then obliged to accept the Sámi syllabi or the Sámi input into the statement of principles? Did the Ministry have veto power, or was there a structure for arriving at consensus? It is unclear, then, where this phase of the reform process falls on Crocker's scale. If we assume that the new government, with its strong support for a true "Sámi curriculum," brought the Sámediggi on board from the start, and that its participation had genuine influence over the outcomes, then both steps—drafting the Principles Section and writing additional syllabi—could have been fully deliberative, earning 7 quality points on Crocker's scale. The Sámi Parliament's reported enthusiasm about the outcome of the reform process gives the impression that its influence was at least substantial.

While the entire R97S process earns only 3 quality points on the Goulet scale due to the late stage at which the Sámi entered, Sámi participation at each of the individual implementation steps seems considerably more robust. If it were possible

Table 2. Analysis of R97S Reform Process

	Goulet's "Entry-Points" Sequence	Sámi Curriculum for 10-Year Compulsory Education (R97S)	Crocker's "Modes" (in Quality Points)
	Initial diagnosis of the problem or condition	reform of M87 (including M87S) is needed (1992)	0
	Listing of possible responses	Unknown	0
	Selecting one possibility to enact	Several of the national subject syllabi ought to be adapted to the Sámi context	0
	Organizing/preparing to implement the course of action chosen	Work begins in Ministry of Education; Sámi demand role but not yet included	0
Sámi Enter Here	Specific steps of implementation (Quality Points: 3)	1) drafting Sámi syllabi based on M87 model (1995), following invitation from Ministry	Participatory implementation 5
	Self-correction/evaluation in the course of implementation	<i>CHANGE IN GOVERNMENT</i> New leadership in Ministry of Education, decision to draft a "principles" section; to bring Sámi into this process; to invite Sámi to submit additional subject syllabi <i>Return to Previous Step</i>	Unknown
	Specific steps of implementation (Quality Points: 3)	1) drafting Sámi principles section (late 1996)	Deliberative participation? 7
		2) drafting additional Sámi syllabi (early 1997)	Deliberative participation? 7
	Self-correction/evaluation in the course of implementation	Unknown	Unknown
	Debating the merits of further action	Unknown	Unknown

to average out the quality points at each of the three stages I evaluate here, we might give the process a 6.3. Doing so would be misleading, however, as it would imply an over-all high quality of Sámi participation in R97S. This evaluation must be tempered by an awareness of the limited influence the Sámi actually had, a limitation that arose from the fact that many of the important decisions were made by the Ministry of Education or the Storting before the SEC and the Sámediggi were ever brought into the process. Prior to their entry, even Crocker's weakest mode—"nominal participation," in which "someone is a member of a group but does not attend its meetings" (Crocker 2008, 343)—does not apply here because the decisions were made by Norwegian government bodies in which the Sámi people play no formal role. The initial steps in the process therefore earn zeros on Crocker's scale. Again, this highlights the importance of using at least two scales to evaluate non-elite participation. A summary of this analysis is presented in Table 2.

6.3. "Knowledge Promotion 2006" Process

Another round of curriculum reforms began in 2004. R97 had consisted of three main parts, a "general section," a section on "principles" (learning objectives), and the subject curriculum (course syllabi). When it was reformed again with Knowledge Promotion 2006, the general section became known as the Core Curriculum and remained intact; the principles were replaced with a "learning poster," which was then supplemented with a "Quality Framework"; and the individual subject syllabi were again reformed. Both the learning poster (with its Quality Framework) and the subject syllabi of the national curriculum (Knowledge

Promotion 2006) were ultimately—though not without negotiation—matched by a Sámi version in the Sámi curriculum (Knowledge Promotion 2006S). As in R97, the Core Curriculum was shared by both the Common and Sámi Schools and contained some material on Sámi history and culture.

If we take the decision to embark upon, and the actual implementation of, Knowledge Promotion 2006 (and 2006S) as a single (albeit lengthy, multi-step) process—as we did for R97—we might again say that the Sámi entered the process quite late. Analyzed according to Goulet’s sequence, it was the Ministry of Education that initially diagnosed the need (i.e., that reform of R97 and R97S was needed). The Ministry then listed possible responses (that the “principles” section—considered by the Sámi to be an important advancement—and the subject syllabi ought to be supplemented and revised). It next decided on the course of action (the principles ought to be replaced with a “learning poster,” approval of the final form of which would fall to the Ministry, and supplemented with a Quality Framework, and certain subject syllabi needed revision). It then began organizing to implement the reforms (conceptualizing the new documents, including identifying their form and purpose, and distributing responsibility for drafting each part). The Sámi were finally able to enter the process in time to participate in “the several specific steps entailed in implementing the chosen course” (Goulet 1989, 167). That is, they joined in time to implement a task laid out for them by others. The whole KP2006S process earns 3 quality points on the Goulet scale, the same as R97S.

As with R97S, while it is possible for us to identify a single “entry point” in this long process, the degree of Sámi participation varies from step to step, making it impossible to identify a single “mode” of participation that applies to the entire Knowledge Promotion 2006S reform process. Thus, I break down the process, from their point of entry forward, into steps, and analyze them separately according to Crocker’s modes. The steps that the Sámi Parliament engaged in were 1) drafting the Sámi learning poster, 2) writing a Quality Framework to supplement that learning poster, and 3) designing a handful of subject syllabi determined by the Ministry to be eligible for the Sámi School (these were limited to syllabi for the teaching of the Sámi language).

By June 2004, the Storting had settled on the principles to be contained in the national learning poster. It did so without inviting input from the Sámediggi, despite substantial Sámi involvement in the drafting of the principles section of R97S. Because it was the principles section of R97S that contained the Sámi learning objectives and ideological statements about the Sámi School, removing this section meant that its successor would need somehow to fill this role. Thus, upon learning of the work underway in the Storting, the Sámediggi Council (the Sámi Parliament cabinet) decided to draw up its own set of principles in a Sámi learning poster (Balto and Hirvonen 2008, 115). In November 2004, following negotiations with the Norwegian Ministry of Education, a working group of the Sámediggi, with the Ministry’s approval, finally began work on its poster, meant to replace the principles

section in R97S just as the Norwegian learning poster would replace the principles section in R97.

A year later, the proposed guidelines arrived for discussion in a plenary session of the Sámediggi, a year and a half after the Norwegian learning poster had been finalized. However, the drafting progressed parallel to, not in cooperation with, the Ministry's drafting of its own poster, and its discussion in the Sámediggi advanced parallel to, not in cooperation with, the discussions of its counterpart in the Storting.⁴⁰ Sámi participation with the Norwegian decision-makers was thus very thin (for they had little impact and did not avoid nondomination), even if their internal deliberations may have been robust. Moreover, the Ministry of Education ultimately rejected the finished Sámi learning poster, accepting instead only an initial "Sámi" clause: one sentence describing the Sámi School: "The Sámi School and enterprises offering training shall provide all pupils and apprentices/trainees with good education that is based on Sámi language, culture and society" (<http://www.samediggi.no> in Balto and Hirvonen 2008, 116).⁴¹ The Sámediggi thus submitted *this* version for deliberation in a plenary session, even though the real

⁴⁰ Given the danger that minority voices might be silenced or muffled in participatory processes with more numerous and powerful actors, one could argue that deliberation along two separate tracks was the only way to ensure that the outcome would take full account of the Sámi voice. However, the process would then need to bring together the two tracks in a final, open-ended deliberation in which both groups enjoyed equal influence over the outcome. This was not the case here.

⁴¹ By this time, the Royal Decree was in force (see footnote 34), however, the language Balto and Hirvonen use is one of "acceptance" and "approval," not "negotiation." It is unclear whether the Ministry retained the power simply to accept or reject the Sámi proposals, as Balto and Hirvonen suggest. However, their description of the scope and nature of the Sámediggi's negotiations with the Ministry over syllabi content indicates that even when negotiations did take place, the Sámi's real influence was limited. In Crocker's view, this lack of impact significantly reduces that group's agency. For this reason, among his four dimensions of democracy, he lists "control." "The dimension of control or influence is important, or the group that 'rules' may be inclusive, address many sorts of issues through many channels, and address them in a variety of ways, including discussion, and yet have no influence over the decision or no impact on the world" (Crocker 2008, 299).

influence that the Sámi had had over its development was minimal, and the body accepted this “Sámi” learning poster on May 31, 2006, two years after the Norwegian learning poster had been finalized.

Here, Crocker’s modes of participation add considerably to the analysis. The Sámi and Norwegian working groups and Parliaments *did* engage in drafting their respective learning posters and both deliberated on the merits of those proposals, but not together, and while the Ministry *did* consider the Sámi proposal, the final decision appears to have been its own. Given that the deliberations on the Sámi learning poster had taken place outside of the processes in which the real power operated, the Sámi deliberations not only had little consequence in the end, but, having taken place “out of earshot,” they were not even able to influence the deliberations of the Norwegian government. It was *these* (Storting) deliberations that ultimately resulted in the Sámi learning poster, with the addition of the one-sentence Sámi clause.

We could characterize this step as “petitionary participation” (worth 4 quality points) in which the “elites” did have an obligation to receive and consider input from the “nonelites” but it remained the prerogative of the elites to make the final decision. (In this case, it was to reject the Sámi proposal wholesale.) Although “petitionary participation” *is* a step up from “consultative participation” (worth just 3 points), as long as the elites retain the ability to disregard the input they receive from the non-elites—regardless of their obligation to consider it—then the real power this accords to the non-elites remains minimal. An *obligation* to “receive and consider” (Nickel

2005, 211) means little more than “deigning to listen” (Crocker 2008, 343) when the elites retain all of the actual decision-making power.

Herein lies the importance of “control,” or influence, in participatory processes. In outlining his Democratic-Functioning Approach, Jay Drydyk (2005) emphasizes the role that “degree of influence” ought to play in judging whether a process is in fact “more democratic.” He helpfully breaks down political activity into the “input side” and the “output side.” What is important on the input side, he argues, is whether these activities are available to individuals; what matters on the output side is how effective those activities actually are, their influence. “Greater access to political activity makes political life more democratic, but it is yet more democratic if that activity influences decision-making” (Drydyk 2005, 256). Of course, it is “more democratic still if the decision-making affected has a real impact on the capabilities that people value as building-blocks of a good life” (Drydyk 2005, 256). Crocker formulates this idea as the ability to impact one’s world, presumably for the better, an important aspect of Crocker’s and Sen’s understanding of agency, which “is not just making (or influencing) a decision, even when the decision is the outcome of deliberation. It is also effectively running one’s own individual or collective life and thereby making a difference in the world” (Crocker 2008, 344). In this case, the Sámi’s own deliberative process, and even the subsequent bargaining with the Ministry of Education, failed to influence the final outcome.⁴² In the meantime, we can still say that this process earns 4 quality points on the Crocker scale (for

⁴² In some cases, bargaining might actually be preferable to “deliberation” if the latter is marred by domination while the former is buttressed by some mechanisms to ensure that all parties wield substantial influence.

“petitionary participation”), but only on a technicality; the lack of influence over the actual decision-making highlights the importance of real influence in participation and provides an argument for building on this analytical framework in order to take this dimension more fully into account.

Sámi exclusion in the learning poster process carried over into the next phase of the reform as well, when the Norwegian government opted to supplement the learning poster with a Quality Framework for Knowledge Promotion that outlined the responsibilities of school authorities under the new legislation, including a responsibility to adapt it to local conditions and individual student needs. The Ministry undertook its drafting, circulating its version of the Quality Framework in March 2006; the Storting adopted it in September, but because the Sámediggi had not received the decision on its version of the learning poster until early summer, it was not able to begin work on its own Quality Framework for the Sámi curriculum until that fall (2006). It was debated on and adopted by the Sámi Parliament in May of the following year, but implementation had to await approval by the Ministry of Education. Faring better than its own version of the learning poster, the Sámediggi's Quality Framework was approved by the Ministry and implemented in fall 2007, a year after the national Quality Framework was implemented (Balto and Hirvonen 2008, 116). Balto and Hirvonen chalk up its approval as a success for the Sámi. I question, however, whether the success of this endeavor may have had less to do with the Ministry's acceptance of the Sámi's educational vision and more to do with the fact that the Sámi Quality Framework was based not its own learning poster, but on

the Norwegian learning poster with the Sámi clause. Can it be said, then, to represent a Sámi vision of education?

With respect to the genesis of the Quality Framework, Sámi participation echoes, and was affected by, the learning poster process. The initial decision to develop a Quality Framework to supplement the learning poster was made by the government. A year after the process began, the Sámediggi was able to offer their input in the form of their own Sámi Quality Framework. However, this input was based on a learning poster that they had no part in creating (their own document having been rejected), the acceptance of which lay entirely with outside decision makers (the Ministry of Education). On Crocker's scale, this process could be a form of "participatory implementation" (worth 5 quality points) in which "Elites determine the goals and main means, and nonelites implement the goals and decide, if at all, only tactics" (Crocker 2008, 343) except that, as in both consultative and petitionary participation, the final decision still appears to have remained with the government.⁴³ Though this time around the decision went in their favor and the draft was accepted, it could easily have gone the other way, as happened with the Sámi draft of its learning poster. We can do no better, therefore, than to award this process 4 out of 7 quality points on the Crocker scale. However, since these deliberations were based not on the Sámi's own learning poster, but on the national learning poster, which the Sámi had no part in drafting (apart from adding their clause and getting it passed in the

⁴³ Despite the Royal Decree (see footnotes 34 and 41), it is unclear whether the state's obligation to consult with the Sámi conferred any real influence upon them, and whether the Sámi had any say over the range of issues that fall under the decree. At any rate, it appears that the government nevertheless retained final decision-making power, whatever discussions it might have been obliged to engage in up to that point.

Sámediggi), even this designation might be generous. Again, this evaluation highlights the importance of non-elite involvement at a very early stage, and of those non-elites having genuine influence over the outcome of the process.

After the learning poster and Quality Framework, the third major area of reform under Knowledge Promotion 2006 was the subject curriculum, the syllabi. In summer 2004, following Parliamentary Notice No. 30 that such a reform was underway, the Sámediggi Council decided how the Sámi subject curriculum should be developed and work began in the fall 2004, a half a year after the national curriculum reform effort began (Balto and Hirvonen 2008, 116). The Sámi Parliament's decision-making authority was limited to syllabi for the teaching of the Sámi language and the syllabi of three programs for upper secondary. By the time the Sámi language course syllabi began circulating for comment in the summer 2005, the national syllabi were already approved. The Sámi syllabi were not adopted until spring 2006. The Sámi curriculum—along with policies for distribution of periods and students in compulsory schooling—then moved to negotiations with the Ministry of Education, a process that proved long and arduous, resulting in Ministry approval just before the 2006-2007 school year began, a year after the national syllabi had been approved (Balto and Hirvonen 2008, 116).

During this implementation step, the scope of their participation was again limited by the authorities prior to their entry into the deliberations and the outcomes of their internal deliberations were subject to negotiations with the Ministry. It is

unclear from Balto and Hirvonen's report whether these negotiations resulted in consensus or the final decision was made—their syllabi “approved”—by the Norwegian government. Technically, as of 2005, the State was legally obliged to enter into good faith negotiations with the Sámediggi.⁴⁴ As Crocker points out, though, there are thinner and thicker forms of negotiation, with the latter possibly merging with “deliberation” (a full “7”). We might say that Sámi participation at this step earns 6 points (for “bargaining”) on Crocker's scale, but according to Balto and Hirvonen's account, *only* on the micro level of words used in a predominantly Norwegian-written curriculum, not in the full development of a Sámi curriculum itself. It is possible that the process remained at the level of petitionary or even consultative participation (worth 4 or 3 quality points). Balto and Hirvonen seem to feel that one of these modes characterized much negotiation with the Ministry, especially when we consider the limited scope of the negotiations. More information is needed on the degree of actual power wielded by the Sámi during this process.⁴⁵ As with the R97S process, a detailed examination of the Knowledge Promotion

⁴⁴ This is a substantial departure from early processes in which the Sámi Parliament simply submitted its proposals for *approval* by the Ministry of Education. However, Balto and Hirvonen admit that these negotiations, while apparently in good faith and between equals, tend to be restricted to word choices in the Sámi versions of the national curriculum, the syllabi of which are not developed by the Sámi but are “adapted” through these negotiations to Sámi purposes. These negotiations will have real meaning when they are over substance, not merely word choice for content pre-determined by the government.

⁴⁵ Access to additional sources in an extended version of this analysis, one meant to be definitive and not mostly illustrative, would allow us to say with more certainty just how much power the Sámi in fact wielded in these negotiations. Negotiations overshadowed by threat of a Ministry veto are a far cry from the kind of deliberation, or even bargaining, that Crocker has in mind. Such additional information would make it possible to build on this framework, as I suggest above, with an additional component representing influence or control over the final outcome (in Crocker's and Drydyk's sense).

Table 3. Analysis of KP06S Reform Process

	Goulet's "Entry-Points" Sequence	Sámi Curriculum for Knowledge Promotion in Primary and Secondary Education and Training Education (KP06S)	Crocker's "Modes" (in Quality Points)
	Initial diagnosis of the problem or condition	reform of R97 (including R97S) is needed (2004)	0
	Listing of possible responses	"Principles" section and subject syllabi ought to be supplemented and revised	0
	Selecting one possibility to enact	"Principles" ought to be replaced with a "learning poster" and supplemented with a Quality Framework; certain subject syllabi need revision	0
	Organizing/preparing to implement the course of action chosen	Conceptualizing new documents (form, purpose, distribution of responsibility)	0
Sámi Enter Here	Specific steps of implementation (Quality Points: 3)	1) drafting Sámi learning poster (late 2004); deliberation and approval in Sámediggi (late 2005)	Petitionary participation 4
		2) drafting Sámi Quality Framework (mid 2007); submission to Ministry for approval (late 2007)	3-4
		3) drafting subject syllabi for the Sámi School (late 2004); negotiation with Ministry for approval (late 2006)	4-6
	Self-correction/evaluation in the course of implementation	Unknown	Unknown
	Debating the merits of further action	Unknown	Unknown

2006S process reveals the need to use both Goulet's and Crocker's schema in evaluating Sámi participation. Again, the process as a whole earns about 3 quality points due to the fairly late stage at which the Sámi meaningfully entered the game. Breaking down each of Goulet's "sequential moments" and analyzing them according to Crocker's "modes of participation" reveals, again, that there is no participation

whatsoever in the early stages of the process (earning zeros), but that once the Sámi do enter, the several specific steps involved in implementing the reform were characterized by varying degrees of participation, with the first step earning a questionable 4 quality points, the second earning a 3 or 4, and the final step landing somewhere between 4 and a 6. A summary of this analysis appears in Table 3.

To summarize, this analysis of several phases of each of three different reform initiatives (changes to the SEC, R97, and Knowledge Promotion 2006) reveals a Norwegian government that, particularly since negotiations became required by law in 2005, has recognized in spirit a thick right to Sámi participation in education, but has failed to fulfill its obligations in practice. If the details of Balto and Hirvonen’s report are taken at face value, we can conclude that Sámi participation often begins

Table 4. Summary of Entry-Points and Modes of Participation, with Quality Points (1993-2007)

	Entry-Point QPs	Mode QPs
Reform of the Sámi Education Council	2.5	3
R97S Reform Process	3	--
• Drafting of R97S Syllabi	--	5
• Drafting of R97S Principles Section	--	7
• Drafting of additional R97S Syllabi	--	7
KP2006S Reform Process	3	--
• Drafting of KP2006S Learning Poster	--	4
• Drafting of Quality Framework for KP2006S	--	3-4
• Drafting of KP2006S syllabi	--	4-6

late, once the biggest decisions have been made, and the nature of the participation is relatively thin, compromised by a limited scope and a threat of a government veto.

Table 4 offers a complete overview of the foregoing illustrative analysis.

In addition to a late entry and only moderate participation in these processes, the scope of Sámi decision-making power is typically limited to a few narrow interest areas, hardly broad enough to deem that the Sámi have anything like “autonomy or self-government in matters relating to their internal and local affairs,” at least not sufficient to “freely pursue their economic, social and cultural development” (United Nations 2007), as the elaboration of self-determination in UN Indigenous Declaration requires. Balto and Hirvonen argue that “[e]ver since the work on the reforms and the new curricula began, the Sámi Parliament has had to defend forcefully the educational rights of the Sámi, as they are not an integral part of the Norwegian administrative system,” yet control of the Sámi schools remains within that same administrative system. “This reform process shows that the right of the Sámi to a separate curriculum—not to mention self-determination—is not clear in the administrative and political system of Norway” (Balto and Hirvonen 2008, 116).

While other scholars (see Fjellheim 2008, Vars 2008) echo the conclusions that Balto and Hirvonen draw—namely that the Sámi do not enjoy true self-determination in education policy in Norway—a detailed case study, drawn from multiple sources and original documents, would enable us to apply this framework with greater certainty and to draw some more concrete conclusions about Sámi participation in education decisions that affect them. It would also be useful, for example, to investigate Sámi control of financial resources.⁴⁶ In the meantime,

⁴⁶ Broadening the analysis to include control of financial instruments for Sámi policy is beyond the scope of this paper, but Fjellheim (2008) offers a detailed discussion.

assuming the details of Balto and Hirvonen's report are accurate, I am able to conclude from my foregoing analysis that the Sámi, a people whose self-determination is limited in at least one important area—education—remain vulnerable in an agency-oriented sense, unable to “freely pursue their economic, social and cultural development” (United Nations 1966[b], 1966[c], 2007) and with inadequate “defenses against the social forces which propel them into processes of change” (Goulet 1971, 38).

7. Conclusion

The “spirit” of the norm of self-determination can best be understood as a legal and political expression of Amartya Sen's development-as-freedom paradigm, particularly David A. Crocker's extended agency-oriented understanding of it. In practice, however, this norm often remains thinly applied. If we understand self-determination to mean “that human beings, individually and as groups, are equally entitled to be in control of their own destinies, and to live within a governing institutional order that is devised accordingly” (Anaya 2008, 49-50), then our assessment of its application in practice needs to be fleshed out. I argue that the norm of self-determination would benefit from an elaboration of its core content, not only in a *substantive* sense, which already receives a fair amount of attention in the literature and in policy circles, but also in a *process* sense.

Minorities, and in particular indigenous peoples, are particularly vulnerable in ways both numerous and complex. As individuals, they are especially susceptible to

harm, and their societies face a “particular disadvantage” both in protecting themselves against unwanted change and in effecting change that they desire. If human rights are a way to mitigate human vulnerability, then the right of self-determination is a protection against a certain type of human vulnerability, what I call “agency vulnerability.” The value in a *process*-focused analysis of self-determination is in its ability to help better reveal the real opportunity that an indigenous people—or any other—have to be and do as they choose, independently to define and pursue a life they value and have reason to value, to reduce their agency vulnerability.

The framework I outline above offers one way in which to evaluate this process aspect of self-determination: by identifying the points at which indigenous peoples enter into the decision-making process and the modes of participation through which they engage the governments of their respective states. With such a framework in hand, we can more easily put the onus on governments to demonstrate that a thick concept of participation is at work in their protection and promotion of “the right of self-determination.”

III. Parental Consent and Children's Rights in Europe: A Balancing Act⁴⁷

“The pursuit of peace based upon justice and international co-operation,” reads the founding document of the Council of Europe, “is vital for the preservation of human society and civilization” (Council of Europe 1949). The Council of Europe (CoE) sees itself as a diverse family of states, enjoying the benefits of democracy and economic cooperation and the protections of human rights law and practice. Yet in many respects and for many citizens, democracy remains thin; economic prosperity, selective; and human rights, at best a privilege of some, at worst, a fanciful hypothetical. While perhaps not a silver bullet, education—more than just an inherently valuable right—may be one of the most powerful weapons available to combat injustices along all three dimensions.

