

## **Introducing Pluralist Internationalism – An Alternative Approach to Questions of Global Justice**

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June 25, 2013

1. In an increasingly politically and economically interconnected world, it is hard to ascertain what justice requires. It is difficult to spell out how principles of justice apply, to begin with, and hard to assess what they entail for pressing political questions ranging from immigration to trade and climate change. The two traditional ways of thinking about justice at the global level either limit the applicability of justice to states -- the only distributions that can be just or unjust, strictly speaking, are within the state -- or else extend it to all human beings. The view I defend in *On Global Justice* (Princeton University Press, 2012) rejects both of these approaches and instead recognizes different considerations or conditions based on which individuals are in the scope of different principles of justice. Finding a philosophically convincing alternative to those approaches is the most demanding and important challenge contemporary political philosophy faces, one that in turn reflects the significance of the political issues that are at stake.

My own view, and thus my attempt at meeting the aforementioned challenge, acknowledges the existence of multiple *grounds* of justice. *On Global Justice* seeks to present a foundational theory that makes it plausible that there could be multiple grounds of justice and to defend a specific view of the grounds I call *internationalism* or *pluralist internationalism*. Internationalism grants particular normative relevance to the state but qualifies this relevance by embedding the state into other grounds that are associated with their own principles of justice and that thus impose additional obligations on those who share membership in a state. The grounds I discuss are shared membership in a state, common humanity, shared membership in the global order, shared involvement with the global trading system and humanity's collective ownership of the earth. Other than shared membership in a state, it is humanity's common ownership of the earth that receives the most sustained treatment. And it is probably in the conceptualization of common ownership as a ground of justice that my view seems strangest.

*On Global Justice* is meant to exemplify the kind of work philosophers can, and must, do to help solve the world's political and economic problems, including problems raised by globalization. Attempts at solving such problems inevitably lead to questions about what kind of world we should have. Philosophical inquiry rarely leads to concrete policy advice unless much of what most people currently believe and much of how our institutions work is taken as constraining what such advice could look like. Nonetheless, we need visions for the future of the world. If such visions try to dispense with political philosophy, they forfeit conceptual tools that are plainly needed to develop and defend them. At the same time, political thought that proceeds with too little connection to the problems that preoccupy those who want to change the world often is complacent and boring, as is philosophical inquiry that mostly investigates its own nature and thinks of political discourse only as one source of input for metaethical analysis.

In what follows I will first discuss some of the major themes from by book and then explain how my view applies to the global trade regime. My purpose is to capture the general approach, address some important questions about that approach as we go along, and the offer an illustration of how this approach applies to a particular policy domain.

2. The most striking fact about the political organization of humanity in the modern era is that we live in states. States are organized societies with a government and a territory. The state's territory is a region where the government can successfully enforce its rules because it can generally physically overpower internal competitors and discourage aggression by outsiders. Needless to say, many countries in Africa, Central and South America, Western and Southern Asia, and Eastern Europe have low state capabilities, in a number of cases so low that they are sometimes called "quasi-states." And of course, other political arrangements are possible and have existed historically. Political organizations that predate states include city-states (which lack the territorial aspect of states), city leagues, empires (which lack the relatively tight and unified organizational structure of states), or feudal structures (which normally include complex internal structures). In a world of increasing political and economic interconnectedness debatable (if perhaps not politically realistic) alternatives to the state system include a world state, a world with federative structures stronger than the United Nations, one with a more comprehensive system of collective security, one where jurisdictions are disaggregated, or one where border

control is collectively administered or abandoned entirely. Reflection on such structures matters greatly in an interconnected world where enormous differences in life prospects persist.

Nonetheless, it has indeed been the state that was the politically dominant mode of organization in recent centuries. Two central philosophical questions arise about the state: whether its existence can be justified to its citizens to begin with, and what is a just distribution of goods within it. As far as the first question is concerned, philosophers from Thomas Hobbes onward have focused on rebutting the philosophical anarchist, who rejects the concentrated power of the state as illegitimate. For both sides of the debate, however, the presumption has been that those to whom state power had to be justified were those living within its frontiers. The question of justice, too, has been much on the agenda since Hobbes, but it has gained centrality in the last fifty years, in part because of the rejuvenating effect of John Rawls's 1971 *A Theory of Justice*. It is because of his focus on the state that Hobbes got to set much of the agenda for subsequent political philosophy. And that emphasis was preserved (at least initially) when Rawls did so much to renew debates in political philosophy.

However, real-world changes, grouped together under the label "globalization," have now forced philosophers to broaden their focus. In a world in which goods and people cross borders routinely, philosophers have had to consider whether the existence of state power can be justified not merely to people living within a given state but also to people excluded from it (e.g., by border controls). At a time when states share the world stage with a network of treaties and global institutions, philosophers have had to consider not only whether the state can be justified to those living under it but whether the whole global political and economic order consisting of multiple states and global institutions can be justified to those living under it. And in a world in which the most salient inequalities are not within states but among them, philosophers have had to broaden their focus for justice, too, asking not only what counts as a just distribution within the state but also what counts as a just distribution *globally*.