As discussed in Chapter 2, education plays an important role encouraging civic participation (Levine and Higgins-D'Alessandro 2010, Blais 2000, Rosenstone and Wolfinger 1980, Verba, Brady and Schlozman 1995), a fundamental condition (and outgrowth) of poverty alleviation and the protection of human rights. Educational attainment is also a factor in an individual's success on the labor market, and while it is unclear whether an educated population is more likely to respect and protect human rights, at the very least, education is itself a “right” in some sense. Yet for large numbers of individuals living inside Europe today, the promise of a rich or even adequate education remains unrealized. This crisis is especially acute for

⁴⁷This chapter is a revised version of a paper originally published in the *Journal of Human Development and Capabilities*, v. 11.3, August 2010, Routledge.

Europe's 10 to 12 million Roma citizens ("Gypsies"), a great many of whom never even finish eighth grade (Kosko forthcoming 2012, Open Society Institute 2007).

This lack of education is both a cause and a consequence of the severe social, economic and political marginalization many Roma face. Among other barriers is the relegation of many Romani students to "special" schools for the mentally handicapped (Greenberg 2010, Kosko 2004, United Nations Development Programme 2002, Organization for Security and Cooperation in Europe 2000). Adequately addressing the problem, however, raises not only political, but also legal and ethical questions; these questions are intimately connected.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth "the European Convention"), by which all member states of the Council of Europe are legally bound, protects a right to education (Protocol 1, Article 2) and a right to freedom from discrimination (Article 14). In recent years, the European Court of Human Rights, which interprets the law, has begun hearing cases of alleged violations of these provisions. Together with an assertion of state prerogative (the "margin of appreciation"), the governments charged with discrimination in the provision of education have claimed that the consent of a student's parents can be proof that an action was not discriminatory. This defense has met with inconsistent responses from the Court.

These inconsistencies—borne out by three recent Court rulings pertaining to discrimination in the education of Romani children—point to the need for a

clarification of the role and limits of parental consent in determining the level and quality of education received by their children. The need for this clarification has implications beyond the segregation of Romani children, reaching into the wider realm of minority rights and the question of who controls the content and quality of education. This, in turn, has a profound implication for who is able to become an active participant in European democracy and prosperity.

In this chapter, I first examine the three European Court of Human Rights cases (one handed down in 2007 and two in 2008) in order to establish the position of the Court on the “parental consent” defense and the need for clarification of this principle. I next set forth the position that domestic and international law should seek to protect parental control of a child’s upbringing. This argument rests on international law, respect for the human dignity of the parents (which requires meaningful consent for any decision affecting their children), and the desirability of minority participation in public discussion. Third, I explain the counter-argument that conceding absolute control to parents can have damaging consequences for a child’s welfare and future life prospects. This counter-argument rests on respect for the human rights of the child and the desirability of that child’s developing into an autonomous and fully-functioning citizen, and prohibits interference by parents or anyone else with the exercise of that child’s rights to education and freedom from discrimination.

Neither of these arguments, I contend, is absolute. Hence, I fold both arguments into a case for a limited parental right, arguing for the need to identify a “threshold” for consent, one that balances parents’ and children’s claims while ensuring a minimal level of education, one necessary for the development of the child’s capabilities and agency.⁴⁸ Above the threshold at which human rights are minimally satisfied, arguments in favor of parental consent are bound up in the ideas of cultural liberty⁴⁹ (Kymlicka 2007, United Nations Development Programme 2004) and agency (Crocker 2008, Drèze and Sen 2002); below it, arguments take their force from the concept of human rights as “minimum” standards delimiting “where decent life starts” (Shue 1996, xi) and the need to protect basic capabilities (including future agency) without which a life might not be “fully human” (Nussbaum 2000, 74), an idea that Joel Feinberg sums up in the title of his article “The Child’s Right to an Open Future” (Feinberg 1980). Determining the exact location of this threshold in each case is a matter for public deliberation; requiring that governments respect this threshold and encouraging this deliberation is a matter for the Court. Before outlining the cases, however, I will offer a few words on the current academic debate about the nature of children’s and parents’ rights and the problem of balancing them.

⁴⁸ Here I refer to “capabilities” in Amartya Sen’s sense, most simply stated as “the substantive freedoms... to choose a life one has reason to value” (Sen 1999, 74).

⁴⁹ “Cultural liberty is about expanding individual choices, not about preserving values and practices as an end in itself with blind allegiance to tradition... [It is] the capability of people to live and be what they choose” (United Nations Development Programme 2004, 4).

1. Children and Parents as Rights-Bearers

This chapter begins from the assumption that children are rights-bearers. Whether this is in fact the case and, if so, what precisely is the nature of those rights, is not uncontested.⁵⁰ Theorists such as James Griffin who subscribe to the “choice” theory of rights hold that human rights are “protections of our human standing, our personhood,” a personhood understood “by analysing agency” (Griffin 2002, 20). Griffin and others argue that very young children, as vulnerable and not yet fully autonomous agents, do not qualify as rights-bearers (though some older children do). Explaining this view of children’s rights, David Archard says that “[t]he primary and appropriate functions of rights are the recognition and protection of the person *qua* autonomous agent. Since children, at least infants, lack the capacities requisite for autonomy on which the very concept of a right is allegedly predicated, it makes no sense, however well-intentioned this might be, to ascribe rights to children” (Archard and Macleod 2002, 5). Griffin nevertheless maintains that young children and infants have significant claims to care (Griffin 2002) which in some cases might amount to the same treatment. Children might also possess a right to *become* autonomous agents, a right the fulfillment of which would almost certainly require some minimum standard of education, the contours and formality of which are open for debate.

Other theorists, such as Harry Brighouse, apply to children the logic of the “interest” theory of rights, which says that the purpose of human rights is to protect fundamental interests or welfare, rather than to protect the freedom to make valuable

⁵⁰ For a rich account of the debate about children’s and parents’ rights, see Archard and Macleod, *The Moral and Political Status of Children* (2002).

choices. Brighthouse argues that “it is generally illuminating to think of children as bearers of welfare rights, but not, usually, as bearers of agency rights” because they have not yet developed the capabilities necessary to exercise true agency (Brighthouse 2002, 32). This position has implications not for whether we use rights language to protect children (we do!) but for the type of rights we ascribe to them. Samantha Brennan finds a middle ground between the choice and the interest theories and advances an argument for a “gradualist approach” that ascribes rights to a being according to the nature of that particular being and its level of development, which, for children, means evolving from “the sort of creatures whose interests are protected by rights to being the sort of creatures whose rights protect their choices” (Brennan 2002, 54). Brennan’s argument might be the basis for the position that children, as *potential* agents, possess certain rights the aim of which is to protect their interest in being able to grow into autonomous adults (or older children). A right to education—perhaps to some types more than others—would certainly be one way to serve that interest.

Similarly, there is much philosophical and legal debate about the nature and origin of parents' rights, a debate that has been particularly fierce with regard to religious freedom in the United States and the American practice of home-schooling. The U.S. Supreme Court, in the landmark 1972 case *Wisconsin v. Yoder*, sided against the state of Wisconsin in favor of the rights of Amish and Mennonite parents to remove their children from school after grade eight (before the child ages out of compulsory education). The unanimous decision rested on the constitutional right to

individual religious freedom, in this case as exercised by the parents both on their own behalf and on behalf of their children whose religious upbringing and, in the respondents' view, salvation, rests in their hands (*Wisconsin v. Yoder*, 1972).⁵¹ (This is, of course, not to say that the Amish community is without internal conflict about the role and scope of elders' authority, as recent attacks in Ohio reveal.⁵²)

Some, however, reject the whole notion of a "parent's right" as a kind of right one has over another human being. James Dwyer argues that while parents do have justifiable permission to make certain decisions on behalf of their young children—in accordance with the rights of those children—there is no such thing as "parents' rights." He argues that the American legal "culture" embraces "an inherent limitation" on individual rights. "This limitation on legal rights embodies the moral precept that no individual is entitled to control the life of another person, free from outside interference, no matter how intimate the relationship between them, and particularly not in ways inimical to the other person's temporal interests" (Dwyer 1994, 1373). He makes the analogy to the outdated notion of a husband's right to control his wife.

Some scholars allow that parents have certain rights with respect to their children while maintaining that those rights have limits. Samantha Brennan and

⁵¹ The Court held that compelling secondary school attendance in this case violated the respondents' rights under the Free Exercise Clause of the First Amendment, which applied to the States via the Fourteenth Amendment (*Wisconsin v. Yoder*, 1972).

⁵² An ongoing case involving Amish attacks on their peers from a different community highlights the concerns that some Amish feel about unchecked control and influence of certain community elders. A recent *New York Times* story points out the worries about undue influence over children, in particular (Eckholm and Lovering 2011).

Robert Noggle apply a threshold concept to the problem of balancing the rights of parents and children. They begin by arguing that parental rights are “stewardship rights,” or rights that arise from a parent's responsibility for—rather than ownership of—a child. “Parental rights are necessary to allow the parents the freedom to effectively protect and nurture children” (Brennan and Noggle 1997, 11). Those rights, therefore, are only legitimate to that end: “[B]ecause those rights have thresholds, they can be infringed if this is necessary for preserving the rights of the child or for making sure that her needs are met” (Brennan and Noggle 1997, p. 10). Thus, Brennan and Noggle privilege the rights of the child over the rights of the parent; indeed the parental rights seem to exist only to serve the child’s. But surely there are other reasons—such as cultural liberty—to protect certain rights of parents, though these are rights a parent holds by virtue of being a human being, not of being a parent. What is useful in Brennan and Noggle’s account is the idea that there are limits to these rights: the buck stops at the protection of the child’s current welfare and future agency. Shelley Burt also argues for limits on parents’ rights but doesn’t go as far, maintaining a “principle of parental deference” with regard to their right to educate their children in accordance with their own religious beliefs. She makes a case for placing limits on parent’s rights only in very specific and exceptional cases such as those that would deprive the child of fundamental skills like literacy (Burt 1994).

Following Brennan and Noggle and others, I start from the assumption that both children and parents are rights-bearers, though limited, and in different ways.

This chapter works from the position that children have welfare rights as well as what we might think of as “future” agency rights (though not agency rights in the standard sense, by which we would be required to allow them to vote, enter into binding contracts, and make other “adult” decisions). With regard to education, those rights, in line with the International Covenant on Economic, Social, and Cultural Rights, are such as will direct the child toward “the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms” (United Nations 1966[c], Article 13) and, in line with Feinberg, will guarantee that child’s “right to an open future.”

Such rights go beyond mere literacy and numeracy and should ensure, in practice, that no child is relegated to a sub-standard school in which the quality and scope of the education does not adequately prepare students to think critically, observe and assess the world around them, make important life decisions, and function as integral members not just of their social but also of their political and economic communities. A school that fails any child in these respects can be understood as failing to meet the threshold requirements for protecting the child’s basic human rights. Parents’ rights, here, might be understood as having two components: the human rights that parents have by virtue of their personhood plus a kind of stewardship right, again following Brennan and Noggle, which they have as parents. Where those rights begin and end with regard to their children is a matter I shall take up below.

2. The Cases

Since 2007, the European Court of Human Rights has decided three cases on indirect discrimination in the provision of education to Romani children who were allegedly discriminated against when the authorities placed them in separate schools. These special schools, of which there are many in Europe (Greenberg 2010, Kosko 2004, United Nations Development Programme 2002, Organization for Security and Cooperation in Europe 2000), follow “a simplified curriculum and effectively [lead] to long-term disadvantage for the children who [attend] them because of the difficulties of progressing into secondary or tertiary education” (Hobcraft 2008, 246). These cases are important in three respects: all three ruled on the admissibility of *statistics* in establishing a claim of discrimination (a departure from earlier jurisprudence); all three turned on whether the *criteria* used to separate the children was objective (and what objectivity entailed); and, most relevant here, all three made a judgment on the role of parental consent in separating a child from the mainstream school. Because the first of the three cases was revolutionary in many respects and laid the groundwork for future decisions, I will spend more time on this case than the others.

The first case is the landmark 2007 Grand Chamber ruling in *D.H. and Others v. Czech Republic*. *D.H.* is the first case of racial discrimination in education ever to reach the Court (Open Society Justice Initiative 2008). In this case, eighteen Romani students, represented by the European Romani Rights Centre (ERRC), brought to the European Court of Human Rights a case against the Government of the Czech

Republic. The events in question took place between 1996 and 1999, in Ostrava, Czech Republic, during which the eighteen applicants (plaintiffs) in the case—all local Romani children—were placed in a school intended for children with learning disabilities. The applicants took their case to the local education authority and then to the Czech Constitutional Court, claiming that they had been discriminated against in the provision of public education.

In Ostrava, the decision to remove a child from the mainstream school is made by the head teacher, based on psychological and aptitude testing done by a specialist, and requires the consent of a legal guardian. This procedure was followed in each case (in several cases the parents requested that the student be moved) and the Czech courts found no violation of local law. After their domestic appeals failed, the eighteen applicants took their case to the European Court of Human Rights, the Second Section of which also ruled against them. They appealed, and the case was heard by the Grand Chamber.

In its 2007 decision, the Grand Chamber overruled the 2006 Second Section decision. Although it also found no violation of local law, the Grand Chamber did find that indirect discrimination had taken place in the removal of the Romani children to a “special” school. Specifically, it found a breach of Article 14 of the European Convention. This prohibition against discrimination, reads:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or

social origin, association with a national minority, property, birth or other status. (Council of Europe 1950, Article 14)

In traditional Court jurisprudence, however, this article is not “freestanding” and discrimination can only be pleaded in conjunction with another Convention right (Gilbert 2002).⁵³ In *D.H.*, as with the other two cases, this article was taken together with Article 2 of Protocol 1, the right to education (Council of Europe 1952):

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. (Council of Europe 1952, Protocol 1, Article 2)

The Court’s decision in favor of the applicants marked the first time it had found discrimination (direct or otherwise) in the provision of public education.

There are numerous details that make this case noteworthy. These include the consideration of country-wide statistical evidence in establishing a *prima facie* case of indirect discrimination, the fact that the Court considered the “wider social context” in its deliberations and findings as opposed to the narrow context of the eighteen applicants (Hobcraft 2008), and—crucially—the decision to embrace the concept of indirect discrimination and uphold the principle that a *prima facie* allegation of discrimination shifts the burden to the respondent state to prove that any difference in treatment is not discriminatory.⁵⁴ While all of these elements made the decision a revolutionary one,

⁵³The Council of Europe promulgated Additional Protocol 12 in November 2000, which only came into force in April 2005, after the alleged violations in these cases took place. This Protocol grants a freestanding right not to be discriminated against (Gilbert 2002). It is worth noting that several of Europe’s most powerful states, including France and the United Kingdom, have not ratified the Protocol.

⁵⁴ This decision was hailed as an important step forward in making European discrimination law consistent with policy. “This ruling places interpretation of the European Convention in consonance with the standards set out in the European Union’s Directives on burden of proof in cases involving sex

the element most relevant to this discussion is the Court's rejection of the parental consent defense. But first, I will briefly lay out the other two cases, the first of which built on, and the second of which departed from, the Grand Chamber's ruling in *D.H.*

In the second case, *Sampanis v. Greece*, the court examined whether the Greek authorities had failed to provide education to the applicants—11 Greek nationals of Romani descent—and then when they did provide it, whether they did so in a discriminatory way (*Sampanis v. Greece* 2008). In 2004, the applicants were denied permission to enroll in primary school. Once admitted in 2005, a backlash by non-Romani parents ensued, with demonstrations outside the school. The Romani students were harassed and intimidated. The police got involved. The students were then moved to a separate school building where they were to receive special preparatory classes. The Romani families signed a written statement expressing their consent that their children be moved. No children ever moved back to the ordinary classes after completing the “preparatory” classes. The applicants brought their case to the European Court of Human Rights citing Article 14 together with Article 2 of Protocol 1 (as in *D.H.*) as well as Article 13 (the right to an effective remedy). The Court ruled in their favor, upholding many of the principles established in *D.H.*, including that “a presumption of discrimination can be supposed from a *de facto* situation and that such a presumption will shift the burden of proof to the respondent state” (EHRLR [a] 2008, 680). The Court also took a position, as in *D.H.*, on the role of parental consent, an issue to which I will return.

and race discrimination and discrimination in employment on diverse grounds” (Open Society Justice Initiative 2008)..

In the third case, *Oršuš and Others v. Croatia*, the Court's decision at first departed from the two previous rulings. The applicants also filed a more far-reaching claim. The 14 applicants, Croatian nationals of Romani decent, had all attended separate Roma-only classes at some point in their primary schooling, ostensibly for linguistic reasons. Five of them had only attended segregated classes while the remaining nine had attended both Roma-only and mixed classes (*Oršuš and Others v. Croatia* 2008, 1033). In addition to Article 14 taken with Article 2 of Protocol 1 (as in the previous two cases), and Article 13 (as in *Sampanis*), their claim also cited Articles 3 (freedom from inhumane or degrading treatment) and 6 (the right to a fair trial). However, the Court rejected the claims under Articles 3 and 13 and part of their claim under Article 6.⁵⁵ It also found no violation of Article 2, Protocol 1 (taken with or without Article 14), holding that in this case, separating Romani children into different classes did not constitute discrimination. The Court also departed from the *D.H.* precedent in rejecting the use of statistics in establishing indirect discrimination. Like *D.H.* and *Sampanis*, it relied on both the "objectivity" of the criteria for segregation as well as parental consent in making its judgment, though it applied different definitions of objectivity and consent and ultimately reached different conclusions (*Oršuš and Others v. Croatia* 2008, 1033).

⁵⁵ The Court did find a violation of Article 6(1), namely, that everyone is "entitled to a fair and public hearing within a reasonable time" (Council of Europe 1950). Given that what was at stake was the continuance of their education, the four years for which the proceedings under the Croatian Constitutional Court had dragged on were deemed excessive (EHRLR [a] 2008).

In this chapter I am concerned with only one of the elements the Court used in determining whether separating Romani students is discriminatory: parental consent. In *D.H.*, the Czech Government argued that the parents' signed consent for the removal of their children to a separate school was evidence that the act did not constitute unlawful discrimination. This consent was the "essential decisive factor" in deciding to place the student in a special school (*D.H. and Others v. Czech Republic* 2007). The applicants, however, argued "that 'there could be no waiver of a child's right not to be racially discriminated against in education' and therefore any consent, construed as such a waiver, cannot be valid" (Hobcraft 2008, 253). The Court agreed. This normative argument, though, was not the only reason. On practical grounds, the Court questioned whether the parents had consented at all, holding that there was reason to doubt whether the parents in question could have made a fully informed, meaningful decision. It also held that restricting the education of any group—with or without parental consent—is against public interest. These three justifications for rejecting the parental consent claim—the inalienability of the child's right, the parents' lack of meaningful agency, and the public interest—demonstrate the need for the Court to clarify the nature, role and limit of parental consent (and, more broadly, agency) in education decisions, a point to which I shall return.

In the second case, *Sampanis v. Greece*, the Court again ruled that the government had acted in a discriminatory way in segregating Romani children and again upheld that parental consent was not a defense against a charge of

discrimination. As in *D.H.*, the Court found three reasons for this. First, though “the applicants signed a statement expressing their wish to transfer their children to a separate building annexed to the school,” they “claimed that they were pressurised [sic] to sign the statement by the Minister for Education, non-Roma parents and some leaders of the Roma community” (EHRLR [a] 2008, 678). The Court also questioned whether the parents had adequate information and power to resist such pressure (again questioning the parents’ lack of meaningful agency). Second, this decision followed *D.H.* in upholding that “it would be against an important public interest,” a pragmatic consideration, “to accept any waiver of the right not to be subjected to racial discrimination,” which itself rests on a third, normative consideration involving children’s rights (EHRLR [a] 2008, 679).

The third case, *Oršuš and Others v. Croatia*, deviated from the first two on the parental consent defense. The Chamber of the Court’s First Section found that the fact that none of the parents had complained about the separation of their children implied consent, which amounted to a defense against a discrimination charge. In *Oršuš*, the Court noted several times that the parents had not asked for their children to be transferred to a mixed class, or objected to their placement in a Roma-only class. The Court made no reference in this regard to the decision in *D.H.*, in which the Court said that the parents’ consent to their children’s segregation could not be decisive (EHRLR [b] 2008, 802). It found no violation of Article 14 together with Article 2 of Protocol 1 (that is, no discrimination in the provision of education).

After the 2008 judgment was handed down, however, the applicants appealed and two years later the Grand Chamber of the European Court of Human Rights overturned the decision of the lower chamber, effectively bringing it in line with the two earlier decisions (*Oršuš and Others v. Croatia* 2010). Yet the inconsistencies between the 2008 decision and the two previous decisions, and the disregard the Court showed in *Oršuš 2008* for the precedents on the parental consent defense, point to the need for clarification of some of the principles (and laws) at stake. Together, these cases also raise the question of what conditions must be present for a parent to give “meaningful” consent and whether such consent can be meaningful at all when what is at stake is a fundamental freedom: the right to freedom from discrimination in education.

The “parental consent defense” (as I am calling it) against a charge of discrimination rests on the view that a parent or legal guardian,⁵⁶ as an autonomous agent, has the right to decide the type of education her child will get, even if it means that that education is different from that received by other children. It assumes that parental control of children’s upbringing, in accordance with one’s religion or culture, is a right.⁵⁷ This right underpins the legal defense which claims that differences in school placement or educational outcomes are not discriminatory if they are the result of parental choice. Such a defense, however, is often merely an excuse governments

⁵⁶ For convenience, I will use the term “parent” as a catch-all that includes any legal guardian.

⁵⁷ Such control might be thought of as a kind of bargain between a government and parents: a state’s survival (immigration notwithstanding) requires its citizens to provide children and to prepare those children for some level of economic and political participation and, in return, it protects parents’ freedom to raise their children more or less as they wish. This bargain gives the state a reason to respect parents’ decisions regarding child rearing, their control. The “consent” at issue in this paper follows from this broader idea of parental “control.” What I mean throughout much of this paper is really “parental control,” as consent implies a more passive form of agency. For consistency, and to capture the weaker sense of control—for example in actions such as signing waivers—I will use the term that appears most frequently in legal documents: consent.

use to avoid the appearance of impropriety—and with it a charge of discrimination—in educational decisions and outcomes related to minorities. This excuse is particularly offensive when the claim that parents have truly given their informed (and uncoerced) consent is spurious, as is too often the case in Roma (and other minority) education. Such cases—where parents are coerced or unaware of the consequences of a decision—are fairly cut and dry when they can be identified. But what should we make of the underlying assumption? Is control of a child’s upbringing in fact a parental right?

3. The Case for Parental Consent

Here I will discuss three justifications—predominantly legal and practical—for respecting the right of parents to control a child’s education. (There are also normative justifications to which I will return later.) First, legal arguments that support this right can be found in both European and United Nations treaties, to which many European countries are party. Rights of this sort, when they refer to such control in the context of minority individuals and traditions, might be classified, following James W. Nickel, as “universal rights applied to minorities” (Nickel 2007). Second, in addition to the legal arguments, multiculturalists such as Will Kymlicka have also forwarded a justification for such a right on the grounds that it is *necessary* to protect minority cultures. Third, there is some support for the notion that a broader right—a right to democratic participation—is protected in European law, and that the right to education, presumably with some control over the content therein, is both a

practical prerequisite for the enjoyment of such a right and a natural extension of it. That is, I will make the argument that supporting the right of parents to be involved in decisions about their children's education arises in part from the desire to promote the democratic participation of minority parents and, when that right results in a more robust education for their children, it raises the probability that those children will be more civically engaged as adults.