In what follows "justice" will always be "distributive justice." A theory of distributive justice explains why certain individuals have particularly stringent claims to certain relative or absolute shares, quantities, or amounts of something. In Shakespeare's *Merchant of Venice*, Shylock makes his demand for a pound of his delinquent debtor's flesh in terms of justice, and until the clever Portia finds a device for voiding the contract, the presumption is that it must be granted. Kant went too far when he insisted that without justice life was not worth living at all,

but in any event, demands of justice are the hardest to overrule or suspend. Justice plays its central role in human affairs precisely because it enables persons to present claims of such stringency.

Consider now some distinctions that characterize much of the current debate about justice at the global level but that, as we will see, pluralist internationalism transcends. Distributive Justice is the genus of which *relationism* and *nonrelationism* are species. Relationists and nonrelationists disagree about the grounds of justice. The *grounds* of justice are the features of the population (exclusively held) that make it the case that the principles of justice hold within that population. “Relationists” about the grounds of justice apply principles of justice only among individuals who stand in a certain essentially practice-mediated relation; “non-relationists” account for principles of justice without recourse to such relations. A reference to practices keeps nonrelationism from collapsing into relationism. The relation of “being within 100,000 kilometers of each other” is not essentially practice-mediated, nor is, more relevantly, that of “being a fellow human.”

Relationists may hold a range of views about the nature of the relevant relations, and they may think there is only one relational ground or several. Relationists are motivated by concerns about “relevance,” the moral relevance of practices in which certain individuals stand. Such practices may include not only those that individuals chose to adopt but also some in which they have never chosen to participate. Nonrelationists deny that the truth about justice depends on relations. They think principles of justice depend on features that are shared by all members of the global population, independent of whatever relations they happen to be in. Rather than focusing on relevance, nonrelationists seek to avoid the “arbitrariness” of restricting justice to regulating practices. Globalization may have drawn our attention to the fact that justice applies globally, say the nonrelationists, but in fact it always did.

“Globalists” are relationists who think the relevant relation holds among all human beings; “statists” think it holds among those who share a state. Globalists think there is only one relevant relation, and that relation holds among all human beings in virtue of there being a global order. (To remember its relationist meaning, readers should connote this term with *global political and economic order* rather than with *globe*.) Statists, too, think there is only one relevant relation, and think that relation holds (only) among individuals who share membership in a state. Statists endorse what I call the *normative peculiarity* of the state; globalists and

nonrelationists deny it. However, nonrelationists agree with statist and globalist that there is only one ground of justice. Offering a theory of justice then means to assess what the uniquely determined ground of justice is and then to assess what principles apply to relevant populations.

3. Statists and globalists disagree about what relation is relevant for the applicability of principles of justice. Nonetheless, they both are relationists, resting claims of justice on nationally or globally shared practices, respectively, and thus to some extent use similar arguments to defend their views. Globalists owe an account of what it is about involvement with, or subjection to, the global order that generates demands of justice. Statists owe an account of what it is (exclusively) about shared membership in states that generates demands of justice. Statists tend to hold that principles of justice do not apply unless a certain condition holds, one that exclusively applies within states. Two proposed accounts of the normative peculiarity of the state are *coercion-based statism*, according to which what distinguishes membership in a state is its coerciveness; and *reciprocity-based statism*, according to which it is its intense form of cooperation. Principles of justice then either apply, or they do not.

However, both of these versions face the challenge that forms of coercion and cooperation also hold within the global order as such, which makes it problematic to argue that principles of justice *only* govern the relation among those who share a state. Different conditions create redistributive demands, and these conditions might occur in degrees or otherwise take on different forms. Coerciveness might be more or less profound or pervasive, and similarly for forms of cooperation. For instance, like the state the World Trade Organization (WTO) is both coercive and cooperative, but is so in very different ways than the state. Statists can respond by arguing that the normative peculiarity of the state is based on its particular kind of coerciveness or cooperativeness. In earlier work (Risse (2006)), I, for one, have accounted for the state's coerciveness in terms of legal and political immediacy. The legal aspect consists in the directness and pervasiveness of law enforcement. The political aspect consists in the crucial importance of the environment provided by the state for the realization of basic moral rights, capturing the profundity of this relationship. However, assuming that something like my account succeeds in explaining what is morally special about shared membership in states, one must still wonder whether this account matters *for justice*, that is, can explain why principles of justice apply *only* among those who share a state. That is the point that globalists push at that stage of the debate.

One way of making progress in light of the debate among statist and globalist is to deny that there is a single justice relationship in which any two individuals either do or do not stand. One may use “principles of justice” as a collective term for different principles with their *respective* ground and scope. Let us call *non-graded* or *monist internationalism* the view that principles of justice either do or do not apply, that they do apply within states, and thus among people who share membership in a state, and only then. Non-graded or monist internationalism is simply the same as statism. Introducing this additional terminology allows us to connect statism to other views that endorse the normative peculiarity of the state. Coercion-based and reciprocity-based statism are versions of monist or non-graded internationalism.

*Graded* internationalism holds that *different* principles of justice apply depending on the associational (i.e., social, legal, political, or economical) arrangements. Graded internationalism allows for associations such as the WTO, the European Union, or the global order as such to be governed by principles of justice, but endorses the *normative peculiarity* of the state. Among the principles that apply within other associations we find weakened versions of principles that apply within states. For this reason I talk about *graded* internationalism in this case. I am lacking the space to motivate the graded view in detail here. Suffice it to say that all those who live, say, under WTO are tied to each other much more loosely than individuals who respectively share a state. It is therefore plausible to think that the principles of justice that hold within the WTO are weakened versions of those that hold within a state.

However, now that I have introduced a non-monist view, we also must take seriously the idea that some grounds could be relational, whereas others would not be. We must consider the possibility that there is no deep conflict between relationism and nonrelationism. Perhaps advocates have respectively overemphasized facets of an overall plausible theory that recognizes both relationist and nonrelationist grounds. Integrating relationist grounds into a theory of justice pays homage to the idea that individuals find themselves in, or join, associations and that membership in some of them generates duties. Integrating nonrelationist grounds means taking seriously the idea that some duties of justice do not depend on the existence of associations. One obvious non-relational ground to add is common humanity. One view that develops these ideas could be called *pluralist internationalism*, or plainly *internationalism*. The use of the term “internationalism” for this position acknowledges the applicability of principles of justice *outside of* and *among* (“inter”) states. This view endorses the state’s normative peculiarity (and

articulates it the same way in which Risse (2006) did earlier), but recognizes multiple other grounds of justice, some relational (e.g., subjection to the global trade regime) and others not (e.g., common humanity). Respectively different principles are associated with these different grounds, all of which binding, say, for states and international organizations. Internationalism transcends the distinction between relationism and nonrelationism.

Internationalism offers one way of preserving the plausible aspects of nonrelationism, globalism, and statism. Obviously, making this view credible, and proving its fruitfulness, requires detailed discussions of its implications for a wide range of areas – which the book provides, for areas including immigration, fairness in trade, and obligations resulting from climate change, but also human rights, obligations to future generations, and others. The costs of making such a move are considerable because it gives up on the uniqueness of the justice relationship. One would also have to meet the challenge that such a pluralist view does not, one way or another, collapse into one of the original views.

4. My defense of pluralist internationalism in *On Global Justice* accepts a twofold challenge: first, to show why statism, globalism, and nonrelationism are insufficient and why a view combining relational and nonrelational grounds is promising; and second, to illustrate the fruitfulness of my view by assessing constructively what principles are associated with different grounds. Altogether I explore five grounds. I recognize individuals as human beings, members of states, co-owners of the earth, as subject to the global order, and as subject to a global trading system. For common humanity, the distribuendum – the things whose distribution principles of justice are concerned with -- is the range of things to which a certain set of natural rights entitles us; for shared membership in a state, it is Rawlsian primary goods (rights and liberties, opportunities and powers, wealth and income, and the social bases of self-respect – all those things that people collectively bring about within a state); for common ownership of the earth, it is the resources and spaces of the earth; for membership in the global order, it is again the range of things to which a set of rights generates entitlements; and for subjection to the global trading system, it is gains from trade.

I do not claim to have identified all grounds: membership in the European Union is a contender, or more generally, different forms of membership in transnational entities. Certain grounds stand out because human affairs render them salient before the background of political

realities and philosophical sensitivities. “Social justice” demarcates the relevance of membership. “Global justice” demarcates the salience of not one but several grounds: those mentioned and possibly others for which one must argue.

One might worry that my approach brings under the purview of “distributive justice” much that may fit under justice, but not *distributive* justice. Indeed, common humanity, for instance, does not stand in contrast to justice but is one ground. Thereby my view acknowledges an important truth in nonrelationism. The issues that I claim fall under distributive justice are tied. The connection is that all grounds bear on the distribution of *something* that is both significant for individuals and salient at the political level, and that all claims based on different grounds place stringent demands on states and other agents. It is possible to think of humanitarian duties as opposed to justice for a narrowly conceived notion of justice. However, there is pressure to think of these duties as stringent, which renders this contrast unconvincing. Internationalism contrasts humanitarian with *other* duties of justice. There does remain some awkwardness in thinking of all the issues in this book in terms of distributive justice. Nonetheless, on balance, there is good reason to do so.

We must take as given a global political order whose principal subdivisions consist of units roughly like the current state, but be open to the possibility that the best justification for doing so requires (possibly considerable) modifications in the norms of the system as we find them. We cannot pretend to be able to invent a global order from scratch. After starting with the state, we can ask what is normatively peculiar about it, and whether there ought to be states, as well as bring into focus the state’s duties to those outside it. But in particular we do not therefore need to agree with John Rawls that there are principles of distributive justice that apply domestically and must be articulated first, and that then there may well be other principles of justice (not distributive justice) that apply globally. Contrary to Rawls—and this is one major difference between his approach and mine—I argue that states are subject to principles of distributive justice also on account of the other considerations reflected in the grounds-of-justice approach, and that there are several grounds of justice, of which some are relational and some are nonrelational.