First, the legal case: the (European) Framework Convention for Protection of National Minorities recognizes the rights of minorities to “set up and to manage their own private educational and training establishments” (Council of Europe 1995, Article 13.1) and learn their own language (Council of Europe 1995, Article 14.1). Article 13.3 of the International Covenant of Economic, Social, and Cultural Rights (ICESCR) protects a similarly worded right (United Nations 1966[c], Article 13.3). With respect to the three cases considered in this chapter, it's debatable whether removing Romani children to a different—substandard—school, managed by the Government without input from the Romani community, is what the framers of these conventions had in mind. Nevertheless, these three cases notwithstanding, European law appears to provide legal grounds for, at the very least, a parent's prerogative to send her child to a school of her choice.

While the law lays out what types of decisions parents have a right to make for their children, Will Kymlicka offers a justification for the existence of such a law. This justification is explicitly articulated in the 2004 UNDP *Human Development*

Report, on which Kymlicka served as an advisor. “Cultural liberty,” the report argues, is “about allowing people the freedom to choose their identities—and to lead the lives they value—without being excluded from other choices important to them” (United Nations Development Programme 2004, 6). This liberty is seen as fundamental to the entire project of “human development,” the understanding of development so heavily influenced by Amartya Sen’s “Capability Approach.” Under this rubric, “[h]uman development is first and foremost about allowing people to lead the kind of life they choose—and providing them with the tools and opportunities to make those choices” (United Nations Development Programme 2004, v). Clearly, education is one of those tools. “As an empowerment right,” the General Comment on Article 13 of the ICESCR states, “education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities” (Committee on Economic, Social, and Cultural Rights 1999, Article 13). Most relevantly for a defense of parental consent, a parent’s decision about the kind of education her children will receive can also be one of those tools, offering an opportunity for her to transmit (elements of) her own culture to her children. Education in one’s own language is one example of the application of the principle of cultural liberty to minority education. But what if education is only offered in the majority (or state) language, as was the case in *Oršuš*? This not only reduces the likelihood of academic success for minority children who speak their own language at home—thus undermining an important goal of the right to education—but it is also an attack on

the cultural right of all people, including minorities, to speak their own language (Council of Europe 1995).

Kymlicka argues that the choice of an official state language and the language of school instruction is not a neutral one but, because it comes at the expense of other languages, is rather an assertion of the importance of a single dominant language (and thus culture) over others. “Refusing to provide public schooling in a minority language... is almost inevitably condemning that language to ever-increasing marginalization” (Kymlicka 2006, 332). It is not a far leap to argue that it also contributes to the marginalization of the minority culture and its people with damaging effects on individual dignity, capability, and self-respect.⁵⁸ Thus, were the Croatian language proficiency of the Romani students and the express parental preference that they learn (at least at first, and even if not exclusively) in the Romani language the sole criteria on which the students in the *Oršuš* case were placed in a separate school, *and* were the quality and scope of instruction at the Romani school equal to that in the mainstream school, then there would be a strong justification for upholding such a decision. This justification would rest on both the need to provide minority children with the most effective education possible as well as the right of minorities to choose their language of instruction.⁵⁹

⁵⁸ Here I refer to “capabilities” in the sense that Amartya Sen and David A. Crocker mean them: 1) “the various combination of functionings (beings or doings) that the person can achieve... a set of vectors of functionings, reflecting the person’s freedom to lead one type of life or another... to choose from possible livings” (Sen 1992); 2) a person’s “freedom or opportunities... to function in ways alternative to her current functioning” (Crocker 2008); 3) “the *real opportunity* that we have to accomplish what we value” (Sen 1999).

⁵⁹ Though this was indeed what the Court found, the evidence suggests that this was unfortunately not the only criteria. Domestic proceedings indicate that the “psychological fitness” of the children was also a consideration. “For example, the first instance judgment says: ‘...these [Roma] children mostly

It is sometimes the case that a Roma parent might prefer that her child be educated in her own language and among her peers, as in *D.H.*, even if the quality of instruction is known to be inferior. This is understandable and constitutes yet another argument in favor of parental consent. However no parent should be forced to choose between educating her children in accordance with their own traditions and in their own language (again, with important caveats to which I will return), and ensuring that her children receive a quality education that will prepare them for civic and market participation and facilitate “the full development of the human personality and the sense of its dignity” (United Nations 1966[c], Article 13). Recognizing and removing this terrible choice that many minorities face, and the evils (intrinsic and consequential) inherent in it, is one of the projects of cultural liberty.⁶⁰

The answer, however, cannot be to remove the element of “choice” altogether—to allow the state to make that choice on the parents’ behalf—but should rather be to remove the *necessity* of making trade-offs between the enjoyment of one’s culture (and, by extension, identity) and one’s right to education. While the Court’s decision in *D.H.* and *Sampanis* was made to protect the right of the children to an education free from discrimination, the basis of its decision reflects another danger, one that pertains directly to the desire to protect this right of individuals “to

have difficulty in channeling their emotions... children of Roma origin do not have basic hygienic skills of washing, dressing, tying or buttoning...” (EHRLR [a] 2008). Also, the parents never explicitly consented—let alone requested—that their children be educated separately. The Court considered consent by omission to be sufficient grounds for demonstrating that this arrangement was the preference of the parents.

⁶⁰ There is some promise in bilingual education programs as well as vocational schools, at least when the state genuinely invests in the quality of such programs and they are not harmful to the students.

participate fully in their communities.” In *D.H.*, the Grand Chamber acknowledged—and rightly so—“that a waiver of rights can only be given, if at all, ‘in full knowledge of the facts’ and... without constraint” (Hobcraft 2008, 257); *Sampanis* followed this “informed consent” logic. The Court went on to say that it did not find sufficient evidence that “[T]he parents of Romani children, who were members of a disadvantaged community... were capable of weighing up all the aspects of the situation and the consequences of giving their consent” (*D.H. v. Czech Republic*, 2007). In *Sampanis*, the Court repeated this argument almost verbatim (EHRLR [a], 2008).

The danger here lies in something the 2004 *Human Development Report* calls “participation exclusion”: when a person or group is prohibited from participating in society in the way that others are allowed and encouraged to do (United Nations Development Programme 2004, 16). Ignoring or proscribing the role of Romani parents in making decisions about their children's education because they are viewed, as a group, as too uninformed or uneducated (or worse, too irresponsible) to make such decisions is a form of participation exclusion. The idea of participation exclusion, a partially pragmatic (or consequentialist) critique, is normatively rooted in respect for the agency and dignity of individuals, as exercised through the choices they make. It is both practically and ethically imperative that no group should suffer restricted opportunities to participate in the political, economic, and social life of their

communities and society as a whole.⁶¹ Being involved in decisions pertaining to a child's education is one important form of participation.

Participation is not just "important," however; Rory O'Connell argues that there is a "right" to democratic "participation" protected in the European Convention. Though the Convention has been traditionally viewed as protecting only a right to participation in the *institutions* of representative democracy, O'Connell says there is a case for pushing the Convention right beyond this limited scope. More importantly, she argues that the Court has already begun moving in this direction (O'Connell 2006). According to O'Connell, the Convention clearly protects a right to a representative democracy but she argues that the Court has also defended a right to meaningful "consultation" democracy, understood in recent years to include involving individuals in legal decisions that affect them (expressed as "a right to be heard"). O'Connell also finds three ways in which the Court could go further to encourage, through its adjudication of human rights cases, a fuller conception of participation, the strongest of which is to insist on effective and even-handed consultation (O'Connell 2006, 4).

⁶¹ Where "intentional communities" such as the Amish are concerned, what counts as an opportunity varies according to the type of education a child receives but not in the way we expect with mainstream society. An Amish child who wishes to remain within the conservative part of the group might not have the opportunity to do so if she receives a conventional liberal education. For this paper, however, I will leave out the discussion of special cases such as intentional communities which state explicitly that they do not wish to participate in mainstream society. Here, I am concerned with groups that *do* wish to have opportunities for such participation, even if they wish it to be so in a way that respects their cultural norms and values. For a fuller discussion of participation, see Crocker 2008, Sen 1999, Drèze and Sen 2002, United Nations Development Programme 2004, and any part of the substantial literature on development and participation. For a critical discussion on deliberate restriction of participation with regard to the Amish in the United States, see Barry 2001.

Insistence on such provisions does not, of course, guarantee effective participation. Members of the majority population might simply refuse to “participate with” Roma or other marginalized peoples. But O’Connell’s propositions are aimed at government, not individuals, thus providing some level of accountability for upholding domestic and international law. A strong role for the European Court would be, as O’Connell hopes, to use its powers of adjudication to expand the currently vague interpretation of the European Convention’s right to participation to include this fuller sense of participation as informed, consultative, even-handed, and most of all, effective. Recognition and enforcement of a right to democratic participation understood in this way could, in time, go a long way to mitigating the danger, as described above, in forcing authorities to balance a test of “informed consent” with protecting against participation exclusion. It also opens the door for Roma and other marginalized individuals to insist on meaningful and effective participation in decisions affecting them and their children.

4. The Case Against Parental Consent

Just as there is a powerful case to be made that we must respect the will of parents in decisions about their children’s education—a case grounded in international law, cultural liberty and respect for the dignity of individual parents, and the importance of encouraging minority participation in policy decisions—there is also a strong (I will argue stronger) case against it. First, I will consider what forms of consent might reasonably be called “meaningful” and second, I will argue that neither a parents’ cultural nor “stewardship” right trumps a child’s right—understood

as a legal or normative one—to a quality education directed toward the full development of her potential.

4.1. Meaningful Consent: Asymmetry, Critical Agency, and Adaptive Preference

Many Roma face incredible structural disadvantages that limit the extent to which they are able to fully participate in policy decisions that affect them, even on the most local level. Numerous recent reports underscore the extent of these disadvantages. In 2005, the UNDP found that in the large majority of poor Roma families the head of the household is unemployed (United Nations Development Programme 2004). The UNDP reported in 2003 that, on average, 15 percent of Central and Eastern European Roma are “constantly starving” (United Nations Development Programme 2002). In the area of education, while little data exist to show changes of school attendance or literacy rates over time, there is evidence that literacy and education levels are falling among the population as a whole (Ringold 2005). And these figures say nothing of the rampant racism and discrimination many Roma continue to face. Such evidence points to massive structural disadvantages that can compromise an individual’s ability to give “meaningful” or “informed” consent regarding the level and type of education her children receive. These disadvantages include asymmetries—vis-à-vis the relevant authorities—in education and confidence, in information, and in bargaining power.

First, asymmetries in education arise from the fact that Roma—like many minorities and members of disadvantaged groups—consistently receive less (quantity) and poorer (quality) education than non-Roma. Dramatic discrepancies between the educational levels of Roma and the (nearly always non-Roma) authorities with whom they must negotiate their children’s education, combined with many Romani adults’ experiences with prejudice, can result in asymmetries in confidence that can lead parents to feel they have little choice but to give their consent to (others’) decisions affecting their child. Second, these asymmetries in education correlate closely with asymmetries in specific kinds of information. A Romani parent may be less likely to have full information about the type and quality of education her child will receive. Even if that parent is aware of the discrepancies in education quality, she is not likely to be aware of the civil and human rights both she and her child possess let alone how to demand recourse to their violation.

A third disadvantage is a basic asymmetry in bargaining power, and is powerfully reinforced by daily interactions between Roma people and non-Roma authorities in the form of school administrators, police, government officials, and even health care providers (Center for Reproductive Rights 2003). Without the education, information, and confidence to stand up to local authorities and demand that her child receive the same quality education as other children, a Romani parent faces a daunting power imbalance. She may be at an extreme disadvantage when pressed to give her consent to a decision that she had no part in making, about which

she has little background information, and recourse to which she is unaware of or unsure how to access.

The combined force of these asymmetries—which, though they certainly do not exist between all Roma individuals and non-Roma authorities, are nevertheless very real and very widespread—leads us to ask: Are the parents in these situations truly able to make fully informed and meaningful decisions? Is their consent truly an exercise of their agency? Better yet, do they possess what Jean Drèze and Amartya Sen have called “critical agency,” “not merely freedom and power to act, but also the freedom and power to question and reassess the prevailing norms and values” (Drèze and Sen 2002, 258)? An important basis for such “freedom and power” is education, a luxury many Romani parents today were not themselves afforded, a fact that in itself constitutes a powerful argument for ensuring quality education for Romani youth.

“Adaptive preferences” can also impact the content and limits of “meaningful” consent. These refer to certain types of mental conditioning in which “the deprived people tend to come to terms with their deprivation because of the sheer necessity of survival, and they may, as a result, lack the courage to demand any radical change, and may even adjust their desires and expectations to what they unambitiously see as feasible” (Sen 1999, 63). If a Romani parent agrees to her child’s being removed to a separate school for children with disabilities not because she feels that this is what is best for her child, but because she has come to expect less

from the education system or because she feels she can demand less, then there are no circumstances under which that concession might be deemed “consent.” (In Chapter IV I discuss in detail adaptive preference formation in education decisions.)

4.2. Parental Prerogatives and Cultural Liberty

There remains yet another argument against allowing governments to use parental consent to justify segregating minority students, an argument that applies not only to Roma but to minorities and marginalized groups everywhere. This argument arises from what Feinberg formulates as a child’s “right to an open future.” We must ask: given the importance of recognizing the cultural rights of a parent, and assuming that the conditions for meaningful consent are satisfied, does a parent’s right to decide what’s best for her children trump a child’s right to a quality education, an “education [that] shall be directed to the full development of the human personality” (United Nations 1966[c], Article 13)? I argue that it does not. First, the whole idea of “cultural liberty” of all peoples—minority and otherwise—is to expand, not contract, choices and a limited or inferior education contracts the life choices of the recipient.⁶² Second, for both pragmatic and normative reasons, rights against discrimination and to education are too important to be waived, for cultural or any other reason.

⁶² As discussed in note 61 above, “intentional communities” that rely on limiting certain opportunities of their members in order to preserve their culture may be a special case, as there is a difference between marginalized minorities and those communities that express a collective will *not* to integrate into mainstream society. This does not negate the rights of child members nor does it assume that they share the views of the community in this respect, but suffice to say that additional arguments are needed here, arguments that are best left for a longer work.

While international law recognizes “respect for the liberty of parents... to choose for their children schools, other than those established by the public authorities,” (United Nations 1966[c], Article 13) and asserts that “[w]ithin the framework of their education systems, the Parties shall recognise that persons belonging to a national minority have the right to set up and to manage their own private educational and training establishments” (Council of Europe 1995, Article 13), these rights are limited. Education is still subject to “such minimum educational standards as may be laid down or approved by the State” (United Nations 1966[c], Article 13). Even where the state has implicitly “approved” (by not interfering with their continuation) the deliberate provision of dramatically sub-standard education to minority groups, international law still insists that real educational opportunities be offered that aim at a higher purpose than the mere provision of education, however thin. The General Comment on Article 13 of the ICESCR reads:

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities... But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence... States parties agree that all education, whether public or private, formal or non-formal, shall be directed towards [these] aims... [E]ducation shall be directed to the human personality's "sense of dignity", it shall "enable all persons to participate effectively in a free society", and it shall promote understanding among all "ethnic" groups, as well as nations and racial and religious groups. (Committee on Economic, Social, and Cultural Rights 1999)

While Article 13 does also protect the “liberty of parents” (see 13.3 and 13.4, quoted above), it does so with the side constraint that the exercise of those liberties are

“subject always” to the provisions set out above. An education so restrictive in scope, depth, or quality as to rob the student of the means to realize these goals (and, by extension, rob society of a means to achieve its larger objectives) can, in at least one important sense, be said to be contrary to the spirit and in many cases letter of international law.

The concept of “cultural liberty” articulated by Sen, Kymlicka, and others in the 2004 *Human Development Report* (HDR), attempts to balance the idea of (multi)cultural rights with long-standing liberal conceptions of individual rights. Defending the right of individuals to make choices in line with their traditions and beliefs, and drawing heavily on Sen’s work in the Capability Approach, they explain cultural liberty as “the capability of people to live and be what they choose” (United Nations Development Programme 2004, 4). But cultural liberty is not cultural determinism. The report argues that “[p]eople want the freedom to participate in society without having to slip off their chosen cultural moorings” (United Nations Development Programme 2004, 10), but at the same time, “[c]ultural liberty is about expanding individual choices, not about preserving values and practices as an end in itself with blind allegiance to tradition” (United Nations Development Programme 2004, 4). One principal reason for this position, Kymlicka argues, is that human beings are constituted by more than a single, narrow cultural identity marker, and too often one identity might be expected to trump another at the expense of important aspects of our well-being (Kymlicka 2007).

The idea of cultural liberty which Kymlicka and the UNDP articulate, while stressing its case for “respecting diversity and building more inclusive societies” (United Nations Development Programme 2004, 2), is also uncompromising in its commitment to human rights. Mark Malloch Brown makes this point explicit in his Foreword to the 2004 HDR: “a girl’s right to an education will always trump her father’s claim to a cultural right to forbid her schooling for religious or other reasons” (United Nations Development Programme 2004, 3). The same should be said of a parent who, probably with the best interests of the child in mind, exercises her right to place that child in a Roma-only school with the full knowledge that the education her child will receive may be so poor as to condemn her to a life of poverty and exclusion, as is almost always the case with graduates of these “special” schools (Greenberg 2010, Kosko 2004, United Nations Development Programme 2002, Organization for Security and Cooperation in Europe 2000). “Cultural liberty” is meant to protect and expand individual choice and freedom, in part by protecting the rights of individuals to practice their traditions and preserve their cultures, but it should not be understood to protect an exercise of “cultural rights” that limit *other* individual’s choices and freedoms in the present or future.⁶³

More broadly, there is a strong argument for the principle that rights against discrimination and to education are too important to be waived. The Court upheld this principle in *D.H.*, siding with the applicants’ assertion that “there can be no

⁶³ Such a limit may or may not also apply to the self, as when an individual, in full knowledge of the consequences, chooses to limit her own freedom, but here I emphasize “others.” This concept does *not* allow, for example, a parent to permanently limit the freedoms of her child. One idea I have tried to advance elsewhere is that agency must be sustainable. Applied here, limiting a child’s education is a limit on her future agency and a violation of a principle I articulate as “sustainable agency.”

waiver of a child's right not to be racially discriminated against in education" (Hobcraft 2008, 253). Education and anti-discrimination rights protect the laying of a foundation for the child's intellectual and personal development, ability and inclination to participate in public affairs and democratic decision making, and options in the labor and marriage markets. At the same time, these rights can help create the conditions for a society that is tolerant, educated, democratic, able to compete in a global economy, and, importantly, just.

But don't parents also have rights? Despite the side constraint mentioned above, Article 13 of the ICESCR does hold that States Parties must ensure "respect for the liberty of parents... to choose for their children schools, other than those established by the public authorities" (United Nations 1966[c], Article 13). If all rights are inalienable, though, where does that leave us? James Nickel argues that rights are not, in fact, all inalienable (Nickel 2006). Clearly prisoners can lose their right to freedom of movement, for example. This type of exception aside, isn't it dangerous to dilute the "inalienable" quality of human rights as absolute side-constraints? And what of the argument that rights to education and freedom from discrimination are too important to be waived or trumped? Nickel (2006) addresses this problem in detail but suffice to say here that we may be able to find a compromise. No one can waive a right on your behalf, including your parents, so perhaps ensuring a child's right to education is inalienable means proscribing—or redefining—certain "rights" typically conferred upon parents. How do we justify such a redefinition, one that will give a certain priority to children's rights?

It is widely accepted that a parent does not ever have the right to kill, maim, torture, or otherwise seriously harm her child. Diminishing the quality of a child's education so much that it does irreparable damage to that child's life prospects, limiting her future agency and possibly condemning her to a life of grinding poverty or humiliation, similarly should be seen a form of harm, or at the very least, risk of harm.⁶⁴ Joel Feinberg refers to this as a violation of the child's "right to an open future," which he sees as a kind of "anticipatory autonomy right." This right insists that the valuable options between which the child might, as an adult, one day choose, must be kept open until such a time as she is "a fully formed self-determining adult capable of choosing among them" (Feinberg 1980, 126). She must be "permitted to reach maturity with as many open options, opportunities and advantages as possible" (Feinberg 1980, 130), or, at least, as reasonably possible. There are limits, then, on the restrictions (and, in Feinberg's view, even influence) under which a parent should be permitted to place a child. An overly restrictive upbringing—or more specifically, in this case, restrictive education—constitutes a real harm and a violation of that child's right to an open future or, put another way, to the preconditions for autonomy.

There is no comparable harm done to the parent by limiting her right to make

⁶⁴ While there is some debate about what constitutes "serious harm," such as exposing a child to the risk of bodily harm by allowing her to ride a dirt bike, even such an exception is not without limitations. Parents are still often required to ensure that the child wears a helmet in order to limit the risk. Similarly with education, a parent might home-school a child and perhaps that education will carry greater risk of limiting that child's opportunities than other forms of education, but there are limits to what that education might comprise. In European countries, where the quality of education is otherwise fairly high, there is substantial evidence (Greenberg 2010, United Nations Development Programme 2002, Organization for Security and Cooperation in Europe 2000) that the limited curriculum and poor teaching quality found in many "special schools" for the Roma constitute similarly serious harm. Of course, an upbringing free from any parental constraints or protections might also compromise future autonomy, but for now I will leave aside the empirical question—What are the best ways to nurture future autonomy?—and say only that objectively poor quality education is certainly not among these factors that nurture autonomy.

decisions about her child’s education, for cultural or practical reasons. A “trade-off” might therefore be necessary, though it is a trade-off between two very different types of rights, a “fundamental” right to education, on the one hand, and a weaker “stewardship” right, on the other.⁶⁵ (While future research might canvass the arguments for and against the presumptive superiority of fundamental individual rights over stewardship rights, and consider also the possibility of their equal moral urgency, I am working here from the strong intuition that a right that one possesses by virtue of being a unique individual is stronger than a right that one might possess by virtue of having some responsibility for the well-being of another human being.)

A final point should be made regarding the possibility that state intervention against a parent’s wishes might, if the child remains in the home, in the end do more harm than good if it sufficiently disrupts the parent-child relationship.⁶⁶ We might also reasonably assume that a parent who is willing to limit her child's future agency in a way that does irreparable damage might also, even if unintentionally, bring about such harm through means other than just limiting the child's education. Such a situation should trigger an intervention from social services, but not a waiver of the child's fundamental rights. We should uphold a general principle of protection with contingencies—if the harms or anticipated harms are modest—for exceptional cases

⁶⁵ This said, the cultural survival of certain insular peoples (including both intentional communities and many indigenous groups) may depend in part on the parental right to control a child’s education and other aspects of her upbringing. Though Roma are not considered “indigenous peoples” and few Roma communities would be considered “intentional” or “insular” in the sense of not desiring integration, in future research I will consider the consequences of my argument for such groups and argue that the applicable international laws can help us to navigate the limits of parental control of education more generally.

⁶⁶ Clearly in cases of physical abuse, for example, state intervention might harm the parent-child relationship, but such intervention would still be justified.

in which it might result in a harmful home environment that would in other ways compromise the welfare, and possibly future life prospects, of the child. But it would be very dangerous to allow the exceptional cases to negate the fundamental rights. Determining the need for, and type of, intervention in such cases is a matter for social policy.

5. The Case for a Threshold

I have so far made a case both for and against the role of parental consent (or prerogative) in educational decisions affecting their children. The three European Court of Human Rights cases examined here show that this problem is not just philosophical, but legal and practical. Pivotal in all three decisions was the role of parental consent in a finding of discrimination in the provision of education, yet these decisions, at least until *Oršuš 2008* was overturned in 2010, are contradictory. Even with the Court's reconsideration in the third case, local implementation of the Court's orders remain largely unfulfilled and there is still no clear sense of when parental decisions should be overridden. There is a need, therefore, for clarification of the role of parental consent in education decisions. I will argue that there is a delicate balance that must be struck: parental consent is important and should be sought, but below a certain threshold of harm, it neither trumps the child's right to education nor justifies discrimination in the provision of that education. The precise location of such a threshold should be discovered locally through broad-based public deliberation, including legislative action, in the absence of which the job defaults to the Court,

albeit with meaningful consultation with the affected parties as well as substantial information, information the Court sought and used in *D.H.* but baldly ignored in *Oršuš 2008*. There are two justifications for identifying such a threshold: normative and pragmatic. We might also classify these as deontological and consequentialist.

5.1. The Deontological Justification for a Threshold

Henry Shue argues that human rights, or “basic rights,” do not delimit the heights to which human beings might aspire, but rather the depths below which we must not (or must not be allowed to) fall. This “moral minimum” is the foundation of a minimally just society (Shue 1980, ix). Martha Nussbaum articulates a similar concept. She endorses Sen’s Capability Approach, but takes it a step further, proposing “a definite list of the most central capabilities,” as the only way “to elaborate a partial account of social justice, a set of basic entitlements without which no society can lay claim to justice” (Nussbaum, 2003, p. 36). She emphasizes that her list of basic capabilities is “tentative and revisable” yet she warns that none can be dispensed with entirely, as “some human matters are too important to be left to whim and caprice, or even to the dictates of a cultural tradition” (Nussbaum 2003, 47), or to majority rule.

I propose that the “threshold” for consent be conceived in a similar way, as demarcating a minimum standard of protection for the child (understood as rights or capabilities) that must be satisfied no matter the objection of the parents, teachers, or local authorities. Below this threshold, the harm to the child (of a poor, overly

restrictive, or insufficient education, for example) outweighs the harm done to the overridden authority. An education, even one consented to by a parent, that will foreseeably confine a child to a life of poverty and deprivation (including agency deprivation) is a violation of that child's right to education as well as an affront to her human dignity. A certain level of educational quality, one that would afford the real opportunity for the child to develop her agency freedom and capabilities to their fullest, must be satisfied. This insistence is grounded partly in the importance of sustainable agency, which requires a minimum standard of education for its development. Applied here, limiting a child's education is a limit on her future agency and a violation of this principle.

Above this threshold, however, respect for the agency of the parents is a matter of human dignity. Moreover, parents have a cultural right—"cultural liberty," in Kymlicka's sense—to choose the type of education their children receive. This is not a tossing aside of rights or capabilities, rather an acknowledgment that once the threshold conditions are met, there is an important role for parental consent. First, it can help protect the rights of minorities, as laid out in various ways in international laws.⁶⁷ Second, the assumption that any individual is unfit to make essential parenting decisions (in the absence of strong evidence) is arrogant and insulting. This is an especially dangerous assumption if it is based largely on the individual's

⁶⁷ These include, to name but a few, the rights of minorities (indeed of all human beings) to "freely pursue their economic, social and cultural development" (United Nations 1966[b], 1966[c], 2007), to "freedom of thought, conscience and religion,... to freedom of opinion and expression" (United Nations 1966[b], 1966[c]), "to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage" (Council of Europe 1995), and to be protected "from policies or practices aimed at assimilation... against their will and... from any action aimed at such assimilation" (Council of Europe 1995).

membership in a demographic group. Overriding the will of a Romani parent, with or without doubts about her ability to make meaningful decisions, is difficult to justify except in the event that failing to do so would expose the child to a ghettoized education that would permanently limit her freedom and well-being, and reduce the quality of her life. This in no way means that it is easy to demarcate where exactly that threshold of “harm” would be. It may be different in different cases, and a variety of factors will have to be considered before any judgment can be made. This is a good thing, as it may force public discussion where previously there had been none.

5.2. The Consequentialist Justification for a Threshold

Concern for the welfare and fundamental rights of all children is the strongest justification for articulating a threshold to protect them against harm, but, to the extent that the authorities from Strasbourg down to the local municipality value democracy and human development, there is a secondary, pragmatic (by which I here mean consequentialist) argument for clarifying the role and limits of parental consent. If the authorities are legally compelled to develop a strong case demonstrating that their decision has met the threshold conditions before justifiably separating a child from the mainstream school, then there is strong likelihood that they will be forced to engage the parents and possibly the whole community in order to justify their decision. While far from perfect in the presence of such asymmetries mentioned above (in education and confidence, information, and bargaining power), such engagement engenders public discussion and deliberation and can in time be one of several factors that can help to dismantle those asymmetries. Thus, the argument in

favor of clarifying—with a kind of legal threshold—the role and limits of parental consent is in part grounded in the importance of public discussion, minority participation in governance decisions, democracy, and development objectives.

Regardless of whether the child's right to education ultimately trumps a parent's or school official's authority to make a decision on that child's behalf, there is an especially important role for public discussion (with the parents or anyone else concerned) in identifying where that threshold might be and how the specifics of the situation will affect it. David A. Crocker argues that (non-elite) deliberative participation, is the “thickest” form of democratic decision-making, both inherently valuable and an important tool for development. “Authentic development occurs when groups at whatever level become subjects who deliberate, decide, and act in the world rather than being either victims of circumstance or objects of someone else's decisions, the tool of someone else's designs” (Crocker 2008, 339). Crocker credits development ethicist Denis Goulet with defending such deliberative participation on instrumental grounds. He argues that “[t]he right kind of participation, at least its ‘upstream’ variety, is likely to have good consequences in reducing poverty, expanding solidarity, and strengthening self-reliance” (Crocker 2008, 340). These are desirable consequences that should be of interest not only to the marginalized parents in question, but to all who claim to be committed to these development and democracy-strengthening goals.

Minority participation in governance decisions can not only have agency- and wellbeing-enhancing consequences, it is also argued to be an important element in policy transformation, which in turn helps to build stronger, more democratic societies.⁶⁸ In the case where a minority group is not well organized or is only minimally politically active, there are less likely to be policy changes in their favor. Melanie Ram, in her detailed case study of post-transition policy changes in the Czech Republic and Romania, found that “the Roma... have not been very organized or politically active as a cohesive minority group, and thus were less effective at pressing their concerns with their government or with the EU” (Ram 2003, 47). Roma involvement in deliberation about parental consent for “special schools” can challenge a government’s view that such consent is a defense against discrimination, and may one day help to bring an end to the practice of separating Romani students altogether, not to mention aid in the development of a more organized and active Roma minority.⁶⁹

The *process* of articulating the role and limits of consent can also instigate a virtuous cycle of participation and education. Just as political participation and public discussion have been shown to have positive democratic and development outcomes, education has been shown to have an impact on political participation.

⁶⁸ For now, we can take for granted that democracy should be a goal in and of itself, since European institutions are firmly and explicitly committed to democracy.

⁶⁹ For the purpose of this chapter, I assume that appropriate (or at least acceptable) venues for such deliberation can be identified. Town hall meetings, parent-teacher associations, and other fora that bring together various stakeholders at a local level are good candidates. Clearly, however, more needs to be said about the most appropriate mechanisms and venues for the kinds of participation I am suggesting. The extensive literature on deliberative democracy and participatory development (see Crocker 2008 and references therein), as well as recent empirical studies, are good starting points. I return to this issue in the “areas future research” section of my conclusion.

This makes the case for open deliberation about parental consent doubly important: not only does it deepen democracy, it plays an important role in ensuring quality education, which in turn reinforces the public participation and further deepens democracy.

Political participation, research has consistently shown, increases monotonically with education (though perhaps this correlation depends upon the kind of education). Education is the one socioeconomic characteristic most closely associated with likelihood to vote (Blais 2000); it has been shown to help citizens develop the skills of civic participation (Verba, Brady and Schlozman 1995); and it engenders a sense of civic duty (Rosenstone and Wolfinger 1980). Meredith Rolfe also argues that individuals with more years of education are more likely to be politically tolerant and support racial and gender equality (Rolfe 2004). All of these outcomes help set the basic conditions for poverty alleviation, the protection of human rights, and the realization of a more vibrant democracy, outcomes that authorities should be interested in on consequentialist (and practical!) grounds, even if they are not interested in whether Romani children receive a quality education or whether their parents play a meaningful role in the decisions.

Until now, I have been arguing that a legal obligation on the part of local authorities to respect some kind of threshold for parental consent will engender a dialogue between parents and school authorities (as well as parent-teacher associations and school boards, where they exist), between individuals and municipal

governments, and hopefully between Roma and non-Roma families in local communities. These changes in the scope and depth of “public discussion” are micro in scale and these processes will take time to gather speed and strength. In the shorter term, however, the European Court itself has a role to play. James Goldston argues that the very taking up of a controversial issue by the Court can help spark public discussion on a large scale, with benefits such as awareness of issues affecting minorities (Goldston 1999).

Here I am referring to a kind of virtuous cycle, where the Court—seeing a need for clarification on the role of parental consent, as it is starting to do—takes up the case and hands down what is likely to be a controversial verdict insisting that school authorities respect the right of a child to a rich education. The state and local government either acts or fails to act to identify locally-appropriate policies that ensure compliance. Local activists, advocates, and the press begin to monitor the progress for evidence of that compliance (as is now happening in the Czech Republic and elsewhere). Governments and schools now find themselves under the microscope. A discussion begins.⁷⁰ Such discussion, as I argue above, may have additional beneficial effects not only in terms of awareness of issues affecting the Roma (and other minorities) but also in terms of participation and democracy (Goldston 1999). If no such discussion begins, or if it fails to identify a locally-

⁷⁰ Of course, courts can err, but such a process might still be instigated by a “bad” judgment. A court decision that is perceived as manifestly unjust by even some segment of society might still stir up public debate which might in time change public opinion and later result in “better” judgments. The point is that courts can be catalysts for social change. The trick, of course, is to ensure that that ensuing discussion includes the voices of those affected, especially the most marginalized members of the communities. Describing the contours of effective, inclusive local deliberation, however, is a discussion beyond the scope of this paper.

appropriate threshold for parental consent that meets the criteria I have discussed here, additional cases will inevitably make their way back through the courts, starting with local and state courts and working their way up to the European Court of Human Rights. Evidence of exactly such a cycle is already apparent in Central and Eastern Europe.

Let me be clear, though, that public deliberation is not a substitute for Court action. While public deliberation decides the precise contours of law, the rule of law sets boundaries on the outcomes of that deliberation, much in the way that Martha Nussbaum hopes that state constitutions will embrace her basic capabilities as minimum requirements for a life fully human (Nussbaum 2000). While such limitations on the outcomes of public deliberation would fail to satisfy the robustly liberal demands of deliberative democrats such as Crocker, the state of Roma education in Europe today fails to satisfy even the most basic demands of justice. In the long run, more democracy—not less—might indeed be the most just solution, but in the short run, as the virtuous cycle I have described above gradually takes its course, immediate action is required lest another “lost generation” of Roma youth loses out on the promise of a rich—or at least minimally useful—education.⁷¹

Meanwhile, even if truly inclusive public deliberation concerning the exact location of the threshold takes immediate root, and results in robust protections for

⁷¹ To be fair, Crocker agrees that deliberation, while in his view an intrinsic good, is not appropriate for all situations, such as when an elite uses it as a means of manipulating others. In *Ethics and Global Development* he suggests four “enabling conditions” for effective and just deliberative decision-making: equal political liberty, equality before the law, economic justice (especially important in this case, as poverty can hinder deliberative participation), and procedural fairness. (See pages 314-321.)

both children and minority parents, the three Court cases cited here demonstrate the need for the Court to clarify its *own* position, which so far has been inconsistent. I argue that that position should be to require demonstrated respect for a threshold below which the harm a child would suffer is so great that it cancels out a parent's consent (informed or otherwise) to that harm. This threshold helps us to strike a much-needed balance between the welfare and "future" agency rights of the child and the cultural and stewardship rights and concern for the human dignity of the parent.

6. Conclusion

Almost a decade into the twenty-first century, within the jurisdiction of the world's most active human rights court, powerlessness, poverty, lack of participation, and lack of access to education continue to ensure that European Roma remain a people on the edge. Despite two Court rulings defending the right to freedom from discrimination in education, a subsequent third ruling has demonstrated the pressing need for clarification on the role and limits of parental consent in ensuring that that freedom is protected. Although the Grand Chamber has since over-turned this third ruling, bringing it in line with the other two, the ongoing controversy, and the lack of action on the part of governments charged with remedying the injustices of segregated schooling, reveal that the debate is hardly settled.

Defending parental consent, I have made the case for why government officials ought to engage parents in decisions pertaining to their children. This case

rests 1) on legal arguments that parents have a right to control their children's education and that "democratic participation" (in this case on the part of parents) is protected in the European Convention; 2) on the "cultural liberty" of all individuals; 3) on respect for the human dignity and agency of parents; and 4) on the social importance of democratic participation and the need to guard against participation exclusion.

Defending a limit on the reach of that consent, I have made the case for why parents might not have a right to impose on their children decisions that would proscribe their basic rights and that would contract rather than expand their future agency and well-being freedoms (that is, their capabilities). I appeal to 1) the structural and informational disadvantages that limit certain individual's ability to give meaningful consent (disadvantages that lead us to ask whether the parent possesses "critical agency" or might perhaps be exhibiting adaptive preferences); 2) the human rights and capabilities of the child, arguing that cultural liberty is grounded in human rights and that certain rights are too important to be waived; and 3) a concept of "basic rights" or "central capabilities" that form a moral minimum below which we must not fall, such that a parent's cultural and stewardship rights to decide what's best for her children do not trump, but in fact are trumped by, a child's basic right to education and to the full development of her capabilities.

In light of these arguments, and given the inconsistent responses of the Court in three recent cases on the matter, I have argued for the need for the Court to

establish basic guidelines for a legal threshold for the use of the “parental consent” defense, and to demand that state and local governments—following and informed by inclusive and deep deliberation—enact laws and policies fleshing out and setting in place those guidelines in practice. Its decision to overturn the 2008 Oršuš decision is encouraging in this respect. An education—even one blessed with parental consent—that will predictably confine a child to a life of poverty, powerlessness, and deprivation is not only a violation of that child's right to an education but also an affront to her human dignity. Thus, the importance of human rights and the dignity and sustainable agency of the child delimit the lower side of the threshold: below a certain level of educational quality, these concerns trump all others, including claims of the parent or school or religious officials to the contrary. The importance of a parent’s agency delimits the upper side of the threshold: above a certain level of educational quality, respect for the agency of the parent in making her own decisions is a cultural right and a matter of human dignity.

In practice, the Court’s affirmation of the need to identify and respect such a threshold should press state and local officials to take seriously the effects of separating a child from a mainstream school. In cases where this seems not to have been done, the Court remains a powerful arbiter, only with a clearer standard for evaluating the adequacy of the parental consent justification, a standard that more explicitly balances two important sets of concerns. Determining where, in any given case, this threshold lies will be normatively and practically complex and must be hashed out at the local level while still protected at the level of the European Court of

Human Rights.⁷² In the end, if that complexity forces school authorities, private citizens (especially minorities), and government officials at all levels to engage with one another in some form of public discussion, then the Court will have indirectly done at least part of its job in pushing member states towards the principles articulated in the founding statements of the Council of Europe: “individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy” (Council of Europe 1949, Preamble).

⁷² Such local deliberations do not negate a role for the Court in evaluating the effectiveness of the decision in protecting human rights. As with the doctrine of margin of appreciation, the Court must respect, but not in all cases concede to, state decisions.

IV. Educational Attainment and School-to-Work Conversion of Roma in Romania: Adapting to Feasible Means or Ends?⁷³

1. Introduction

Observing and reporting on the abysmally low education levels of European Roma has become a central concern of numerous European institutions and civil society groups, especially since the recent eastward expansion of the European Union has put the issue onto the accession states' reform agendas. Neither advanced statistical analysis nor a robust theoretical framework is needed to state conclusively that Roma are, on average, less educated than non-Roma. Plausible explanations abound: formal schooling is too expensive even when nominally "free;" discrimination in schools drives Roma children away; Roma "culture" does not value formal education; job prospects for educated Roma are poor. However, very little rigorous analytical work has been done to test these hypotheses and to try to disentangle the drivers of low educational attainment among Roma.⁷⁴ Even less theoretical work has sought to understand the possible motivations and constraints Roma face in pursuing education. Observing an obvious outcome and merely postulating its root causes are poor foundations for policy making. What happens to Roma educational attainment when we control for poverty, for example? Equally important, is formal schooling something that Roma value *and* have *reason* to value?

⁷³ This chapter is a revised version of a paper that is forthcoming in the *Journal of Human Development and Capabilities*, Routledge.

⁷⁴ "Educational attainment" denotes the highest grade level completed. This is distinct from "educational achievement," which measures performance, typically with standardized test scores or grades.

Both Amartya Sen (1999) and Martha Nussbaum (2000) argue, in their respective versions of the Capability Approach, that education is vitally important, intrinsically and instrumentally. It builds the skills and knowledge necessary to choose a wider range of functionings and to perceive the scope of possible choices. It can also be a good in itself, whether or not it results in satisfaction or other good consequences. However, educational preferences, like other preferences, can be “adaptive.” Sen describes adaptive preference as a type of mental conditioning in which “the deprived people tend to come to terms with their deprivation because of the sheer necessity of survival, and they may, as a result, lack the courage to demand any radical change, and may even adjust their desires and expectations to what they unambitiously see as feasible” (Sen 1999, 63).

Some scholars (Bridges 2005, Bridges 2006, Watts 2009) have argued that individuals from certain backgrounds might see secondary or higher education as unfeasible for them, and thus might come to “prefer” not to pursue further education even when it is technically available to them. David Bridges clarifies that, “[t]hey may experience their decision as a free choice, but it is one which has been adapted to the limited options set by their circumstances: it is, in this sense, an ‘adaptive preference’” (Bridges 2006, 15). Bridges also cautions that we ought not to assume that *all* choices not to pursue further education are necessarily evidence of adaptation, at least not of the type that might provoke intervention (Bridges 2005). Moreover, Donald Bruckner argues, even *adaptive* preferences can be worthy of our respect, as rationally chosen pathways, albeit ones borne of a limited capability set: “the

contingent causal genesis of a preference does not automatically make it irrational” (Bruckner 2009, 323). A choice to become, for example, a bricklayer, may be “rational” in Bruckner’s sense, still “adaptive” in Bridges’s, and yet not “inappropriately adaptive” in Serene Khader’s sense, in which such preferences run counter to our basic human flourishing and might be candidates for preference transformation interventions (Khader 2011).

Michael Watts argues that, when evaluating the education choices of lower-income individuals, we should not assume that the choice to forego higher education is evidence of significant adaptation; rather we should ask whether those individuals nevertheless exercised their own agency and pursued their own well-being ends but through different means. We should fetishize higher education no more than we should commodities. “The capability approach is not simply concerned with the acquisition of more and more (educational) resources but with the freedoms individuals have to use the resources they have to choose and lead lives they value and have reason to value” (Watts 2009, 434-5). While an educated mind is certainly intrinsically valuable, most individuals—including Sen and Nussbaum—seem to value education more for its instrumental ability to enhance our well-being and expand other aspects of our capability sets, valuable “ends” of their own. If we can achieve these ends in a less costly way, we may have good reason to prefer that. Moreover, if our expectations for our feasible level of future well-being are dampened by adaptive preferences, we may be even less inclined to invest in extra years of schooling. Thus, we should consider whether and to what extent individuals

might adapt their preferences according not only to what they see as feasible *means* for improving their lives (How much education can I afford?), but also as feasible *ends* of education (How will it benefit me? How comfortable can I hope to be?).

Turning this perspective to the case of the European Roma, collectively and more pejoratively known as “Gypsies,” we might address the question that for so long dominated the Roma education policy debate: Do Roma value education? Decades of policies aimed at helping Roma parents to “appreciate” the value of education might have missed the point. Perhaps the question is not whether Roma—or any others—value education, or even whether they can afford it, but whether they have *reason* to value it. Much analysis focuses on the adaptive preference among lower-income individuals to consume less education because it is seen as unfeasible, but my analysis asks whether some individuals might revise downward not only their perception of the *feasibility* of further education, but of its *instrumental value* based on an anticipated best-case future. If one is not rewarded by more choices and improved well-being, then the adaptation is not just to the perceived feasibility of the investment, but to the expected returns, regardless of whether one would, in fact, value those expanded choices and enhanced well-being if they were attainable. Policies, then, might focus less on patronizingly encouraging Roma to “value” education, and more on giving them a reason to do so. While policy has indeed begun making this turn, there remains little statistical analysis underpinning that shift.

1.1. The Roma

Europe's largest ethnic minority (conservative estimates range from 10 to 12 million),⁷⁵ Roma are also among its poorest and fastest growing populations. Having suffered centuries of discrimination and marginalization, many Roma now find themselves trapped by cycles of poverty and unemployment, which in turn further their social and economic exclusion. The expansion of the European Union into some of the more heavily Roma-populated countries of Central and Eastern Europe (CEE)—most recently Romania, boasting Europe's largest Roma population—has forced the status of the Roma to the forefront of the development, human rights, and anti-discrimination policies required for accession. Their exclusion is increasingly a focus of economic concern as well. A 2010 World Bank study estimated the would-be gains of Roma economic inclusion in Romania to range from 887 million Euro to 2.9 billion Euro annually, depending on the size of the Roma population estimate used (World Bank 2010, 17). The situation, however, remains grim.

In the large majority of poor Roma families in Central and Eastern Europe, the head of the household is unemployed (United Nations Development Programme 2005[a]), and in countries surveyed for a 2004 UN health report, more than 50 percent of Roma respondents admitted that there was “never” enough food for the entire family, and 15 percent responded that they “are constantly struggling with starvation” (United Nations Development Programme: Romania 2004). Roma life expectancy, in comparison to non-Roma living in the same area, can be as much as 17

⁷⁵ Many sources estimate a larger population. See FN4, above.

years lower (United Nations Development Programme: Romania 2004).⁷⁶ Though little data exist to show changes in school attendance or literacy rates over time, there is evidence that literacy and education levels are falling (Ringold 2005). Educational attainment is considerably lower within Roma populations than non-Roma, and regular reports by governments and NGOs reveal that, despite comprehensive national-level strategies such as Romania's *Governmental Strategy for Improvement of the Condition of Roma*, educational outcomes for Roma are not improving or, according to some, are improving at an abysmally slow rate measured mostly in terms of declining failure rates rather than actual learning outcomes (Open Society Institute, 2007). Meanwhile, widespread segregation of Romani children into separate schools, or schools for the learning disabled, continues despite European court rulings and, in some places, national legislation prohibiting it (Greenberg 2010, Organization for Security and Cooperation in Europe 2000, Kosko 2004).