The emphasis throughout *On Global Justice* is on justifying the state to those respectively *excluded* from it. As far as the focus on the state is concerned, my work is aligned (e.g.) with that of John Rawls and David Miller, but differs from them especially in its emphasis on collective

ownership, by supporting further-reaching duties outside of shared membership in a state based on other grounds of justice, and, as matter of general philosophical outlook, by seeking to justify states not merely to those respectively included in them, but also to those excluded. As far as the support for such duties and that goal of justifications of states are concerned, my work is aligned with that of cosmopolitans such as Charles Beitz, Thomas Pogge, and Simon Caney, but differs from them again in its emphasis on collective ownership as well as in its vindication of the moral significance of the state. By acknowledging different grounds of justice, pluralist internationalism preserves valid insights from all those approaches, but also substantially diverges from each.

What is indeed most distinctive about my approach is the significance I give to humanity's collective ownership of the earth. Thereby I revitalize and secularize an approach dominant in the 17<sup>th</sup> century that has never again reached as much prominence, and that has largely (though not entirely) dropped out of sight since the Rawlsian Renaissance of political philosophy. Suppose the US population shrank to two, capable, however, of controlling borders through electronic equipment. Surely they should permit immigration. If so, we should theorize about the space humanity jointly inhabits, and about what entitlements there can be to parts of it. Such theorizing takes us to a suitable notion of collective ownership of the earth. In the 17<sup>th</sup> century, the motivation for this approach was obvious: the Bible states that God gave the earth to humankind in common. Many questions could be addressed through an interpretation of that gift, such as concerns about the possibility of owning the sea and the conditions under which territory could legitimately be claimed. Philosophers such as Hugo Grotius, John Locke, and Samuel Pufendorf saw questions of collective ownership as central to their work. This approach is also present in international law, where for about forty years the term "common heritage of mankind" has been applied to the high seas, the ocean floor, Antarctica, and Outer Space. Central questions include how to make sense of this ownership status without recourse to a divine gift, and how to select the philosophically preferred one from among different versions of it. Immigration is one topic to which this approach applies. Less obvious ones include human rights, as well as obligations towards future generations and obligations arising from climate change. At this stage, not only do we face problems of global reach, but humanity as a whole confronts problems that have put our planet as such in peril. It is therefore only appropriate to find a suitable place in

moral and political philosophy for theorizing about all human beings' symmetrical claims to the earth.

Humanity's collective ownership of the earth was the pivotal idea of the political philosophy of the 17<sup>th</sup> century. European expansionism had come into its own, so questions of global reach entered political thought and needed to be addressed from a standpoint that was nonparochial (not essentially partial to one of their viewpoints) as far as European powers were concerned. At the same time, appealing to God's gift of the earth—as reported in the Old Testament—was as secure a starting point as these troubled times permitted. Although that debate took the biblical standpoint that God had *given* the earth to humankind, some protagonists, such as Grotius and Locke, thought this matter was also plain enough for reason alone to grasp. And indeed, the view that the earth originally belongs to humankind collectively is plausible without religious input. We have much to gain from revitalizing this idea. What is at stake is ownership of, as John Passmore put it, “our sole habitation . . . in which we live and move and have our being” (1974, 3), or in Henry George's words, of “the storehouse upon which [man] must draw for all his needs, and the material to which his labor must be applied for the supply of all his desires” (1871, 27). Or, as Hannah Arendt said in *The Human Condition*, “The earth is the very quintessence of the human condition, and earthly nature, for all we know, may be unique in the universe in providing human beings with a habitat in which they can move and breathe without effort and without artifice” (1958, 2).

5. My approach makes the normative peculiarity of states central, as well as the existence of a system of multiple states. But states exist only contingently. If it were morally desirable for the state system to cease to exist, then my theory of global justice could not offer us an ultimate ideal of justice. That ideal would be offered by a vision of the political arrangement that should replace the system of states. So we must explore whether it is true that morally there ought to be no system of states but instead there ought to be either no states or else a global state. This is a task that is important enough to the overall project in *On Global Justice* that I devote two chapters to it, chapters 15 and 16.

Chapter 15 considers several arguments that find fault with the way we live now, the system of states. I explore four strategies one may deploy (a) to identify faults of the state system and (b) to use the identified moral failings to reach the conclusion that there ought to be no

system of states, and thus no global order. Chapter 16 offers a sweeping objection to any attempt to argue toward the conclusion that the state system ought to cease to exist, one that draws on the epistemic limits of utopian thinking. We simply do not have an alternative to the existence of states that we understand sufficiently well to take it to be action-guiding. There does remain a nagging doubt about whether there ought to be states at all; nevertheless, morally and not merely pragmatically speaking, we ought not abandon states now, nor ought we aspire to do so eventually.