Slight improvements in Roma educational attainment are hardly heartening, given their very low starting point. In 2007, just 0.8 percent of Romania's non-Roma population under the age of 40 had no education at all, compared with 20.9 percent of the Roma population. Figures for those with only a fifth grade education were two percent and 23.1 percent, respectively. The gap closes only slightly for individuals with an eighth grade education: 18.7 percent of non-Roma and 38.2 percent of Roma. Meanwhile, the compulsory school abandonment rate⁷⁷ for the whole population

⁷⁶ Figure for Roma women in Slovakia, compared to non-Roma women in the same area (United Nations Development Programme: Romania 2004)

⁷⁷ This is the share of students who abandon school at an age when school attendance is still mandated.

tripled in the decade between 1993/94 and 2004/05, rising from 0.6 percent to 1.7 percent (Open Society Institute 2007).

Existing reports, though, while descriptively thorough and often well researched, rely for their analysis on observed and intuitive associations between Roma status and human development outcomes such as educational attainment and poverty. For example, the 2007 OSI report, citing the cost of keeping a child in school, makes a strong case that “a clear connection exists between the economic status of Roma and the educational attainment of their children” (Open Society Institute 2007, 332). To my knowledge, however, only one published work to date has investigated whether the raw difference in educational attainment between Roma and non-Roma remains once differences in economic status—and other factors that also might be correlated with education—are accounted for, and this work only covered individuals educated entirely or partially before the transitions from communism in Southeastern Europe.⁷⁸ Moreover, this analysis again assumes that one’s preference is adapted according only to the affordability of education now, and not according to the expected enhancement of capabilities and well-being later.

There is also little systematic research on the attitudes of individual Roma and how these might impact life choices. One survey, however, does investigate attitudes

⁷⁸ In a recent paper in the *International Journal of Manpower*, Niall O’Higgins (2010) explores determinants of educational attainment among Roma but restricts his sample to individuals who were born between 1940 and 1979, so most received their entire education in the immediate aftermath of World War II or (at least partially) under communism, making it difficult to apply the study to today’s education systems. In order to make this paper as policy-relevant as possible, I examine only individuals who were educated in Romania after the fall of the Ceaușescu regime.

(though it does not try to connect them to actual outcomes). In 2002, the UNDP and ILO jointly surveyed 5,034 Roma, and collected the findings into the report *The Roma in Central and Eastern Europe: Avoiding the Dependency Trap*.⁷⁹ The collected data point to substantial perceived discrimination and an overall sense of hopelessness about the future as well as a perception that education, while perhaps valuable in its own right, is not among the most important factors in one's success (United Nations Development Programme 2002). The reported attitudes are consistent with Watt's argument that when looking at adaptive preferences, the relevant evaluative space is what one seeks to achieve ("success"), and not how one seeks to achieve it ("education" versus "hard work"). The 2002 UNDP/ILO survey found that only 27 percent of Roma in Romania felt that a good education was among "the three major conditions in order to succeed in life." Even fewer (11 percent) placed professional skills in this basket. Hard work (54 percent) and good luck (61 percent), together with good health (67 percent), were perceived to be most important. When asked "What are your children's life chances in comparison with the majority of children in the country?" across six life dimensions where 1 is "higher," 2 is "the same," and 3 is "lower," mean responses were most pessimistic in response to "to find a job" (mean of 2.6), though all means were above 2 (United Nations Development Programme 2002).

⁷⁹ During the research phase of this essay, the complete data from the UNDP/ILO survey could be accessed on <http://roma.undp.sk>, but access is now restricted. I have therefore cited the resulting report in which the aggregated, analyzed results were ultimately published, although my own figures are taken from the survey results directly.

When asked “What could be the main three justifiable reasons for a boy from your household not to attend school?” the answers of the Romanian Roma in the UNDP/ILO survey strongly supported the hypothesis that poverty is at least one related factor, while also refuting the suggestion that many Roma parents wish to keep their children out of school for cultural or other reasons. Of the 15 possible reasons given for keeping a boy child home, only two were given by more than 20 percent of respondents: “he does not have decent clothes” (52 percent) and “I would not stop my child from going to school under any conditions” (31 percent). These were followed by “even if he attends, he will be unemployed anyway” (17 percent) and “the teachers treat him badly at school” (16 percent). Only six percent answered “He has already learned what is necessary to progress in life” and only five percent responded that “children do not learn the really important things at school.” The results were similar for girls, except that 16 percent also responded that “she has to help in raising the younger children,” an indication of the influence of poverty as well as gender roles in girl child education decisions. Finally, of those who reported having difficulty finding a job, 56 percent attributed this to their “ethnic affiliation” compared to 43 percent who attributed it to “insufficient qualification,” pointing to substantial perceived discrimination in the job market (United Nations Development Programme 2002). Together these survey responses reveal a population the majority of which, on the one hand, do not feel that good education is as important to succeed in life as hard work, good luck, and good health, but on the other hand, still want to send their children to school (at least provided they have “decent clothes”), puzzling findings for those in the “Roma culture does not value education” camp.⁸⁰

⁸⁰ It is important to note that no elaboration is given in the survey on the meaning of the phrase “to

What, then, is the real story behind Romania's quest to meet the second Millennium Development Goal: "to ensure that, by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling," Roma children included (United Nations 2008)? Using 2002 data from Romania's most recent census, this chapter examines and seeks to explain the educational attainment of Roma in Romania.⁸¹ I focus on completion of primary education, defined as through eighth grade.⁸² I hypothesize that the high immediate opportunity cost of education (due to the extreme poverty many Roma face) combined with perceptions of low returns to education (due to high unemployment levels and low average wages) decrease the incentive to stay in school and can result in a rational calculus to drop out.⁸³ Put in Capability terms, I hypothesize that the adaptive preferences of Roma—preferences not only about the immediate feasibility of additional education

succeed in life." It may well be that what many readers of this survey understand as economic or professional success is not how some respondents understand a successful life, further underscoring the need for caution in assigning meaning to Roma individuals' idea of what constitutes the "good life." Although it is very possible that two thirds of Romanian Roma do not believe that good education is one of the three main constituents of economic success, particularly given the employment analysis conducted later in this paper, it may also be that if the question asked explicitly about economic or professional success, the responses would have differed.

⁸¹ *Census of Romanian Population and Households from 2002.*

⁸² The Romanian government considers grades 1-8 to consist of "elementary school" (I-IV) and "junior secondary education" (V-VIII). Here, "primary school" is grades 1-8, which, at the time I extracted the data (October, 2008), the compilers of this data set (IPUMSI) used for the purposes of international standardization. In Romania in 2002, education was compulsory through grade eight, or approximately 14 years of age, though data reveal that many students are closer to 17 when they complete eighth grade. While it is impossible to know the age at which each individual completed primary school, age group analysis shows that no one who was 13 at census time had completed primary school; for 14-year-olds, this figure is 7.9 percent, 64.3 for 15-year-olds, and 86.4 for 16-year-olds; the percentages level off at around 90 percent for ages 17-20. Thus, many students complete primary school at 15 or 16, but few finish who have not done so by then.

⁸³ This is, of course, only part of the story. There is much anecdotal evidence of other barriers Roma face in enrolling and remaining in school, including being turned away at registration, incorrect assumptions about a child's eligibility for school or the cost of school, mistreatment or neglect by teachers and other students, and sometimes parents' preferences. All of these barriers, however, would be easier to overcome if parents and students were convinced that education was worth the effort.

(adaptation to the available *means* for achieving the good life) but also about the long-term benefits available to them (adaptation to the available *ends*)—might lead them to perceive less of a reason to value education, whatever else they might value.

2. Predicting Educational Attainment: Previous Work

What does the literature suggest might be the main predictors of educational attainment for Roma? I have not been able to find any systematic attempts to isolate the variables contributing to Romani educational attainment in Romania, though sociological research in the United States and recent education research in the developing world offer good starting points. Evidence from the United States suggests race as an important factor in explaining disparities between the attainment rates of different ethnic groups (Porter 1974), although several studies show that race gaps disappear or even reverse if endowments (family income and family background, including parents' education and number of siblings, among others) and scholastic ability are accounted for (Portes and Wilson 1976, Cameron and Heckman 2001). Findings from developing countries echo the importance of household income⁸⁴ (Tansel 1998, Filmer and Pritchett 1999, Behrman and Knowles 1999) and of parental education (Tansel 1998, Mani, Hoddinott, and Strauss 2009).

⁸⁴ Filmer and Pritchett (2001) have found that use of a composite “asset index” as a proxy for family economic status seemed as, if not more, reliable in predicting enrollment as conventionally measured consumption expenditures.

Aspirations can also play an important role, particularly for disadvantaged groups. Amartya Sen argues that we make education decisions according to the extent to which we have reason to value that education, both in terms of its costs and benefits now, and its ability to expand our capability set and enhance our well-being later. This cost-benefit analysis underlies the influential human capital model according to which individuals will evaluate the direct and indirect costs (such as income foregone) of education against its expected return (Schultz 1960, Becker 1964, Mincer 1974). Sen links this theory to aspirations: if our expected best-case future is dampened by adaptation to what we “unambitiously see as feasible” (Sen 1999, 63), this has serious implications for our cost-benefit analysis and highlights the importance of recognizing possible preference adaptation both to the *means* and *ends* of achievement. Existing empirical evidence supports this view. Portes and Wilson (1976) find self-esteem and educational aspirations to be important determinants of attainment among African American students (whereas parental status, measured ability, and school grades dominate among whites). Gill and Reynolds (1999) find teacher expectations to have a strong effect on African American students’ reading and math outcomes through sixth grade.

While the existing literature provides useful guides for understanding trends in Roma education, we cannot assume that existing research will be directly applicable to the Roma in Romania. Their position is an uncommon one, as a desperately impoverished and marginalized population living within a relatively developed EU country, and little empirical work has been done on this group. Kertesi and Kézdi

(2011) find that controlling for health, parenting, school fixed effects and family background all but eliminates the sizable Roma/non-Roma test score gaps in reading and math in Hungary. Although this is in line with the above evidence, drivers of achievement differ from those of attainment, even as the former can be one driver of the latter. Other studies investigate the role of Roma education as a predictor of employment or poverty or health, but, apart from O’Higgins, no published papers of which I am aware 1) uncover whether Roma, *ceteris paribus*, are less educated than non-Roma, and 2) examine what factors drive Roma educational attainment. The implications for Romanian public policy—and development programs aimed at Romania—are very different depending on the source of the education gap, if it exists. Language barriers, for example, require different policy solutions than lack of post-graduation employment opportunities.

3. The Data

The 2002 *Population and Housing Census*, conducted by the Romanian National Institute of Statistics, covers 99.83 percent of the population. Collected through face-to-face interviews between March 18 and 27, 2002, all data are reported at the individual level. The universe includes foreign citizens who had established “usual residence” more than a year before the census, and excludes Romanian citizens legally residing in Romania but who had left the country more than one year earlier. The enumeration unit was the household and every person aged 14 years and

over was interviewed individually. A single resident adult answered building, dwelling and household questions, including about any children under 14.

The microdata used in this study are courtesy of the University of Minnesota's Integrated Public Use Microdata Series International (IPUMSI). The self-weighting IPUMSI sample was generated by selecting every tenth household in the census after a random start, yielding a total of 2,137,967 observations, of which 1,910,201 individuals (89.35 percent) are categorized as Romanian, 141,659 (6.63 percent) as Hungarian, and 52,619 (2.46 percent) as Gypsy (here, "Roma").⁸⁵ The remaining 33,488 individuals (1.57 percent) report their identity as belonging to one of a number of other minority groups. The key variables used in this study are described in Annex 1. I also give summary statistics for each, for the entire sample and the restricted sample I use in Section 4.

3.1. Descriptive statistics: education, employment, and poverty

Evidence from numerous surveys, including the large-scale surveys that resulted in *Faces of Poverty, Faces of Hope* (United Nations Development Programme 2005[a]) and *Avoiding the Dependency Trap* (United Nations Development Programme 2002), points to stunning deprivation among European Roma and equally stunning levels of inequality between Roma and non-Roma. Data

⁸⁵ Hungarians, followed by Roma, represent the largest ethnic minority in Romania. Many estimates put the number of Roma at several times the census figure, closer to 5-10 percent. Though the data set uses the term "Gypsy" (Romanian: *Tigan*), I will use "Roma." There is much variation in the understanding of both terms and not all individuals embrace the term Roma (though far fewer embrace the Romanian *Tigan*). In using the Romani ("Gypsy" language) term, I am following both standard international and common Romani practice.

on key well-being and education variables from the 2002 Romanian census corroborate that evidence (Table 5). The data show that Roma are on average younger than non-Roma (24 versus 38 years old), less likely to speak Romanian as a first language (51 percent versus 91 percent), and have more of their own children living at home (almost 2 to 1).⁸⁶ They are also less likely to be married, separated, divorced or widowed, possibly due to the difference in the age profiles of the populations. Roma are also more likely to live in rural areas.

Regarding variables that proxy for long-term levels of wealth and income (which are not available in the census data), the data show that 98 percent of non-Roma have electricity, compared to 84 percent of Roma. Figures for sewage disposal fall to 53 and 16 percent, respectively. Roma also live in much smaller homes; average living area per person is 16 square meters for non-Roma, but less than eight for Roma. The figures for education are also dramatically different. The census shows that non-Roma are far more likely to complete primary school than Roma (82 to 37 percent); 55 and 9 percent, respectively, finish secondary school; and 98 percent of non-Roma report they are literate, to 72 percent of Roma.⁸⁷

⁸⁶ It is likely that many more Romanian Roma speak Romanian as a first language than this figure suggests. In all probability, those Roma who speak Romanian as a first language are more able to convincingly report that they are ethnically Romanian or some other ethnicity. Thus, the large share of Roma who are recorded in the census as non-Roma very likely do not speak Romani as a first language.

⁸⁷ T-tests run only for individuals age 15 and up for primary, 19 and up for secondary, and 22 and up for university.

Table 5: Comparative Descriptive Statistics, Non-Roma and Roma (t-tests)

	Non-Roma	Roma	Difference (SE)
Age	37.78	24.20	13.58*** (0.0960)
Lang: Romanian	0.919	0.514	0.405*** (0.00124)
Female	0.515	0.499	0.0159*** (0.00221)
Single	0.381	0.723	-0.342*** (0.00214)
Married	0.492	0.224	0.268*** (0.00220)
Separated	0.0381	0.0142	0.0238*** (0.000838)
Widowed	0.0890	0.0391	0.0499*** (0.00125)
Num. Children	0.97	1.72	-0.754*** (0.0070515)
Urban	0.525	0.382	0.143*** (0.00220)
Electricity	0.982	0.840	0.142*** (0.000636)
Sewage	0.532	0.157	0.375*** (0.00219)
PP Living Area	15.96	7.739	8.226*** (0.0487)
Literate††	0.977	0.724	0.254*** (0.0008817)
Edu: NIU	0.101	0.240	-0.139*** (0.00135)
Edu: < Primary (age >16)	0.183	0.634	-0.452*** (0.0022382)
Edu: Primary††† (age > 16)	0.817	0.366	0.4516*** (0.0022382)
Edu: Secondary (age > 19)	0.549	0.091	0.4587*** (0.0030174)
Edu: University (age > 22)	0.086	0.022	0.0840*** (0.0018067)
Edu: Unknown	0.0130	0.0260	-0.0130*** (0.000506)
Employed‡	0.518	0.273	0.245*** (0.00283)
Unemployed	0.0694	0.113	-0.0433*** (0.00145)
Inactive	0.413	0.614	-0.202*** (0.00279)
Unemployed‡‡ (excl. inactive)	0.118	0.292	-0.174*** (0.00296)
Head Employed	0.5401	0.3776	0.1311*** (0.0022052)

*** $p < .01$, ** $p < 0.05$, * $p < 0.1$

†The t-test for this variable, "number of own children living at home," was run only for individuals ages 16-50.

††T-test restricted to individuals age 15 and up; †††Figure indicates individuals with only this level of education; ‡ All five employment variables are for individuals ages 15-65; ‡‡This is the conventional definition of "unemployed": the ratio of unemployed to total employed-plus-unemployed; it excludes inactive individuals.

Finally, though 52 percent of non-Roma are "employed" according to census calculations, only 27 percent of Roma are employed; for heads of household, these

figures rise to 54 percent and 38 percent, respectively.⁸⁸ However, though the employment rate can be understood as the percent of individuals who were “working” at the time of the census, its complement is not the unemployment rate, since these means are calculated across the population and, while they do exclude children under 15 and seniors over 65, they do not exclude housewives, the disabled, discouraged workers or other groups who are not active in the labor market.⁸⁹ More telling is the unemployment (excluding inactive) rate and the inactive rate itself: 12 percent of non-Roma are unemployed by the conventional definition, compared to 29 percent of Roma. Meanwhile, 41 percent of non-Roma between 15 and 65 are not in the labor market at all, compared to 61 percent of Roma. This may be in part due to the fact that Roma between the ages of 15 and 50 have almost twice as many of their own children living at home as do non-Roma. This means that large families who might otherwise pay for childcare could be unable to do so, requiring a parent or older sibling to give up paid labor to care for young children.⁹⁰

⁸⁸ The employment tests were restricted to individuals ages 15-65. A 2010 World Bank report found that 69 percent of Roma men in Romania now work, the same share as in the majority population and a heartening sign of progress. However, only 31 percent of Roma women are now employed, 24 percentage points below the rate for majority women. But Roma still earn far less. “Labor earnings for individual employed Roma in Romania are a mere 39 percent of the labor earnings for employed non-Roma” (World Bank, 2010, 7-8). It will be useful to repeat the present analysis with 2012 census data.

⁸⁹ The “inactive” observations were not excluded from the calculation of the “employed” variable because Roma between 15 and 65 have 2.3 times the odds of being “inactive,” so excluding this group would bias the sample. A description of the employment variable can be found in the census enumeration text, available from IPUMSI: https://international.ipums.org/international-action/variables/173939/enumeration_text#ro2002a.

⁹⁰ The differences between all of the means in Table I are statistically significant at the 1 percent level. Chi-square tests for each of these variables (results not reported) reinforce the implications of the figures discussed above by confirming that these variables are not independent of Roma status. Every one of the chi-square tests is also statistically significant at 1 percent.

4. Educational Attainment

Here I test primary education completion rates for Roma and non-Roma to try to determine whether, *ceteris paribus*, they are equal. I have limited the sample to respondents ages 17 to 20, before which they are much less likely to have completed primary school (though still might).⁹¹ Setting an upper bound on age, while shrinking my sample to a fairly narrow age group, has three benefits. First, it allows me to capture as many respondents as possible who were living with their mother at the time of the census, most importantly allowing me to control for the powerful effect of mother's education but roughly also to account for endogeneity concerns due to unobserved ability.⁹² Second, it allows me to control for family socio-economic status (through wealth proxies), without generating a problem of endogeneity whereby the

⁹¹ About 64 percent of 15-year-olds had completed primary school by 2002; the figure rises to 86 percent for 16-year-olds and levels off at 90-91 percent for ages 17-20. Thus, some older teens still finish 8th grade, but the data seems to show that by age 17—the age at which school attendance is no longer compulsory—all who will complete primary school already have. By leaving out students 16 and under, I capture only those who either have or never will finish primary school, rather than including some who have not yet but still might. I leave out students ages 21 and up because of problems with income endogeneity and the likelihood that they no longer live with their mothers. Also, those 20 and under had a maximum of one year of school, if any, under communism, making the results more relevant for current education policy. The Roma figures are the same as for the population as a whole. Eliminating individuals over 20 does not affect the overall primary school completion rate. Those aged 21-60 (post WWII cohorts) have the same completion rate as 17-20 year-olds: 90 percent. Those aged 21-40 have a higher rate: 95 percent. This is consistent with government and NGO reports that the primary drop-out rate has been on the rise since the fall of communism, affecting Roma more dramatically. Roma age 21-60 had a 40 percent completion rate, compared to 33 percent for the 17-20 age group. This is also consistent with arguments that many protections for Roma and other minorities ended with the transition, deepening the inequality.

⁹² The census defines the mother as a “social,” not necessarily “biological,” mother, making the assumption of ability similarity a very rough one, however ability is not necessarily genetic but can also be “nurtured.” At least one study has questioned the effectiveness of mother's education as a control for ability (Card 1999), but a 2011 study of the Roma/non-Roma education gap in Hungary (Kertesi and Kézdi, 2011) found parents' education (together with family income and poverty) to be one of several “family background” variables that have an important effect not only on the test score gap itself but also on other “parenting” measures that themselves impact ability through cognitive and skill development. Note: I only have data on mother's education if she was co-resident at the time of the interview. For the parent-linking rule, see IPUMSI: <https://international.ipums.org/international-action/variables/173739>.

respondent's wealth might be affected by her education level, rather than the other way around. Third, those children who were 20 at the time of the census were seven or eight in December 1989, meaning they would have started school the year of (or at most the year before) the collapse of communism in Romania.⁹³ Restricting the sample allows me to exclude those children who attended school under the communist system, when the educational system differed in many respects. Though there was almost certainly a lag in impact, this nevertheless allows me to examine several cohorts of children whose education was shaped only by the post-communist education system, thus making the results more relevant to current education policy in Romania. In the general population, the completion rate is the same for this cohort of individuals as it was for the post-war to transition cohorts (ages 21-60): 90 percent. For Roma, the completion rate is lower: 33 percent for this group, compared to 40 percent for older Roma.

Although I do lose a significant number of observations this way (my total sample size drops to 98,938), it is important that I am able to exclude the communist years and be able to control for wealth and mother's education. Teenagers with a mother at home are 2.7 percentage points more likely to have finished primary school than those without, which means that by restricting my sample size I am estimating an upper bound on educational attainment for this age group. This effect appears to be even larger for Roma than for non-Roma—Roma children with their mothers at home are 6.1 percentage points more likely to complete primary school, compared to 2.6 points for non-Roma. This means I am estimating a lower bound on the

⁹³ Before 2003 compulsory schooling began at age seven; it is now six.

difference between the groups. Thus, the results that follow tend to overestimate Roma educational attainment relative to non-Roma, *and* slightly overestimate educational attainment as a whole, a problem that arises in several other places as well.⁹⁴ However, this chapter is concerned with the relative, not absolute, performance of Roma and non-Roma. The differences are likely diminished by several systematic biases, addressed in the discussion.

To predict educational attainment, I use logistic regressions to estimate the odds of completing primary education. Model 1 estimates the raw effect of Roma ethnicity where Y_i is a binary variable for primary school completion (Column 1, Table 6). This unconditional test reveals that the odds that a Roma individual will complete primary school are 96 percent lower than for a non-Roma. Of course, there are a number of factors—such as whether or not one is a native speaker of the language of instruction—that can compromise both academic achievement and attainment. Model 2 adds controls for individual characteristics. These are age, a female/male dummy, and a mother tongue dummy for the Romanian language.

Once I account for these individual characteristics, the change in the odds of completing primary school for Roma is negligible (Column 2, Table 6). Age and speaking Romanian both have the expected positive impact, and being female—surprisingly—also increases the likelihood of completion. Other factors that might

⁹⁴ Summary statistics (mean values) reveal that among children ages 17-20 whose mother is present in the home, 26 percent of Roma and 67 percent of non-Roma have completed primary school, a 41 percent gap. Among those whose mother is not at home, 22 percent of Roma and 69 percent of non-Roma have finished 8th grade, a 47 percent gap. (The differences between the means are statistically significant at 99 percent.)

impact the likelihood of completing any given level of education include geographical location and urban or rural status. These can contribute to the quality of the school and instruction, the distance of a school from one's home, its safety, and the relative education levels of others around you. While I would ideally control for these factors directly, I can only add in an urban dummy and seven dummies for the eight regions of Romania, holding the most populous region as the reference point. I find that living in an urban area is associated with almost three times the odds of completing primary school (Column 3, Table 6). Again, these additions absorb very little of the "Roma effect" on the odds of primary school completion.

In addition to individual and regional characteristics, there are reasons to suspect that lower socio-economic status of students, particularly over the long-term, corresponds to lower educational attainment (Tansel 1998, Behrman and Knowles 1999, Filmer and Pritchett 1999, Holmes 1999), a hypothesis that has been shown to hold in 35 different countries (Filmer and Pritchett, 1999). This correlation is due to a variety of factors, not the least of which is the pressure on older children to contribute to family income, through work in or outside the family or through begging. Because neither income nor wages are included in the Romanian census, I rely on proxies as described above. This substitution has some benefits. Such variables have been shown to be better predictors of long-term family wealth than current income or expenditure reports (Filmer and Pritchett 2001); they are also less susceptible to reporting distortions than income. Moreover, education may be less sensitive to short-term income shocks than it is to permanent family wealth (Tansel

1998). This is not only because families may attempt to smooth consumption in the face of short-term fluctuations, but because more permanent features of home life such as the availability of electric light and study spaces removed from the main living area can substantially impact the effectiveness of education, and thus promotion and retention.

Therefore, in Model 4, I proxy for long-term family wealth using per capita living area in square meters, the presence of electricity in the home (Mani, Hoddinott and Strauss 2009), and the availability of sewage disposal (either sewage or septic system), a factor that also has implications for health outcomes and in turn education. I also add a dummy for whether the head-of-household is employed. Economic factors turn out to absorb a significant proportion of the “Roma effect,” though Roma still have 89 percent lower odds of completing eighth grade, compared to non-Roma (Column 4, Table 6). Having the head-of-household employed is associated with increased odds of finishing eighth grade, as is the presence of basic utilities and increased living area per person, as we would expect. Finally, there is wide agreement in the education literature that the education levels of a child’s parents—in particular her mother—are in many cases the single best predictor of her own educational attainment (Tansel 1999, Mani, Hoddinott, and Strauss 2009). Model 5 thus includes four dummies for the (resident) mother’s highest level of education completed. The full model is:

$$Y_i = \beta_0 + \beta_1 \text{Roma}_i + \beta_2 X_i^1 + \beta_3 X_i^2 + \beta_4 \text{emp_emp_head} + \beta_5 X_i^3 + \beta_6 \text{edattan_mom}_i + \varepsilon_i \quad (5)$$

where X^1 is a vector of predictors for individual characteristics (age, female, Romanian mother tongue), X^2 is a vector of predictors for geographical characteristics (urban, seven regional dummies), and X^3 is a vector of proxies for long-term family wealth (living area per person, and electricity and sewage in the

Table 6: Explaining Primary School Completion (individuals ages 17-20 with mother in household at census time).

	(1)	(2)	(3)	(4)	(5)
Roma	0.043*** [0.002]	0.049*** [0.002]	0.048*** [0.002]	0.114*** [0.006]	0.232*** [0.012]
Age		1.052*** [0.012]	1.057*** [0.012]	1.043*** [0.012]	1.101*** [0.013]
Female		1.630*** [0.041]	1.552*** [0.040]	1.539*** [0.041]	1.535*** [0.043]
Lang. Romanian		1.441*** [0.053]	1.465*** [0.064]	1.554*** [0.069]	1.399*** [0.064]
Urban			2.867*** [0.075]	1.136*** [0.041]	0.941 [0.036]
Head Employed				1.262*** [0.033]	1.058** [0.029]
PP Living Area				1.145*** [0.005]	1.111*** [0.004]
Electricity				3.298*** [0.210]	2.614*** [0.176]
Sewage				3.402*** [0.138]	2.246*** [0.095]
MO: Primary					4.591*** [0.141]
MO: Secondary					11.083*** [0.492]
MO: University					11.876*** [1.572]
MO: Unknown					1.039 [0.361]
Region Constant	13.763*** [0.177]	3.185*** [0.658]	1.411 [0.300]	0.132*** [0.030]	0.030*** [0.007]
Observations	98938	98938	98938	98938	98938
pseudo r2	0.0991	0.108	0.146	0.233	0.3

† Region includes dummies for 7 of the 8 regions of Romania, with the most populous omitted. The dependent variable evaluates to 1 if the individual completed primary school, and to zero otherwise. Omitted Category for mother's educational attainment is "less than primary." Odds ratios reported. Robust standard errors in brackets; *** $p < 0.01$, ** $p < 0.05$, * $p < 0.1$

home). This model reinforces the importance of the education of the respondent's mother. For every additional level of education attained by the mother, the odds of an

individual's completing primary school go up dramatically. The "Roma effect" is also reduced. Nevertheless, the odds for Roma remain 77 percent lower than those for non-Roma (Column 5, Table 6).

These five models reveal a disturbing trend in Romani education in Romania. Most discouraging is the fact that a Roma individual, compared to a non-Roma, has 96 percent lower odds of finishing eighth grade, signaling a dramatic inequality in educational outcomes, whatever the background reasons for this inequality. After controlling for a variety of factors, the odds remain 77 percent lower. On the one hand, it is encouraging that we can identify some of the most powerful factors that predict educational attainment among Roma—and that these factors, such as long-term family wealth and mother's education, to some extent lend themselves to policy interventions—but on the other hand, it is discouraging that, despite conventional controls, there remains a significant difference between the primary school completion rates of Roma and other ethnic groups.

So, why the difference? I hypothesize that *perceived returns to education* vary between groups, thus contributing to differences in adolescents' preferences to pursue secondary education, and in their parents' support of that pursuit. Particularly for families facing extreme economic hardship, the opportunity costs of education grow as the child's immediate earning potential grows upon her reaching working (or begging) age. This is a related, but different, problem from the inability of poor

families to pay school-related costs in the present.⁹⁵ This disincentive also goes above and beyond the disadvantages that poor children face from long-term economic factors discussed above.

Thus, short-term costs and long-term disadvantage aside, a child in poverty faces a difficult trade-off between income forgone in the present and possible income forgone in the future. The expected future returns to education must be sufficiently high to outweigh the immediate needs of the family. If education offers little in the way of well-being enhancement now, it must do much to expand one's anticipated ways of being and doing in the future. This we can test. Although I do not have data on the direct cost of education with respect to *local* labor conditions in areas with high concentrations of Roma or among the Roma as a group, I am nevertheless able to determine the odds that a Roma individual will be employed compared to a non-Roma, *ceteris paribus*. In Section 5 I attempt to use employment to measure and compare the returns to education for Roma and non-Roma in Romania.

One limitation of these regressions is the absence of information about other possible intervening variables in the education models. For one, parent and teacher expectations of children in their care as well as early educational achievement (grades and test scores, for example), have been shown to affect grade completion rates (Gill

⁹⁵ Though public education from kindergarten is free for all children in Romania, there remain numerous costs associated with sending a child to school. These range from the cost of clothing, shoes, and school supplies, to “fees” levied by individual schools or teachers. Information asymmetries mean that many poor families are unaware of the illegality of some fees, or of the existence of programs such as school lunch vouchers. School administrators do not always encourage families of very poor—particularly Roma—children to seek assistance.

and Reynolds, 1999; Portes and Wilson, 1976). Self-esteem has also been demonstrated to be an important factor in minority education (Portes and Wilson 1976), but there is no way to test for this using census data. Lack of a control for ability is of course a problem, but I attempt partially to control for it by including mother's education, something that has itself been a strong determinant of educational attainment in other studies (Mani, Hoddinott and Strauss 2009, Tansel 1998) and most recently of Roma educational achievement (Kertesi and Kézdi, 2011).⁹⁶ I am unable to use this strategy in the employment models, however, where unobserved ability causes education to be endogenous. See Card (1999) for a discussion of the unreliability of using mother's education to account for ability. Next I consider whether perceived returns could impact educational decisions.

5. Returns to Education

Employment can be a motivating factor in educational decisions in one of two ways: 1) the need for employment now (which can motivate a student to drop out of school to work) or 2) the hope of better employment later (which can motivate a student to remain in school in order to improve her employment prospects in the future). One would expect that these two needs could conflict, particularly within marginalized or low-income groups for whom immediate need can be acute. Thus, I attempt to test whether there are differences between expected returns to education between Roma and non-Roma that could lead students and their parents to weigh one

⁹⁶ Mother's education affects a child's through avenues other than ability alone. This control is necessarily very rough. In footnotes 92 and 102 I offer a brief account of this problem.

option over the other. Can Roma youths, if they stay in school, expect to be rewarded with employment? If so, is the probability of their being employed, at each level of education, the same as for the rest of the population? And are they likely to be rewarded with an occupation befitting their education? Put another way, what set of possible futures are Roma youths likely to see as feasible and to what extent are they likely to see education as a means to achieve one of those ends? Moreover, is there evidence that their expectations, and thus preferences, might differ from those of the rest of the population?

Before attempting to measure the employment returns to education for Roma and non-Roma, I use logistic regressions to estimate the impact of Roma status on the odds of being employed. I find that, regardless of education and a variety of other variables, Roma are far less likely to be employed. I next turn to returns to education. Conventionally, returns to education are measured by wages. The Romanian census, however, does not include information for either wage or income, so I use a dummy variable for employment to try to capture the employment returns to education, which here I will refer to as the school-to-work conversion rate in order to avoid confusion with the conventional understanding of the term “returns to education” in wage regressions. Using logistic models, I compare Roma to ethnic Romanians and Hungarians (the largest minority group, followed by the Roma) as well as to the population as a whole and find that the school-to-work conversion rate is higher for Roma at all levels of schooling, a finding consistent with other studies that show that less well-off members of society frequently have higher returns to education—

especially at low levels—than do their better-off peers (Card 1999).⁹⁷ In short, Roma are less likely to be employed, regardless of education level, but education, once obtained, has greater impact on a Roma individual's chances of employment.

Attempting to estimate returns to education in this way is not without problems, however, as educational attainment is notoriously endogenous due to possible covariance with other individual characteristics, like family background and ability. While I use mother's education as a rough ability control in the educational attainment models, I only have this variable for individuals who live with their mothers, a group that is not likely to be representative of the entire working-age population. Thus, I do not use it in the employment models.

Another shortcoming of this method is that measuring returns to education with an "employed" dummy variable, rather than with wage, does not speak to whether individuals—once employed—are finding employment commensurate with their education. I therefore estimate another set of logistic models examining the odds of falling into a high-skill or unskilled occupation and find that, regardless of education, Roma are far more likely to be in unskilled jobs. I argue that this fact, and the overall low employment levels among the Roma population, could be driving low *perceived* returns to education among Roma children and their families, and thus dampening the desire to consume higher levels of education given the already high

⁹⁷ However, even a dramatic increase in the chances of employment (or in income) for a low-income group can still be very small in absolute terms when the baseline is very low. Large increases in the chances of employment still may not result in chances equal to or even approaching those of the rest of the population.

opportunity cost of education for poor families. (Recall that 17 percent of the Roma respondents in the UNDP/ILO survey, when asked why they would keep their son home from school, reported "even if he attends, he will be unemployed anyway" (United Nations Development Programme 2002).) To return to Sen's terms, families may "adjust their desires and expectations to what they unambitiously see as feasible" (Sen 1999, 63), with regard to *both* the means and the ends of education.

5.1. Employment

As we saw from the t-tests in Table I, on average just 27 percent of working-age Roma are employed compared to 52 percent of non-Roma. The difference is statistically significant at 1 percent. This statistic isn't particularly helpful, however, since it does not follow that 73 percent of Roma are unemployed; many are simply

Table 7: T-tests for Employment by Roma Status

	non-Roma	Roma	Difference [SE]
Employed	0.518	0.273	0.245*** (0.00283)
Unemployed†	0.118	0.292	-0.174*** (0.00296)
Inactive	0.413	0.614	-0.202*** (0.00279)
Head of Household Employed	0.504	0.373	0.131*** [0.00221]

*** $p < .01$, ** $p < 0.05$, * $p < 0.1$, Robust standard errors in brackets.

The t-tests for the first three employment variables were run only for individuals ages 15-65.

†This is the conventional definition of "unemployed": the ratio of unemployed to total employed-plus-unemployed; it excludes inactive individuals.

inactive, far more than in the non-Roma population of the same age (Table 7).⁹⁸ In Model 7, I find that number of children at home and female have a negative effect on employment, as we might expect. It is unclear why being married should have such a substantial effect, since we are controlling for gender and the presence of children. Model 8 adds controls for region and urbanicity, which will also help to control for variables like distance to school. School quality is more difficult to control for, as segregated Roma schools have been shown to be dramatically inferior to integrated schools, but the census does not track the type of school a child attended. Living in an urban area has a negative effect on employment, consistent with expectations for an economy with a large agricultural sector. Model 9 adds the individual's level of education. The full model is therefore:

$$Y_i = \beta_0 + \beta_1 \text{Roma}_i + \beta_2 X^1_i + \beta_3 X^2_i + \beta_{4-8} \text{edattan}_i + \varepsilon_i \quad (9)$$

where X^1 is again a vector of predictors for individual characteristics (age, age², female, and Romanian mother tongue, marital status) and X^2 is the vector of geographical predictors (urban, and the seven regional dummies). The effects of education are also as expected: secondary and university education (compared to less-than-primary) make one substantially more likely to be employed. The negative effect of primary school completion is probably due to the large number of individuals employed in agriculture for whom even primary education might be perceived as unnecessary. With this full set of controls, Roma still have 56.7 percent lower odds of being employed (Table 8).

⁹⁸ The World Bank using 2008 data from the Romania Family Budget Survey (NIS), found that the labor force participation rate among working-age Roma men *exceeded* that for majority men, 84 to 75 percent. This is reversed for women, with a rate of 37 to 58 percent, respectively (World Bank, 2010, 14). The 2002 census figures used here show a 55 and 68 percent labor force participation rate, respectively, for Roma and non-Roma men, and 33 and 50 percent for Roma and non-Roma women.

Table 8: Effects of Roma Status on Employment

	(6)	(7)	(8)	(9)
Roma	0.349***	0.373***	0.370***	0.433***
	[0.004]	[0.006]	[0.005]	[0.007]
Age		1.532***	1.546***	1.486***
		[0.002]	[0.002]	[0.002]
Age2		0.994***	0.994***	0.995***
		[0.000]	[0.000]	[0.000]
Female		0.508***	0.511***	0.532***
		[0.002]	[0.002]	[0.002]
Num. Children		0.852***	0.837***	0.889***
		[0.002]	[0.002]	[0.002]
Married		1.718***	1.729***	1.672***
		[0.010]	[0.010]	[0.010]
Separated		1.285***	1.309***	1.298***
		[0.013]	[0.013]	[0.013]
Widowed		1.422***	1.417***	1.509***
		[0.017]	[0.017]	[0.018]
Lang. Romanian		1.144***	1.173***	1.145***
		[0.008]	[0.009]	[0.008]
Urban			0.786***	0.618***
			[0.003]	[0.003]
Edu: Primary				0.814***
				[0.006]
Edu: Secondary				1.400***
				[0.010]
Edu: University				5.286***
				[0.057]
Edu: Unknown				0.270***
				[0.025]
Region†			Yes	Yes
Constant	1.075***	0.001***	0.001***	0.002***
	[0.002]	[0.000]	[0.000]	[0.000]
Observations	1478865	1478865	1478865	1478865
pseudo r2	0.00377	0.181	0.185	0.208

*** $p < .01$, ** $p < 0.05$, * $p < 0.1$, Robust standard errors in brackets. Dependent variable equals 1 if the respondent is employed, and zero otherwise. Sample includes individuals ages 15-65.

† Region includes dummies for 7 of the 8 regions of Romania, with the most populous omitted.

5.2. School-to-Work Conversion by Ethnic Group

Having identified a significant difference in the odds that a Roma individual, regardless of education, will be employed, I next attempt to isolate—for Roma and non-Roma separately—the “employment returns to education,” that is, the returns to the investment in education that come in the form of employment. Using the same controls as Model 9, minus the Roma dummy, I estimate a series of logits for four different population groups aged 15-65 to try to determine the degree to which education levels seem to impact employability for each group.⁹⁹ The four groups for which I run Model 10 are the Romanian population as a whole, ethnic Romanians, ethnic Hungarians, and Roma. Y_i is once again the dummy for employment.

Interestingly, the results (Table 9) reveal that completing primary school has a different impact on employment for different groups: it benefits Roma and Hungarians while appearing to have a negative effect for Romanians. The baseline is “less than primary,” so for Romanians, there is a higher correlation between being employed and having less than primary education than there is between being employed and having primary education. A few tests indicate that this may be due to the effect of employment in skilled agriculture and fisheries—including occasional work and work on family or subsistence farms—which tends to discourage school attendance while also offering comparatively stable employment.¹⁰⁰ Within the

⁹⁹ Ideally, I would have a wage variable in order to control for the effect of the reservation wage, but since I do not, and since the wealth “proxies” I have—electricity, per person living area, etc.—are for the household and not the individual, I do not attempt to control for wage.

¹⁰⁰ The data show that 66.4 percent of those with “less than primary” education live in rural areas and 76.4 percent work in skilled agriculture or fishing, compared to 40.3 percent and 18.8 percent of those with at least primary education, respectively. 24 percent of Romanians are skilled farmers or

Roma population, completing primary school increases one's odds of employment by 30 percent. There is a substantial jump in the impact of secondary school for all groups, particularly for Hungarians and Roma. University education has the greatest impact, again, especially so for Romania's two largest minority groups.

While these school-to-work conversion tests do tell us something about the odds of being employed, they say nothing of the type of employment. Are educated Roma finding well-paid work, commensurate to their level of education, at least at a rate similar to the rest of the population? While we cannot directly test for wage returns to education, we can extend the tests for odds of employment by disaggregating by occupation type, which for the census was reported both for employed and unemployed individuals (but not for inactive individuals). Do Roma, for a given level education, have equal odds as non-Roma of being employed in a given occupation type? Though we cannot account for possible wage discrepancies between Roma and non-Roma in a specific job (O'Higgins, 2010, finds evidence of wage discrimination within occupations), we can draw broad conclusions about the general wage bracket associated with different occupation types, such as high-skill "professional" or "managerial," and unskilled "elementary" employment. In a very indirect, and admittedly rough, way this can approximate wage returns to education.

fishermen. In all likelihood, this group—both very likely to drop out of school young and to be employed, even occasionally—is driving the primary education coefficient for Romanians. While 37.4 percent of Roma are also farmers or fishermen, the baselines for both educational attainment and employment are much lower: so few Roma complete primary school to begin with that those who do stand a better chance than less-educated Roma of being employed. This of course says nothing of their employment chances compared to non-Roma.

Table 9: Employment Predictors by Ethnic Group (Model 10)

	Population	Romanians	Hungarians	Roma
Age	1.482*** [0.002]	1.495*** [0.002]	1.477*** [0.007]	1.227*** [0.009]
Age2	0.995*** [0.000]	0.995*** [0.000]	0.995*** [0.000]	0.997*** [0.000]
Female	0.535*** [0.002]	0.533*** [0.002]	0.590*** [0.009]	0.328*** [0.009]
Num. Children	0.876*** [0.002]	0.887*** [0.002]	0.900*** [0.008]	0.935*** [0.009]
Lang. Romanian	1.239*** [0.009]	1.396*** [0.089]	0.885** [0.046]	0.949* [0.027]
Married	1.717*** [0.010]	1.685*** [0.011]	1.678*** [0.039]	1.205*** [0.041]
Separated	1.325*** [0.014]	1.295*** [0.014]	1.337*** [0.053]	1.297*** [0.122]
Widowed	1.550*** [0.019]	1.516*** [0.019]	1.568*** [0.073]	1.271*** [0.109]
Urban	0.615*** [0.003]	0.605*** [0.003]	0.926*** [0.015]	0.394*** [0.012]
Edu: Primary	0.888*** [0.006]	0.768*** [0.006]	1.299*** [0.042]	1.296*** [0.040]
Edu: Secondary	1.551*** [0.011]	1.301*** [0.010]	2.607*** [0.082]	2.135*** [0.110]
Edu: University	5.815*** [0.061]	4.958*** [0.056]	9.703*** [0.491]	6.566*** [1.989]
Edu: Unknown	0.273*** [0.025]	0.264*** [0.027]	0.164*** [0.088]	0.430*** [0.110]
Region	Yes	Yes	Yes	Yes
Constant	0.002*** [0.000]	0.002*** [0.000]	0.002*** [0.000]	0.039*** [0.005]
Observations	1478865	1325180	99078	31785
Pseudo R2	0.2067	0.2077	0.2304	0.1244

*** $p < .01$, ** $p < 0.05$, * $p < 0.1$, Robust standard errors in brackets. Sample comprised of individuals ages 15-65. Dependent variable equals 1 if the respondent is employed and zero otherwise.

To test the odds that a Roma individual will end up in either the top or the bottom occupational category (thus, presumably, the top or the bottom wage bracket), I run two logistic models, controlling for the same characteristics as in Model 9. The

two dependent variables are a composite of the top three occupation types in the census—senior officials and managers, professionals, and technicians and associate professionals—and a variable for the bottom type, unskilled “elementary employment.” I restrict the sample, as above, to individuals ages 15 to 65 and I exclude not-in-universe, military (a small fraction of the population), those whose responses are unknown or suppressed, and the unemployed or inactive. I run the same pair of logits twice: controlling for education the first time, but not the second (Table 10).

Interestingly, the tests reveal that Roma have 1.15 times the odds of being in one of the “highest” occupational categories, when we control for education. Of course, only one half of one percent of Roma fall into this category, compared to just over nine percent of non-Roma—in this set, that is 280 and 191,277 individuals, respectively—and education is, unsurprisingly, a powerful determinant of achieving this status. Given the extremely low rate of completion of secondary or tertiary education among Roma (nine and 0.2 percent, respectively),¹⁰¹ it is not surprising that the very few highly educated Roma individuals would find their way into high-skill jobs. This assumption is confirmed by the second set of logits, which show that, when not controlling for education, Roma have 0.207 times the odds (or 79.3 percent lower odds) of landing in a high-skill occupation than non-Roma. In contrast, Roma have more than 2.5 times the odds of ending up in unskilled “elementary”

¹⁰¹ Here, secondary completion was calculated for Roma age 20 and up, and university for Roma age 23 and up, at the time of the census.

employment than non-Roma, even controlling for level of education. (This odds ratio goes up to 4.1 when we remove the education control.) We can conclude from these

Table 10: Effects of Roma Status on Occupation Type

VARIABLES	Controlling for Education		Not Controlling for Education	
	High-Level Employment	Elementary Employment	High-Level Employment	Elementary Employment
Roma	1.154* [0.093]	2.537*** [0.068]	0.207*** [0.013]	4.093*** [0.107]
Age	1.008*** [0.003]	1.067*** [0.003]	1.163*** [0.002]	0.988*** [0.003]
Age ²	1.000*** [0.000]	0.999*** [0.000]	0.998*** [0.000]	1 [0.000]
Female	2.319*** [0.018]	0.936*** [0.009]	1.584*** [0.009]	0.998 [0.009]
Num. Children	0.773*** [0.004]	1.119*** [0.005]	0.648*** [0.002]	1.237*** [0.005]
Married	1.195*** [0.014]	0.706*** [0.009]	1.184*** [0.010]	0.637*** [0.008]
Separated	0.939*** [0.017]	0.950** [0.021]	0.891*** [0.013]	0.918*** [0.020]
Widowed	0.871*** [0.025]	1.072** [0.030]	0.628*** [0.014]	1.172*** [0.033]
Lang. Romanian	0.939*** [0.014]	0.98 [0.016]	1.064*** [0.013]	0.951*** [0.016]
Urban	2.040*** [0.018]	1.449*** [0.017]	5.035*** [0.039]	0.885*** [0.009]
Edu: Primary	0.288* [0.198]	0.396*** [0.065]		
Edu: Secondary	1.316 [0.899]	0.323*** [0.053]		
Edu: University	26.486*** [18.098]	0.116*** [0.019]		
Edu: Unknown	1,143.627*** [781.587]	0.005*** [0.001]		
Region Dummies	Yes	Yes	Yes	Yes
Constant	0.002*** [0.001]	0.152*** [0.026]	0.004*** [0.000]	0.117*** [0.007]
Observations	753504	753504	753504	753504
pseudo r2	0.415	0.0813	0.141	0.0257

*** $p < 0.01$, ** $p < 0.05$, * $p < 0.1$; Robust standard errors in brackets; ages 15-65.

tests that, *regardless of their level of education*, not only are Roma less likely to be employed than non-Roma, they are also far more likely to end up in unskilled, low-wage employment. These figures make a powerful statement about both the employment and wage returns to education for Roma individuals in Romania and, by extension, their degree of labor market marginalization. These results call into

question the extent to which Roma might have reason to value education beyond its intrinsic benefits.