I cannot take the time here to expand on these themes from the book in any more detail. But let me emphasize why I think this discussion is rather important. On the one hand, if this view of the justification of states is correct, a major project of modern political philosophy has failed, namely, to show that states are the uniquely rational or moral political arrangements of human beings. But on the other hand, a certain view about the justification of states that has become rather widespread among political philosopher in our time also fails, to wit, that the state system is deeply flawed, and that for that reason we should abandon it if only we could, but we just cannot. This view of states grants them only a pragmatic justifiability and false assumes that we actually understand a world without states well enough to think of the system of states as a pragmatically, but indeed only pragmatically un-abolishable mode of political organization.

6. So indeed, then, there are different grounds that come with their respectively different principles of justice. For the shared membership in a state I assume that something like Rawls's two principles of justice is correct. The principles I argue in the course of this book are associated with different grounds of justice are the following:

- (1) *Shared membership in a state*: 1. Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all. 2. Social and economic inequalities are to be arranged so that they are both (a) attached to offices and positions open to all under conditions of fair equality of opportunity and (b) to the greatest benefit of the least advantaged.
- (2) *Common humanity*: The distribution in the global population of the things to which human rights (understood as rights needed to protect the distinctively human life) generate entitlements is just only if everyone has enough of them to lead a distinctively human life (and thus if those rights are satisfied).

- (3) *Collective ownership*: The distribution of original resources and spaces of the earth among the global population is just only if everyone has the opportunity to use them to satisfy her or his basic needs, or otherwise lives under a property arrangement that provides the opportunity to satisfy basic needs.
- (4) *Membership in the global order*: The distribution in the global population of the things to which human rights (understood as membership rights) generate entitlements is just only if everyone has enough of these things for these rights to be realized.
- (5) *Trade*: The distribution of gains from trade among states is just only if no country enjoys gains that have come at the expense of people involved with the trade, where these gains occur *at the expense* of certain people if either (a) their contributions to the production of goods or the provision of services for export do not make them better off (than if they were not producing those goods at all) to an extent warranted by the value of these contributions (and they did not voluntarily accept such an arrangement), or (b) their involvement in the trade has emerged through human rights violations, or both.

I hope these principles are sufficiently intelligible for our purposes. A number of chapters in the book offer extensive commentary on them.

Every agent and institution has the duty to do what it can, within limits, to bring about the necessary conditions of just distributions, as described in the principles of justice. The first task when asking how institutions (or any entity with obligations of justice) ought to contribute to justice is to ask, for *which* principles do they have this obligation to do what they can, within limits, to bring about justice? The second question is, what is the priority ranking of those principles for this institution? When talking about priority among principles, I do not have in mind that from the standpoint of the universe, achieving justice is more important in some distributions than in others. Such a standpoint generates no priority ranking among the principles. But we can ask whether for a given agent or institution charged with trying to bring about justice there is a priority among these principles. Institutions have particular purposes (that other entities may or may not also have), have limited time and resources, and have more power and competence to influence things in some areas than in others. They may plausibly also have their own concerns of justice that would not stand out from the standpoint of the universe but to which entities may show partiality in their execution of their general duty to do what they can to bring about justice. I assume all principles of justice can be satisfied at once within a world of multiple states. Given this assumption, the problematic aspects of granting a kind of partiality especially to states are much less troublesome than they otherwise would be.

Let us say that ground G is *embedded* in H if the individuals in the scope of G are also in the scope of H. I introduce this notion to answer the question, for which principles of justice does an institution (in this case the state) have corresponding obligations? I respond as follows. First, we find the ground G most closely linked with the institution (in this case, the ground of state membership). A ground is “linked” with an institution if the operations of the institution are primarily directed at, or most directly affect, the people in the scope associated with that ground. For instance, the operations of a state (or its government) are primarily directed at members of that state. We ask then what principles are associated with that ground, where a principle is associated with a ground if it either arises from the ground in the familiar way (e.g., as the Rawlsian principles arise from the ground of state membership) or arises from another ground in which the first ground is embedded. So this sense of a principle’s being associated with a ground is broader than what we are familiar with. Then we apply this rule: An institution has duties corresponding to all principles associated (in the broader sense) with the ground linked to the institution. This approach to deciding which principles an institution has duties to try to bring about is more restrictive than the view that entities with obligations of justice are responsible for all principles. States, for instance, have no obligations relating to Rawlsian principles in other states or, say, principles applying to people on another planet.

As far as states are concerned, I submit the following list of principles of justice that ascribe obligations to states, in order of priority (which reflects my own considered judgment):

1. Within the state, each person has the same indefeasible claim to an adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.
2. (a) The distribution in the global population of the things to which human rights (understood as membership rights) generate entitlements is just only if everyone has enough of them for these rights to be realized. (b) The distribution of original resources and spaces of the earth among the global population is just only if everyone has the opportunity to use them to satisfy her or his basic needs, or otherwise lives under a property arrangement that provides the opportunity to satisfy basic needs.