One might argue that Roma *opt out* of traditional or high-skill employment rather than being excluded from it, perhaps having instead access to sources of unearned income, for example from remittances or black-market activity. Were this to be the case, we could expect Roma to have similar standards of living as non-Roma, or at least to be similarly able to meet their basic needs, yet this is not so. The inability of this analysis to account for the large differences in Roma employment outcomes means that there is another factor, or set of factors, for which I have not been able to control that limits the labor market success of this group. That is to say, there is something going on here that makes Roma less likely to be employed, or employed in well-paying jobs. I have accounted for education and a host of other possible variables that could reasonably impact the chances for employment, but there is still something missing, some other factor for which I have not controlled. One possibility is discrimination, evidence for which O'Higgins (2010) and the World Bank (2010) find using decomposition techniques and which is backed up by countless governmental and non-governmental reports.

5.3. Discrimination in the Job Market?

In order to tease out the contributions of various measurable characteristics to the inter-group (non-Roma and Roma) difference in employment and employment type, I employ a non-linear extension of the Oaxaca-Blinder decomposition (Fairlie

1999). The standard Oaxaca-Blinder technique (Oaxaca 1973, Blinder 1973) decomposes the difference in the outcome probability to that portion which we are able to explain by inter-group differences in determining characteristics (the “endowment effect”) and that which we are not able to explain by these differences. In studies of the gender or race wage gap this unexplained portion is often attributed to discrimination (though it in fact absorbs all unobserved differences so a determination of discrimination must be justified by an exhaustive set of explanatory variables). The technique accomplishes this by attributing the “endowments” of one group (here, non-Roma) to the group of interest (here, Roma) and examining the resulting change in outcome for the second group. For example, it attributes the education, marital, regional, and language characteristics of non-Roma to Roma and recalculates the outcome. The Fairlie extension addresses the fact that the standard Oaxaca-Blinder decomposition is intended for continuous dependent variables and does not produce easily interpretable (or always accurate) results for binary outcomes estimated with non-linear models such as logit and probit.

Table 11 reports the results of these decompositions. First, taking the results of the employment decomposition, which uses the same independent variables as the employment logits above, I find that the probability that a non-Roma individual aged 15 to 65 is employed is 51.8 percent while the probability for a Roma individual is 27.3 percent. Of the 24.5 percentage point difference, however, only 8.6 percentage points are explained by the independent variables. The largest contributor to the explained difference is the binary variable for whether the individual has less than

primary school education. The results tell us that if Roma (as a group) had the less-than-primary education incidence of non-Roma, then the explained employment gap between the two groups would be 12.7 percentage points smaller (of course this figure alone is larger than the total explained difference but that is due to the counterbalancing effects of other variables). The binary variable for completion of secondary school also has a sizeable impact but, interestingly, it works in the opposite direction: if Roma had the same high school completion rate as non-Roma, then the gap between them would be *larger*. The reasons for this result, however, are unclear.

Table 11: Non-linear decompositions of employment gaps (employed and employment type)

	Employed	Elementary Employment
Age	0.097 [0.000]	0.028 [0.004]
Age2	-0.092 [0.000]	-0.026 [0.003]
Urban	-0.012 [0.000]	0.010 [0.001]
Edu: Less than Primary	0.127 [0.001]	0.064 [0.013]
Edu: Primary	0.004 [0.000]	0.006 [0.006]
Edu: Secondary	-0.081 [0.000]	-0.117 [0.014]
Edu: University	Dropped	-0.028 [0.003]
Edu: Unknown	0.001 [0.000]	Dropped
Total Observations	1478865	753504
Non-Roma	1447080	744860
Roma	31785	8644
Probability non-Roma	0.518	0.071
Probability Roma	0.273	0.315
Difference	0.245	-0.243
Explained difference	0.086	-0.087

Robust standard errors in brackets; ages 15-65; Order of independent variables randomized across 100 Fairlie decomposition iterations.

Independent variables included but not reported: Gender female, Number of own children living at home, Marital status, Mother tongue Romanian, Region dummies

Second, examining the results of the decomposition for elementary (no- or low-skill) employment, I find the probability that a non-Roma individual will wind up in elementary employment is 7.1 percent, but the probability jumps to 31.5 percent for Roma, controlling for other relevant characteristics. The difference between the two groups is 24.3 percentage points, only 8.7 of which are explained. Here, the secondary education variable contributes 11.7 percentage points to the explained gap (again, the size of this contribution is counterbalanced by other variables, though this fact does not diminish its weight).

Most important in both decompositions—for group-specific probability of employment and of ending up in elementary employment—is the size of the unexplained inter-group difference, as a proportion of the total difference. In standard Oaxaca-Blinder decompositions, it is the unexplained share of the gap that is often attributed to discrimination. Of course, this attribution assumes that there are no important omitted variables. In this case, the standard predictors for employment returns to education have been accounted for, with the exception of native ability. However, for us to assume that the dramatic unexplained differences in probability of employment and of ending up in elementary employment (15.9 and 15.6 percentage points, respectively) are due to ability, we would have to be willing to accept that Roma, as a group, are simply less able than non-Roma, an assumption we have no reason to accept and many plain reasons to reject.¹⁰² Likewise with the other possible

¹⁰² Kertesi and Kézdi (2011), in their study of the Roma/non-Roma test score gap in Hungary, found that once health, parenting, school fixed effects and family background are controlled for, the substantial gap in both reading and mathematics disappears for reading and becomes very small for math, further reinforcing that ability is not intrinsic to ethnicity (Kertesi and Kézdi 2011). Of course, it

explanation: lack of proclivity for work, or, in plainer terms, laziness. It is difficult to argue that an entire ethnic group is prone to sloth, particularly if we can demonstrate (see Section 3) that that group's wellbeing is already substantially compromised by poverty (nevermind that individuals engaged in "elementary" employment often work harder, longer hours than those in more skilled trades). World Bank data further argue against the laziness argument.¹⁰³ Although we cannot say with absolute certainty that these decompositions reveal "anti-Gypsy" discrimination in the job market, they do, ultimately, reveal a stunningly high level of unexplained difference in employment outcomes, holding other factors constant.

6. Discussion

In economic terms, the results presented above may very well reveal the basis for reduced incentives for Roma to invest in education beyond the most basic level; in Capability terms, they may reveal the basis for adaptive preferences that lead Roma to privilege current well-being over a seemingly unrealistic future in which education

is also possible that poor education quality in segregated or Roma-dominated schools simply result in low-skill graduates unable to compete on the job market, a form of "ability" that is neither native nor accounted for here. This hypothesis is borne out by Kertsi and Kézdi's finding that controlling for school and class fixed effects substantially decreases the test score gap. Be that as it may, a prospective employer very well may not know the quality, only the quantity, of basic education an applicant has received. Thus, the assumption on the part of that employer that a Roma applicant has lower ability or skill-level than a non-Roma applicant with the same education level nevertheless amounts to discrimination, regardless of whether that assumption is based on racial prejudice or on generalizations about the quality of education a Roma applicant has received.

¹⁰³ According to the World Bank study (2010), in Romania "Roma labor force *participation* rates strongly contradict laziness and welfare dependency perceptions, especially among men. Measuring the proportion of the working age population either employed or unemployed but willing and looking to work, the labor force participation rate for working-age Roma men *exceeds* the rate for men from the majority populations... Hence, while Roma are *willing* to work, often they cannot find jobs." (World Bank 2010, p. 13).

only hypothetically leads to better employment. These results also force us to ask other important questions. In the Romanian context, *why* are Roma so much less likely to be employed than non-Roma and so much more likely to be employed in unskilled labor (controlling for education and other factors)? Why is such a large share of the difference in probability of employment unexplained? There are a number of possible answers to these questions.

First, we must recognize that one unobserved variable is ability.

Overrepresentation of Roma children in schools for the mentally handicapped and learning disabled is evidence that policy makers and school administrators all too often conclude that lower levels of mental ability among Roma account for their poorer performance in school (Organization for Security Cooperation in Europe 2000, Kosko 2004, Greenberg 2010). However, such a conclusion would require hard evidence that childhood development is being compromised by poor nutrition across the whole of the Romanian Roma population. While this reply does not account for environmental determinants of ability, it answers at least part of the concern. (See footnotes 92 and 102 for a further, brief discussion of this problem).

Second, we could conclude that Roma are more likely to have access to sources of unearned or informal income and thus have less need to bother with formal education. (The widespread view in Europe that many Roma are thieves makes this hypothesis particularly relevant.) However, long-term income and wealth proxies demonstrate that, as a group, Roma still have less access to goods and services than

non-Roma and are in fact less able to meet their basic needs, as evidenced in the UNDP's assertion that 15 percent of European Roma are "constantly struggling with starvation" (United Nations Development Programme 2002). It is unlikely, therefore, that they are earning sufficient informal income to compensate for a lack of formal employment and render schooling unnecessary.

Third, we could suggest, as many do, that Roma simply prefer not to work. "Laziness" is, in fact, one of the most persistent public stereotypes about Roma. A 2010 World Bank survey in four countries revealed that "according to the vast majority of [those interviewed], there is... a widespread perception among the general public that Roma do not have jobs because 'they prefer to live off social assistance' and even because 'they are lazy and lack willpower,'" assertions made by 81 and 66 percent, respectively, of Romanians surveyed (World Bank 2010, 12-13).¹⁰⁴

However, we can again refer to their staggeringly low capabilities, or opportunities to fulfill their basic needs; it is unlikely that Roma sacrifice their own—and their children's—well-being out of laziness. Moreover, the same World Bank study finds that "Roma labor force *participation* rates strongly contradict laziness and welfare dependency perceptions," and reports that only 12 percent of working-age Roma in Romania (2008 figure) receives guaranteed minimum income support, contradicting the perception that they simply "live off social assistance" (World Bank 2010, 14).

¹⁰⁴ I coordinated this survey for the World Bank in the summer of 2010 with support from four in-country consultants. Those interviewed were asked what they believed *the average person* from the majority sees as the reasons for low Roma employment. The question provided five possible non-mutually exclusive responses: (1) unlucky – not enough jobs; (2) lazy and lack of willpower; (3) face discrimination; (4) lack sufficient education or qualification; (5) prefer to live off social assistance. The survey results were included in the 2010 "Roma Inclusion" policy note. A more detailed report is forthcoming.

Fourth, we arrive at the most probable—if notoriously difficult to prove—explanation: discrimination in hiring. This phenomenon, for which I find evidence here, is borne out by countless studies and anecdotal evidence but only measured in two published reports: O’Higgins and the 2010 World Bank study. Building on the finding that low education levels in part drive low employment rates, the World Bank policy note uses the Oaxaca-Blinder decomposition method and finds that “around one-third of the wage gap between Roma and majority populations can be attributed to discrimination and other factors beyond differences in education, experience, and locality” (World Bank 2010, 11). In the present chapter, the Fairlie extension of the Oaxaca-Blinder decomposition reveals that nearly 16 percentage points of the differences between Roma and non-Roma in employment and employment type (elementary) go unexplained by the standard predictors, strongly pointing toward discrimination in the job market.

The present study does have several limitations that should be flagged. One limitation is the omitted variables in the education models—factors such as parental expectation, school quality, and of course ability—discussed in Section 4. The other four limitations all introduce a bias into the results. These are: 1) the ambiguity of the quality and frequency of employment and education, 2) differential effects of resident mothers, 3) underreporting of Roma ethnicity, and 4) underestimation of the Roma/non-Roma employment gap arising from the differential likelihood of young Roma and non-Roma individuals (ages 15-22) being out of the job market for

continued education. Each of these has the potential to bias this study in a direction that makes Roma appear better off than they really are relative to non-Roma. That is, these estimates represent a generous picture of the probable reality. The other limitations of this study, the omitted variables, do not necessarily result in a patterned bias but do complicate the analysis.¹⁰⁵

Putting statistical analysis aside, a Roma child and her family are not likely to consider the results of multivariate logistic regressions when weighing her employment prospects. Chances are better that she will observe the low absolute employment rate and high likelihood of that employment's wage being low—regardless of education—and *perceive* that schooling isn't worth the cost. Compound that discouragement with the very real possibility that her family might need her to help support the family by working—or at least helping to care for younger siblings while they work—and the opportunity costs of remaining in school go up considerably. While my tests (and those of O'Higgins and the World Bank) show that Roma actually have *higher* returns to education than non-Roma, the extremely low baseline means the absolute gains are not likely to be very high, increasing the possibility that the opportunity cost will outweigh those gains. If the degree to which one values education is directly proportional to the expected return to that investment, and inversely proportional to present income forgone, these findings tell a compelling story of why Roma are so much less likely than non-Roma to finish primary school, let alone go on to secondary. They tell a story of a rational economic calculus to consume less education.

¹⁰⁵ The author is happy to provide a more detailed explanation and analysis of these limitations.

None of this is to say that Roma do not “value” education, intrinsically or even instrumentally; the UNDP/ILO survey and countless cases illustrate that they do. Nor does any of this lend itself to simplistic conclusions that Roma inhabit a “culture of low aspirations” or that “it’s the poverty, stupid.” Rather, it forces us to ask where pursuing a formal education falls in a ranking of possible ways of being or doing, a ranking that also includes meeting a variety of basic immediate needs. One need not fail to value education, or even the well-being enhancement it might bring, in order to decide that the costs outweigh the expected benefits. There is disagreement, or at least ambiguity, in the literature about whether such a decision constitutes an “adaptive preference.” Bridges, in distinguishing certain rational choices from adaptive preferences argues that in some cases the choices “may be clearly perceived as external constraints... which the individual is aware of as external constraints and which remain a focus of discontent. They are not internalised. To this extent this is not a case of adaptive preference, simply because the individual has not made the adaptation” (Bridges 2006, 22).

Serene Khader further problematizes the analysis of such choices, contending that one might maintain an adaptive preference of a lower-order while remaining unhappy that her circumstances limit the vectors of capabilities from which she might choose, thus imposing limitations on her flourishing. She argues that adaptive preferences, even those she deems “inappropriate,” or inconsistent with basic human flourishing, do not necessarily reveal a *global* preference on the part of the chooser to

fail to flourish, or even a failure to value the “good” in question (Khader 2011). Deprived people, she points out, are quite capable of formulating and acting on the basis of rational conceptions of the good and a person may rank her existing (lower-order) preferences, while still maintaining the (higher-order) preference to have more choices in life, unattainable though that preference may seem. In the case of Roma education, a Roma teenager may rank a slew of lower-order preferences (help feed her family, learn a skill, abide by her parents’ wishes that she marry) well above continuing her education while still wishing that she had more options. Such preferences may be adaptations to actual *or* perceived reality. Moreover, ranking her preference for education lower than her preference for work might nevertheless be consistent with the higher-order preference to flourish along at least one important dimension, such as being well-nourished, in the short-term. If she is consciously unhappy about these limitations, however, Bridges argues that these are not adaptive preferences but basic trade-offs. Whatever terminology you use, the difficulty of determining whether educational preferences of individual Roma are or are not “inappropriately adaptive,” or perhaps simply reveal rational trade-offs, is problematic for policy solutions that rely primarily on individual preference transformation, that is, on getting Roma to “understand the value of education.”

So far, however, this discussion speaks only to the immediate constraints to pursuing education, but this teenager might not be convinced that education is the best means to a desired end in the first place. “[A]n understanding of adaptation... must be used judiciously and the distinction between adaptations to the means of

achieving wellbeing and adaptations to ends of well-being must be made clear” (Watts 2009, 436). If experiences have led one to believe that success beyond just “getting by” is out of reach, then it may make sense to rely on hard work or other, less costly, means to achieve that end. Even if Bridges is right, then, that an individual might rationally and consciously choose not to attend high school, and still be unhappy about having to make that choice (rendering this preference not “adaptive” by his understanding), that same individual might nevertheless exhibit adaptation to the ends of education if she believes it is unlikely to result in greater success in life. Such discrepancy might arise, for example, where one values education for some of the benefits it can bring (and would thus prefer it under different circumstances) but does not feel it has enough practical value to make it a priority (and will thus prefer not to pursue it). This hypothetical would be consistent with some of the attitudes Roma reported in the UNDP/ILO survey (see Section 1.1 above) (United Nations Development Programme 2002).¹⁰⁶

7. Conclusion

Roma face numerous disadvantages compared to non-Roma. They are considerably less likely to have access to basic utilities such as electricity and sewage disposal. They have less living space per person, are less likely to complete

¹⁰⁶ For example, when asked about justifiable reasons for keeping a son home from school, only five percent of Roma surveyed reported that “children do not learn the really important things at school,” implying that the vast majority of Roma feel that education has some value in life. At the same time, however, 17 percent said that “even if he attends, he will be unemployed anyway,” implying that almost one in five Roma feel that lousy employment prospects undermine the value of sending a child to school.

education at any level, and are considerably more likely to live in a home where the head of the household is not employed. The education models in Section 4 of this study indicate that Roma are also significantly less likely than non-Roma to complete a full course of compulsory education. Adding a series of controls only marginally diminishes this difference in educational attainment.

Following the insights of Schultz, Becker, and Mincer, I have attempted to explain these differences by testing the impact of Roma status on employment (controlling for education) as well as employment returns to education for Roma. I have done this using employment status and occupation type. I found that the impact of education on employment is higher for Roma than for non-Roma yet, at all levels of education and controlling for a variety of factors, Roma still have lower odds of being employed. Also, when employed, the odds are 2.5 times higher that they will find themselves in unskilled, low-wage jobs regardless of education level. The World Bank finds that “[t]he poor labor market outcomes can in large part be explained by the very large education gap between Roma and non-Roma” (World Bank 2010, 9), but the insights of this chapter question whether the inverse might also be true. Can the education gap in part be explained by the poor—relative and absolute—labor market outcomes of Roma?

From a policy perspective, then, interventions designed to transform Roma individuals’ (adaptive?) preferences about education as a feasible means for achieving success could fail without further interventions designed to transform Roma

individuals' (adaptive?) preferences toward the feasible ends of that education. If "success" is understood as "just getting by," then rational individuals might not view the investment as worth the gamble. Such preference transformation, directed at both the feasible means and ends of education, would require both individual and structural interventions. At this time, I will leave aside any discussion of either the normative or practical implications of individual preference transformation and will not argue in its favor with the exception of the clear need to correct misinformation about things like school fees and the availability of social programs.¹⁰⁷

If the goal is to increase not only the accessibility but the appeal of formal education to the wider Roma population, as this chapter suggests, then further research is needed into the precise structural barriers to education that help form education preferences ("adaptive" or otherwise). What must change, I argue, is not only the perceptions of Roma about the returns to that education, but the everyday reality of a society in which, regardless of schooling and a variety of other factors, a Roma individual has two and a half times the odds of being in a low-paying job. Such structural interventions, once identified, could help address possible adaptation to the feasible "ends" of education.

Of course, education must also be made more beneficial to a family than immediate work. One option could be to offer vocational education that includes some work experience and income generation. This might still seem insufficient to a

¹⁰⁷ Despite the fact that that most Roma are among the poorest members of the Romanian population, only 12 percent of working age Roma individuals receive guaranteed minimum income support (World Bank 2010, 14), raising concerns about access to and information about much-needed social assistance.

struggling family, however, and might be inappropriate or pre-mature for the very young children vulnerable to being put to “work” begging at an age when instruction in basic skills is still an important part of any education. Responding to the larger problem of child labor, Kaushik Basu advocates for “collaborative interventions, that is, public action which alters the economic environment such that parents of their own accord prefer to withdraw the children from the labor force” and can thus more easily send them to school. “The availability of good schools, the provision of free meals, and efforts to bolster adult wages are examples of collaborative interventions” (Basu 1999, 1115). Although more research is needed to identify precisely what types and sets of interventions might work best in the Romanian context, such structural interventions as these could help address possible adaptation to education as a feasible “means” of achieving the good life.

By identifying some of the barriers to educational attainment (such as poverty) and finding some evidence for others (such as discrimination in the job market), this chapter seeks to lay the empirical foundation for further research into precisely what types and sets of collaborative interventions might prove most effective in expanding Roma education. Until then, the problem of Romani integration is likely to continue.

Annex 1: Variables & Summary Statistics

Table 1. Definitions of main variables

<i>Individual characteristics</i>	
Roma	=1 if ethnicity is Roma
Age	Continuous variables
Lang. Romanian	=1 if mother tongue is Romanian
Female	=1 if female
Single	=1 if single or never married
Married	=1 if married or in union
Separated	=1 if separated, divorced, or spouse absent
Widowed	=1 if widowed
Num. Child	Continuous, number of own children living at home at time of census
<i>Area of Residence</i>	
Urban	=1 if urbanicity, 0 if anything else
Region	Categorical, 8 regions of Romania
<i>Income and wealth proxies</i>	
Employed	=1 if employed, 0 if unemployed or inactive
Occupation Type	=Categorical, 10 categories for the person's primary occupation ¹⁰⁸
Head Emp	=1 if the head of household is employed
Sewage	=1 if dwelling has sewage or a septic tank, 0 if there is no sewage disposal available
Electricity	=1 if dwelling has electricity
PP Living Area	Continuous, in m ² per person, includes only rooms, not hallways, storage, or outdoor spaces
<i>Education variables</i>	
NIU	=1 if individual is “not in universe” (under age 10)
< Prim	=1 if individual has not completed primary school (grade 8)
Primary	=1 if individual has completed primary school (grade 8)
Secondary	=1 if individual has completed secondary school (grade 12)
University	=1 if individual has received a university degree
Unknown	=1 if individual's education is not known
MO < Prim, MO Prim, MO Second, MO Uni	=1 if individual's resident mother has not completed primary school, has completed primary school, has completed secondary school, has received a university degree
FA < Prim, FA Prim, MO Second, MO Uni	=1 if individual's resident father has not completed primary school, has completed primary school, has completed secondary school, has received a university degree

¹⁰⁸ The occupation variables used in the models are a composite variable of the three highest-skill categories plus a variable for the lowest-skill category. They were created from a categorical occupation variable using the 1988 International Standard Classification of Occupations (ISCO) of the ILO. If someone has more than one job, the “primary occupation” is the one in which the person had worked the most time or earned the most money.