(Principles 2(a) and 2(b) are at the same level of priority.)

3. Within the state, each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.

4. Social and economic inequalities are to be arranged so that they are both (a) attached to offices and positions open to all under conditions of fair equality of opportunity, and (b) to the greatest benefit of the least advantaged.

(4 (a) has priority over 4 (b).)

Once again the discussions throughout a number of chapters in *On Global Justice* provide an extended commentary on their meaning and implications, especially for items 2 (a) and 2 (b), which have a rather complex background, and also have implications with regard to future generations. But in this case too I hope that the statement is clear enough for present purposes. Two grounds do not appear on this list of principles as they apply to the state: common humanity and subjection to the trade regime. The implications of common humanity are subsumed under 2 (a). To the extent that trade creates obligations for states pertaining to other states, they too are subsumed under 2 (a). To the extent that trade creates domestic obligations, they are subsumed under principle 4. This does not mean that trade does not generate demands of justice; it merely means that the principles on this list are sufficiently general to absorb these demands to the extent that they apply *to states*.

In addition to principles of justice *On Global Justice* also argues for some demands of reasonable conduct that are weaker than the demands of justice. Those demands – which I again state without elaboration -- concern immigration policies and intergenerational equality:

( $\alpha$ ) *Immigration*: If the territory of state S is relatively underused, co-owners elsewhere have a pro tanto claim to immigration.

( $\beta$ ) *Intergenerational equality*: Each generation can reasonably be expected to leave a nondeclining stock of natural capital behind (*strong sustainability*).

( $\gamma$ ) *Absorptive capacity*: Regulation of access to the absorptive capacity of the atmosphere ought to be done in terms of ideas of fair division.

The grounds-of-justice approach dilutes the contrast between domestic and foreign policy. To ensure acceptability of the global order, governments can reasonably be expected to assume responsibility for a globally even-handed (and to some extent harmonized) immigration policy. Ensuring acceptability also requires the implementation of a climate change policy. Governments must not neglect duties with regard to immigration, climate change or future generations even if (given *current* policies) discharging such duties threatens disproportionately to affect disadvantaged segments of society. Social policy must be reformed, then, and especially

domestic tax codes must be adjusted accordingly. Inheritance taxes and other taxes targeting the increasingly large share of the very wealthy in rich countries' economies are particularly suitable sources of income that could help with discharging international duties. Governments must think of matters of domestic and global justice together rather than in isolation and with distinct priority for domestic matters.

But entities like the state do not only have obligations of justice (and of reasonable conduct). They also have an additional duty to *give account* for what they do to realize their obligations of justice, and have this duty towards those who are in the scope of the relevant principles of justice. That is, an entity A with an obligation of justice to entity B owes an actual justification to B for what it does to realize this duty. Such account giving may take on rather different forms depending on whether it involves immediate interaction between the parties in this relationship. Moreover, such account giving can be more or less effective, depending on (roughly speaking) whether the account recipient can impose sanctions on the account giver as appropriate and thereby set incentives for the account giver to make sure the duties in question are executed. Chapter 17 of *On Global Justice* argues in detail why the presence of obligations of justice implies obligations to give account. In a nutshell, there are two arguments. One is an argument from respect. Too much is at stake when claims of justice are under consideration. So respect for those to whom these particular duties are owed requires that an actual account be given. Arguments from respect are ubiquitous, but it is in the context of a theory of justice that they do real work. Furthermore, there is the instrumental argument that the requirement of an actual justification increases chances that justice will be done.

7. I conjecture that realizing my proposed principles would go a long way towards eliminating poverty and reducing inequality. In a just world the mutual benefits of economic interaction could come to full fruition. Countless gifted individuals would no longer have to focus on securing bare survival. These points, I believe, will be crucial facts about a world that would emerge were my principles implemented. However, what is also true is that, as far as the theory is concerned, a just world could in principle be plainly as unequal as ours (across countries, that is, not within countries). The poor would be richer, but the rich could be too. Ours is not a just world – though not in virtue of inequality, but in virtue of widespread human rights violations, and thus in virtue of the state of the worst off falling below a minimum threshold. Also, in a just

world as I envisage it, there could be much more inequality than in different views of a just world, for instance one where the difference principle applies globally.

These results might strike some readers as wrongheaded – and indeed, it was because of its implications about inequality that in a recent review of *On Global Justice* in the *London Review of Books*, my book was characterized as reflecting the “temper of our timid, muddled times.” Suppose there is a very rich country where human rights are satisfied but the difference principle is not. Suppose there is another country that is not wealthy enough for the difference principle to apply but where human rights are satisfied (though barely so). Suppose everyone in the wealthy country is richer than everyone in the poor country. Internationalism implies that the only injustice in this scenario may be within the rich country. There is no injustice in the relative situations of the countries. But the response to any worry this scenario might create is straightforward: our inquiry has not delivered principles that condemn this scenario per se.

Kok-Chor Tan (2004) points out that “in a world marked by stark international inequality, it is implausible that citizens of richer countries may show greater concern to compatriots without simultaneously undermining the ideal of universal equal respect” (pp 157f). In a very unequal world, that is, the realization of any principles of justice may be in jeopardy. Let me illustrate how serious this worry is. In *The Culture of Disbelief*, in a context that does not otherwise concern us, legal scholar Stephen Carter recollects two encounters with teenagers, and asks which ones are “the most dangerous children in America” (pp 204f). In the first encounter Carter is forced to take shelter from a shoot-out among drug dealers in Queens. In the second he overhears a conversation among girls in a commuter train passing through wealthy Connecticut suburbs. The girls seek to impress each other with the exclusivity of their communities, dropping names of fashionable people who live there or stop by. One girl mentions that her father owns a store. Another one’s triumphant outcry “Your father has a store?” decides the contest in this second girl’s favor. That people in the first girl’s neighborhood would own stores means it lacks exclusivity.

The dealers are likely to be dead or imprisoned within a few years. It is those privileged teenagers, submits Carter, who are the most dangerous children because of the socially insulated way in which they can advance through life. If their insulation makes them callous towards fellow citizens, as it too often does – and this takes us back to Tan’s worry -- how much more will it make them callous towards individuals in faraway lands? How would privileged

individuals in an unequal world care about any kind of injustice affecting distant individuals? Education, media engagement, political leadership and much else is needed to make it more likely that people empathize with distant strangers and let these people's plight enter into their election behavior so that governments, in turn, take seriously their obligations towards non-citizens. This is a truly daunting task that must accompany the realization of my vision of justice. It is nonetheless a *much* easier task to accomplish than to abandon states, or to take other measures to reduce global inequality further than my theory would. Tan's worry is serious, but especially globalists or non-relationists get no mileage from this fact.

8. Within states, *democratic* mechanisms offer the appropriate form for governments to give account to its citizens for what they do to realize the principles of justice that only concern the members of the given society. However, a government that is democratically accountable to its citizens for domestic justice has strong incentives to neglect other duties. The problem is not merely that the dynamics of electoral politics—the ability and willingness of political parties to make promises they can realize only by neglecting other duties—might *occasionally* interfere with other values. The real problem is that voters are preoccupied with their own concerns. Politicians cater to these preoccupations, running the risk of being penalized in elections if they fail to do so. This normally implies a high degree of political inward-directedness. To the extent that domestic politics seeks to realize justice, efforts focus on domestic principles. The problem we have detected concerns both the pursuit of justice as far as it involves noncitizens and the state's ability to give account to them. Yet not only do governments have other duties, they are also accountable to those in the scope of other principles of justice. Thus the fact that governments are accountable in this way for principles of *domestic* justice creates a challenge for finding accountability mechanisms related to *other* principles of justice.

Since governments have a disincentive to give account to people other than their own citizens, would not *global democracy* be the appropriate accountability mechanism? For instance, the global population might elect representatives who would be ultimately accountable to them while states would be intermediately accountable to them. Another, more demanding possibility would be that noncitizens join citizens in having voting rights with respect to the government of each state. Each government would be ultimately accountable to the world population.

However, while the ideas behind democracy apply to all human beings, they have institutional implications respectively only for appropriately organized groups, groups that share a sense of common destiny and communicate with one another on issues of public policy. Nonetheless, in recent decades much work has been done to explore whether some kind of democratic governance would be appropriate or required outside of states. To be sure, cosmopolitan democrats do not generally seek to abandon states. They think of states as units within a multilayered governance system. That system includes intergovernmental institutions whose members are states, as well as cosmopolitan institutions that are ultimately accountable to all human beings on a “one citizen, one vote” basis. World citizenship and national citizenship would coexist in a system of autonomous but complementary units. Representation in the UN and elsewhere should be strengthened. Transnational civil society and especially nongovernmental organizations (NGOs) should participate in governance.

One may muster a number of reasons for a cosmopolitan democracy: an appropriate consideration of the interests of all involved requires global democracy; democracy has bestowed more benefits than other forms of governments in domains in which it has been tried (city-states, territorial states), and there is reason to think that this will be true at the global level; international society is already thickly institutionalized, and individuals increasingly have multilayered identities, corresponding to economic globalization. These potentially overlapping identities provide the basis for participation in global civil society. In due course, states will “wither away,” the *demos* of domestic politics submitting to the global *demos*. Crucially, cosmopolitan democrats might say that the current absence of a global *demos* does not affect their argument. A global *demos* does not need to precede global democratic institutions. Instead, their creation may help with the formation of such a *demos*. More plausibly, gradual reform toward global democratic institutions would also gradually lead toward a global *demos*.