Table 2. Summary statistics: Full Sample

<i>Variable</i>	<i>Obs</i>	<i>Mean</i>	<i>Std. Dev.</i>	<i>Mi</i> <i>n</i>	<i>Max</i>
Roma	2137967	0.02	0.15	0	1
Age	2137967	37.44	21.86	0	98
Lang. Romanian	2137967	0.91	0.29	0	1
Female	2137967	0.51	0.50	0	1
Single	2137967	0.39	0.49	0	1
Married	2137967	0.49	0.50	0	1
Separated	2137967	0.04	0.19	0	1
Widowed	2137967	0.09	0.28	0	1
Num. Children	2137967	0.67	1.00	0	9
Urban	2137967	0.52	0.50	0	1
Employed	2137967	0.36	0.48	0	1
Unemployed	2137967	0.05	0.22	0	1
Unemployed (excluding inactive)	882379	0.12	0.32	0	1
Inactive (employment)	2137967	0.59	0.49	0	1
Head employed	2137967	0.50	0.50	0	1
Occupation: High skill‡	778438	0.23	0.43	0	1
Occupation: Elementary‡	1359529	0.07	0.08	0	1
Electricity	778438	0.07	0.26	0	1
Central Heat	2137967	0.35	0.48	0	1
Sewage	2137967	0.52	0.50	0	1
PP Living Area, m ²	2137967	15.76	11.12	0.5	220
Edu Attainment: NIU*	2137967	0.10	0.31	0	1
Edu Attainment: <Primary	2137967	0.22	0.41	0	1
Edu Attainment: Primary**	2137967	0.25	0.43	0	1
Edu Attainment: Secondary**	2137967	0.36	0.48	0	1
Edu Attainment: University**	2137967	0.06	0.24	0	1
Edu Attainment: Unknown**	2137967	0.01	0.11	0	1
MO's Edu Attain.: < Primary†	775687	0.18	0.39	0	1
MO's Edu Attain.: Primary†	775687	0.35	0.48	0	1
MO's Edu Attain.: Secondary†	775687	0.41	0.49	0	1
MO's Edu Attain.: University†	775687	0.05	0.21	0	1
MO's Edu Attain.: Unknown†	775687	0.00	0.03	0	1
FA's Edu Attain.: <Primary†	656939	0.13	0.33	0	1
FA's Edu Attain.: Primary†	656939	0.24	0.43	0	1
FA's Edu Attain.: Secondary†	656939	0.56	0.50	0	1
FA's Edu Attain.: University†	656939	0.07	0.26	0	1
FA's Edu Attain.: Unknown†	656939	0.00	0.02	0	1

* NIU = Not in Universe (too young); ** Indicates level completed; ‡ only for individuals who are employed. † only available for resident parent; ‡ only for individuals who are employed.

Table 3. Summary statistics: Sample restricted by age (17-20) and mother-in-household

<i>Variable</i>	<i>Obs</i>	<i>Mean</i>	<i>Std. Dev.</i>	<i>Min</i>	<i>Max</i>
Roma	99046	0.03	0.17	0	1
Age	99046	18.41	1.13	17	20
Lang. Romanian	99046	0.91	0.28	0	1
Female	99046	0.45	0.50	0	1
Single	99046	0.99	0.10	0	1
Married	99046	0.01	0.09	0	1
Separated	99046	0.00	0.04	0	1
Widowed	99046	0.00	0.02	0	1
Num. Children	99046	0.02	0.15	0	5
Urban	99046	0.59	0.49	0	1
Employed	99046	0.23	0.42	0	1
Unemployed	99046	0.13	0.34	0	1
Unemployed (excluding inactive)	35809	0.36	0.48	0	1
Inactive (employment)	99046	0.64	0.48	0	1
Head employed	99046	0.64	0.48	0	1
Occupation: High Skill‡	22966	0.04	0.20	0	1
Occupation: Elementary‡	22966	0.10	0.30	0	1
Electricity	99046	0.98	0.13	0	1
Central Heat	99046	0.41	0.49	0	1
Sewage	99046	0.60	0.49	0	1
PP Living Area, m ²	99046	11.97	6.27	0.5	110
Edu Attainment: NIU*	99046	0.00	0.00	0	0
Edu Attainment: < Primary	99046	0.08	0.28	0	1
Edu Attainment: Primary**	99046	0.54	0.50	0	1
Edu Attainment: Secondary**	99046	0.38	0.48	0	1
Edu Attainment: University**	99046	0.00	0.00	0	0
Edu Attainment: Unknown**	99046	0.00	0.03	0	1
MO's Edu Attain.: < Primary†	99046	0.11	0.31	0	1
MO's Edu Attain.: < Primary†	99046	0.36	0.48	0	1
MO's Edu Attain.: Secondary†	99046	0.47	0.50	0	1
MO's Edu Attain.: University†	99046	0.06	0.23	0	1
MO's Edu Attain.: Unknown†	99046	0.00	0.02	0	1
FA's Edu Attain.: < Primary†	85056	0.09	0.29	0	1
FA's Edu Attain.: Primary†	85056	0.22	0.41	0	1
FA's Edu Attain.: Secondary†	85056	0.60	0.49	0	1
FA's Edu Attain.: University†	85056	0.08	0.28	0	1
FA's Edu Attain.: Unknown†	85056	0.00	0.02	0	1

* NIU = Not in Universe (too young); ** Indicates level completed; † only available for resident parent; ‡ only for individuals who are employed.

V. Conclusion

The three essays that I have presented in this dissertation each tackle a different aspect of decision-making in minority education.¹⁰⁹ The first essay began with the broadest, most far-reaching kinds of decisions, those made by groups (or representatives of groups) during the process of education policy formation. The second and third essays moved closer to home (and school), to the narrower kinds of decisions made by individual parents, school officials, and school-age children. These two essays investigated, respectively, the right of these individuals to make certain kinds of decisions, and the “mechanisms” by which—or contexts in which—those individual decisions are made. Although each of the three essays directly addressed some aspect of education policy, and the public and private decision-making processes that drive it, the chief investigative spaces of this dissertation are multiculturalism (in particular its liberal incarnation: cultural liberty) and human rights. The big normative questions challenge us to wrestle with the tensions that arise in trying to accommodate ethno-cultural minorities in the public education systems of liberal democracies.

Although I deployed both in this project, the concepts of (minority) human rights and multiculturalism are by no means coterminous and, in Europe, recent political engagements with each of them have been dramatically different. The readiness with which some European politicians are prepared to throw the multiculturalist project to the dogs stands in sharp contrast to the lengths to which

¹⁰⁹ Here I am using the term “minority” to include national minorities, indigenous populations, and those ethno-cultural minorities that do not fall easily under either category.

others will go to defend their reputations as stalwart protectors of human rights. In Germany, political leaders have proclaimed “multiculturalism is dead!”¹¹⁰ and Chancellor Angela Merkel announced last year that “[T]he approach [to build] a multicultural [society] and to live side-by-side and to enjoy each other... has failed, utterly failed.”¹¹¹ Meanwhile, on the other side of the Rhine, the French European Affairs Minister, bristling at accusations that France was violating human rights by targeting Roma communities for mass deportations, chastised the European Justice Commissioner for addressing France in a tone unfit for “a great state like France, which is the mother of human rights.”¹¹²

Although it is true that the multiculturalist and human rights camps have not always come down on the same sides of the normative or political fence, especially with regard to women’s rights (see Okin 1999), they do share at least one fundamental interest: protecting the vulnerable. This dissertation has struggled with several dilemmas that public policy makers run into in their efforts to reduce that vulnerability in a way that respects the rights of minorities and indigenous peoples to define, develop, protect and promote their cultures, while also protecting the universal human rights of the individuals that make up both the minority and majority populations. The primary focus of these three essays has been on the rights of individuals and groups to make decisions for themselves—in this case, education decisions—and the normative, legal, and political questions that arise in the process.

¹¹⁰ “*Multikultiist tot!*” Horst Seehofer, leader of Germany’s CSU party (BBC News 2010).

¹¹¹ (BBC News 2010)

¹¹² Pierre Lellouche, French European Affairs Minister (Davies 2010)

This process of individual (or group) decision-making comes down to agency: are we to be the authors of our own lives? Moreover, do we always have the information, the skills, the resources, and the freedom to be so? Numerous international and regional treaties, conventions, conferences, and bodies are dedicated to protecting the necessary human rights and promoting development opportunities that can help ensure that we do. Yet a full half of the human family continues to live in poverty and human rights abuses, including violations of cultural rights, continue in every country in the world. Minority groups are all too often the focus of such abuse. When they are not, grinding poverty and social and political marginalization contribute to a standard of living that is frequently well below that of majority populations living in the same areas. These realities interfere with the ability of individuals (and the groups with which they affiliate themselves) to exercise agency in even the most basic day-to-day situations, including, but not limited to, decisions about the type, content, duration, and purpose of education.

There are, most importantly, normative reasons to care about the ability of minorities to exercise agency, over educational or any other decisions. These include the promotion of human rights, development, democracy, and dignity, to name a few. There are pragmatic policy concerns as well. The countries of Europe—countries that see themselves not only as belonging to an economic but also to a “values” community—are members of a variety of international institutions, programs, and organizations through which they have committed themselves to protecting their minority individuals and groups. To whatever extent these states would like to be

seen as making a sincere effort toward achieving these goals (and given the reliance of the newer and aspiring EU Member States on foreign and EU aid, that desire is not insignificant), they have a reason to enact and try to enforce appropriate laws (a necessary if not sufficient part of the solution) and to establish state practices that make enjoyment of the spirit of those laws a reality, not merely an aspiration.

Meanwhile, recent events and continued levels of extraordinary deprivation demonstrate that the fundamental freedoms of Europe's minorities are under fire. It is becoming painfully clear that existing minority rights protections (in law and policy), including but not limited to protections of cultural identity and freedom, are either insufficient or insufficiently enforced, with human, economic, and even environmental consequences. This is true of those more robust protections that pertain to indigenous peoples as well as those aimed primarily at national minorities, although indigenous rights in Europe do appear to enjoy more consistent protection.¹¹³

One possible solution is to rethink the minority protection regime to include stronger multicultural provisions—something more like the cultural and group rights accorded to indigenous peoples. However, such rights—like the right of indigenous groups to self-determination in education—if insufficiently elaborated on paper, can result in limited enjoyment of that right in practice. And we still run into the problem that multiculturalism and human rights make an uneasy marriage. Allowing a parent

¹¹³ A satisfactory defense of this empirical statement is not possible here, though the website of the UN Permanent Forum on Indigenous Issues provides a wealth of relevant information for those wishing to explore the accuracy of this statement.

the “cultural freedom” to put a child into what amounts to a sub-standard school can violate that child’s right to a robust education. To complicate the matter further, provisions that seek to protect and promote cultural rights will not necessarily guard against violations of civil and political or social and economic rights, violations of the kind that restrict labor-market access for even educated minorities, potentially leading them to make educational decisions for themselves or their children that only serve to perpetuate their social and economic exclusion. With this dissertation, I have tried to address each of these problems in turn. But, of course, as with any research, this project opens up as many questions as it answers.

VI. Areas for Future Research

David A. Crocker has more than once shared the wisdom of Nelson Mandela with his students. Crocker closes graduation ceremonies, and Mandela closes his autobiography, by telling us “I have discovered the secret that after climbing a great hill, one only finds that there are many more hills to climb” (Mandela 1995). Here are four places where I might begin to climb.

1. On “Typologies” of Rights

Does the current typology of minority rights adequately protect vulnerable groups? James W. Nickel makes a compelling case for both minority and group rights that rests not on one’s identification with a certain category of minority group but rather on the existence of a certain need that is not met or cannot be met by existing (universal) (individual) rights. A typology of rights that responds to vulnerability and need as well as to historical protection gaps—as Nickel, Shue, Kymlicka and others persuasively argue human rights should do—does not correspond neatly to the international typology of vulnerable groups as it is currently divided (with respect to indigenous peoples and national minorities, with significant overlaps and gaps). The result is what is often referred to as a “protection gap.” I will argue, and will substantiate through future research, that this term is actually comprised of two different kinds of protection gaps. First, where international laws and norms exist to address the vulnerability of certain groups, but those laws are not enforced or the norms are not implemented in domestic policies, then there is what we could call an Implementation Gap. This gap receives considerable attention in

academic literature and in policy and advocacy circles and is the kind of problem that most have in mind when referring to a “human rights protection gap.”

The second type of protection gap, which I call a *Relevancy Gap*, can actually be broken into two distinct parts: a Group Relevancy Gap and a Vulnerability Relevancy Gap. Imagine a Group X with Vulnerability Y. In some cases, protections exist to address Y, but they don’t pertain to Group X. For example, this can happen when a group (such as a “national minority”) that is the target of a particular set of protections is delimited in such a way as to exclude other groups that share those same vulnerabilities. I call this the *Group Relevancy Gap*, a problem that has yet to be clearly articulated in the literature. In other cases, protections exist that pertain to Group X, but they don’t address Vulnerability Y. This gap arises because the broadly-stated, highly inclusive nature of most human rights laws is not finely tuned enough to the *very* particular vulnerabilities that certain sub-groups might face. I call this the *Vulnerability Relevancy Gap*. Compared to the Implementation Gap, the Relevancy Gap of either type—which arise in part from the current system of categorizing different “types” of minorities and applying different protections accordingly—receives considerably less attention outside of advocacy circles. These are concepts that I have been in the process of fleshing out and hope to give more attention to in the near future.

In my future research, I hope not only to investigate this problem, but to propose a solution based on creative social policies that respond to individual

vulnerability (including those vulnerabilities that can only be addressed through group rights protections similar to those found in the Indigenous Declaration) without having to invoke the language of either group rights or multiculturalism. These policies will need to be justified solely on the grounds of individual protection (of both well-being and agency), something that I believe is possible. In this way, I hope to arrive at an approach that is viable along three crucial dimensions: 1) adequacy and ethical defensibility of coverage, 2) political feasibility, and 3) rhetorical and persuasive power.

Also on the topic of typologies of minorities, a related, but more narrowly formulated question is: *What does the distinction between the two main “types” of homeland minorities—groups commonly referred to as national minorities and indigenous peoples—mean for public policy design?* Related to this topic is an empirical question: *Does legal recognition of indigenous status have any discernable impact on the agency and wellbeing of the group in question?*

2. On Advocacy Strategies

Is the pursuit of indigenous status by minority groups likely to be an effective strategy for securing broader rights and enhancing their wellbeing and/or agency?

Abstracting from the cases of the Sámi or Roma, it is worth asking whether the pursuit of ethnocultural recognition through the achievement of indigenous status nevertheless could be the “best” way for minority groups to seek legal protection. I expect to conclude that, at least in the long run, such an expansion of the definition of

“indigenous” to include national minorities and others could have a negative impact not only on the current state of indigenous protection but on the status of minorities more broadly. Because of the perceived risks that indigenous claims pose to territorial integrity and state sovereignty, such a trend might backfire, resulting in the narrowing of indigenous rights protection and re-securitizing of state-minority relations. Kymlicka argues that “[t]he tendency of national minorities to adopt the label of indigenous peoples, if it continues, may well lead to the total collapse of the international system of indigenous rights” (Kymlicka 2007, 287). As more and more minority groups seek to redefine themselves on the international stage as “indigenous” groups, this is a topic that is worth exploring.

3. On Participation

What is the most appropriate framework for evaluating group participation in public policy decision-making? This question extends my exploration in chapter 2 of the usefulness of the evaluative framework that I constructed using Goulet’s and Crocker’s work. So far, I have put together and tested out a framework for evaluating the quality of participation according to the point of non-elite entry into the process and the mode of participation at work. As I suggested in chapter 2, this framework might be extended to include other dimensions of participation such as breadth and control/influence. However, even if I could work out a way to assign (symbolic) numerical values to other dimensions such as these, doing so would quickly render the framework too unwieldy to be useful. Rather than adding additional, siloed variables, I would like to explore the possibility of combining them into a single

index. Future research on this subject would need to explore whether this is possible and, for that matter, would be useful.

A second question on the topic of participation comes from comments I received on my presentation of chapter 2 at the 2011 conference of the Human Development and Capability Association: *How might we best arrive at a culturally appropriate understanding of 'participation' for indigenous peoples, one that reflects their distinct traditions of governance?* This question has both normative and empirical dimensions and poses a critical challenge for anyone claiming to offer a framework for evaluating any aspect of indigenous self-determination. Possibly carrying the largest research burden of any of the questions I have thus far posed for future work, this topic will require substantial engagement with the literatures on participation, agency, democracy, and social contract theory, as well as significant field work undertaken with indigenous peoples themselves, peoples whose voices are for the most part not represented in any of these bodies of literature.

A third participation-related question, which was adumbrated above, arises from this dissertation but is beyond its scope: *What are the most effective and justifiable forms of and venues for public discussion and deliberation in the presence of asymmetries of power?* In particular I have in mind those asymmetries that frequently accompany interactions between a powerful majority population and a vulnerable, marginalized, or despised minority. Answering this question will be an important next step in operationalizing the solution I proposed for identifying the

location of an appropriate threshold for parental consent in education decisions affecting their children, a solution that relied heavily on public deliberation and legislative action but left open the specific forms or venues most appropriate for such deliberation.

Goulet has highlighted the importance for development of finding ways to extend “micro” participation to venues of “macro” decision-making, referring to this as “the upscaling of participation from micro to macro arenas” (Goulet 2005). Engaging in this project is an important—and natural—next step for my own research. In particular, more research is needed to identify the precise types of mechanisms and venues least likely to reproduce power asymmetries and most likely to include otherwise marginalized members of the community. It might very well be that different venues are most appropriate in different localities, for example, depending on the breadth and depth of a “contestatory” civil society. While important, I’ve left this (partially empirical) question aside for future work.

When I do take this question up, I will start by reviewing the extensive theoretical literature on deliberative democracy and participatory development (including Crocker 2008 and references therein). As for empirical work, Alkire (2002), Baiocchi, Heller and Silva (2011), Fung and Wright (2003), Goulet (2005), and Van Cott (2008) have analyzed case studies from Latin America, Southeast Asia, and the United States. Alkire focuses on women’s income generation projects. Baiocchi *et al* look at the various relationships between the state and different kinds

of civil society. Fung and Wright's discussion of Empowered Participatory Governance is particularly instructive in its focus on the institutional design of different sorts of participatory venues. Goulet (2005), in discussing the promise of "micro" participation on "macro" issues and projects, looks specifically at damn construction. Van Cott turns the lens on indigenous participation, examining the possibilities for local innovations by Andean indigenous groups to inform the literature on radical democracy. All of these works promise important insights.

4. On Agency

While many of the research questions outlined above require substantial empirical research, in my immediate post-doctoral research, I hope to tackle a more in-depth exploration of two of the normative concepts that I have sketched in this dissertation and in other recent research: the idea of *agency vulnerability* and the connected idea of (critical and) *sustainable agency*. I feel that both have something important to add to the current discussions of individual and collective agency, the latter most especially so in the context of children's rights. It will also be worth exploring the relationships between—and relative advantages, disadvantages, and justifications of—the related concepts of agency, autonomy, and self-determination. Turning to the practical application of these concepts, and very much related to the participation questions I highlighted above, I might also investigate the mechanisms and venues—in civil society, government, and public life more generally—that would be most effective and appropriate for the individual and collective exercise of critical and sustainable agency. Crocker, meanwhile, is in the process of extending his own

thinking on the concept of agency to several additional questions, each of which will be relevant for my own research: *Why is agency a good thing? How might agency be “incentivized” in a way appropriate for the ideal of agency? How could agency achievement and agency freedom be “operationalized” in a way that would allow us to compare the agency freedom/achievement at two different times or at the same time in two different societies?*

5. On Self-Determination

In many respects, this dissertation does not do justice to the wide-ranging theoretical debate about self-determination. One important respect in which these essays come up short is in the lack of attention to the often-discussed tension between the interests and aims of individuals and those of groups. Many individuals might support the attainment of self-determination or autonomy for a political, national, ethnic or other group with which they identify, while some of their individual interests or ends remain at odds with those of the group. Moreover, self-determination might be a fundamentally individual pursuit. Anaya argues that “the characterization of self-determination as a right of ‘peoples,’ however, does not deny the individual as an important beneficiary of the norm.” He goes on to cite Dov Ronen in arguing “that it is ultimately the individual that matters in the realization of self-determination values” (Anaya 1993, 137). Balancing these individual interests with those of a heterogeneous group, however, is not simple. Although an adequate discussion of these tensions is beyond the scope of the research presented here, and although I have

tried to address some of these tensions as they apply to specific cases, there is much work that remains to be done on this subject.

6. Final remarks

I began this work with a quotation: “It is the integrity of the inner worlds of peoples—their rectitude systems or their sense of spirituality—that is their distinctive humanity. Without an opportunity to determine, sustain, and develop that integrity, their humanity—and ours—is denied” (Steiner 1992, in Wiessner 2008, 1171). I have attempted in these pages to make the case for the importance of education in the development, evolution, preservation, and deconstruction of precisely those inner worlds, by those to whom they matter most. I have also attempted to engage with several pressing challenges that arise in the efforts of states to offer such education in diverse democratic societies, challenges that often come down to questions of decision-making, private or public, individual or collective. Though much research remains to be done in order to answer these questions, I have begun this task here. I look forward in my future work to starting up some of the “hills” I have identified above, chipping away at these burning questions, the aim of which, ultimately, is to identify those policies and practices most likely to contribute to the larger project of ensuring human freedom in a diverse world.

Appendix A: Crocker's Typology of Participation

(Crocker 2008, 343-4, footnotes omitted)

- (i) **Nominal participation:** The weakest way in which someone participates in group decision-making is when someone is a member of a group but does not attend its meetings. Some people are group members but are unable to attend or unwilling to attend because, for instance, they are harassed or unwelcome.
- (ii) **Passive participation:** In passive participation, people are group members and attend the group's or officials' decision-making meetings, but passively listen to reports about the decisions that others already have made. The elite tells the nonelite what the elite is going to do or has done, and nonelite persons participate, like the White House press corps, by listening and, at best, asking questions
- (iii) **Consultative participation:** Nonelites participate by giving information and their opinions ("input," "preferences," and even "proposals") to the elite. The nonelite neither deliberate among themselves nor make decisions. It is the elite who are the "deciders," and while they may deign to listen to the nonelite, they have no obligation to do so.
- (iv) **Petitionary participation:** Nonelites petition¹⁶ authorities to make certain decisions and do certain things, usually to remedy grievances. Although it is the prerogative of the elite to decide, the nonelite have a right to be heard and the elite have the duty receive,

listen, and consider if not to heed. This participatory model, like that of consultative participation, is often used in traditional decision-making.

- (v) **Participatory implementation:** Elites determine the goals and main means, and nonelites implement the goals and decide, if at all, only tactics. In this mode nonelites do more than listen, comment, and express. Like soccer players they also make and enact decision, but the overall plan and marching orders belongs to the coach.
- (vi) **Bargaining.** On the basis of whatever individual or collective power they have, nonelites bargain with elites. Those bargaining are more adversaries than partners. Self-interest largely if not exclusively motivates each side, and nonelite influence on the final “deal” depends on what nonelites are willing to give up and what concessions they are able to extract. The greater the power imbalances between an elite and nonelite, the less influence the nonelite has on the final outcome. An elite may settle for some loss now in order to make likely a larger future gain. Alliances with and support from actors outside and above tend to enhance nonelite bargaining power.
- (vii) **Deliberative participation:** Nonelites (sometimes among themselves and sometimes with elites) deliberate together, sifting proposals and reasons to forge agreements on policies that at least a majority can accept.

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