Cosmopolitan democrats are partly right. On the one hand, justice requires accountability, and requires it to be as effective as reasonably possible. Given the disincentives that democratic domestic politics creates for governments to pursue justice if it concerns only noncitizens, account giving to noncitizens is not sensibly placed into a domestic institutional framework. It is as far as these matters are concerned that the cosmopolitan democrats are correct. They are also correct that the absence of a global *demos* does not settle the question of how account giving should occur that does not merely address fellow citizens. But on the other

hand, the results from chapter 16 of *On Global Justice* – which I presuppose now -- imply that we should not now aim for the kind of fundamental change involved in creating a global demos. Crucially, we do not understand a world with a global demos well enough to take a vision of such a world to be action guiding. The point is not merely that we should not seek to create such a world immediately, but that we should *not now actively aim* to create it at all, even step by step, given that we do not understand well enough what such a world would be like. We can of course simply *stipulate* that it would be a world *with a global demos*, much like in a mathematical model we can make any assumptions we like (as long as they are consistent), but we do not have enough historical and social scientific experience to tell us what kind of change steps we might take towards creating such a world would bring about, and thus what, taken altogether, such a world would be like. These results critically supplement the point that there currently is no global demos. Perhaps states will wither away, and we must then reconsider what counts as realistic utopia. But saying *that* is strikingly different from *now* urging reforms designed to create a global demos. We must find ways of holding states accountable for such matters, short of presupposing or aiming for a global demos.

The considerations of the last paragraphs lead to the conclusion that it is *international organizations* or other entities of global administrative law that most plausibly create the context in which states give account to noncitizens for their contributions to justice. After all, domestic politics is not the right setting, nor is a form of global democracy. Those entities would be transnational or even global in nature but would neither presuppose nor seek to bring about a global demos. In one way or another, they would critically involve states, or at least respect their presence. At the same time, giving account within such entities is different from, and considerably more effective than, simply giving account to other states directly, without an institutional framework that structures the relevant activities and could impose sanctions. Similarly, giving account within such entities is more effective than giving account to NGOs that cannot enlist the sanctioning power of states. When we think about the design of such entities, we must be aware that centuries of learning about democracy teach little for global institutions. Those must go through a learning process that is entirely their own.

9. We have now begun to discuss how international organizations enter into my theory of global justice. One important role they play is that they are the most plausible place where states can

give account for how they go about certain obligations of justice that pertain to those who are not members of the state in question. Which international organization is best suited to be the place where such account giving occurs depends on the content of the duties in question. The WTO, for instance, is the natural place where states should give account for how they go about their obligations regarding matters of justice in trade. But there is more to be said about international organizations within the confines of my theory. Let me discuss these matters further using the WTO as an example.

What duties of justice does the WTO have? Again, every institution has the duty to do what it can, within limits, to bring about the necessary conditions of just distributions. To answer the question of what duties the WTO has, the first step, in my pluralistic theory, is to ask, which of the various principles does the WTO have a duty to do what it can, within limits, to try to realize? As for states, we must ask whether there is a ground most closely linked with the WTO. This is (obviously) shared subjection to the global trading system. States have obligations to bring about justice in trade (see above for a statement of the relevant principle), and so does the WTO. In fact, the relationship between the WTO and this principle is parallel to that between states and the Rawlsian principles. We noted earlier that this principle of justice in trade drops out of the list of principles that apply to *states*—not because trade does not generate demands of justice but because the principles on that list are general enough to absorb them. But given the policy domain for which the WTO has been put in place, that is not the case here. Next we ask in which other grounds that first ground is embedded, and are directed to collective ownership of the earth, membership in the global order, and common humanity. I conclude that the relevant principles with regard to which the WTO has obligations are those associated with these four grounds.

These results contradict views that limit the WTO to trade liberalization. Nonetheless, the extent to which the WTO must be guided by principles associated with those other grounds is limited by what trade can achieve, which is an empirical question. Still, just as states cannot limit themselves to duties in virtue of shared membership, the WTO cannot *ex ante* limit itself to trade regulation. One striking consequence of the result that the WTO has duties to realize principles that have all of humanity in their scope is that the WTO has obligations to the citizens of nonmember countries as well as to those of member countries. The WTO is already officially concerned with more than trade or efficiency. The preamble of the Marrakesh Agreement talks

about “reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade.” Yet these goals should be pursued “with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand,” as well as with a view to ensuring that “developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.” Limited as it is, moral language appears in the WTO’s mandate. This language ought to include justice.

We can make another argument to assess what duties the WTO has when it comes to justice. Entities that are empowered by states and whose activities affect the satisfaction of the obligations to which states are subject ought to assist states with their duties. In virtue of having been founded by and receiving power from states, such entities are subject to demands of justice that apply to states, namely, those with regard to the domain for which they were founded. Therefore, the WTO ought to help states realize obligations *they* have in virtue of being involved with the trade system. What is important to note is that this implication also concerns *purely domestic* obligations of trade. We have yet to discuss how the WTO ought to be accountable, which adds demands on the organization. However, a commitment to *justice* ought to be added to the moral commitments in the mandate. Most important, given the set of principles of justice that internationalism advances, the WTO must have a human rights–oriented mandate. Since the view of human rights that I defend implies a duty of assistance in building institutions, the WTO also has a development-oriented mandate that derives from this human rights–oriented mandate.

As we already noted, the organization devoted to regulating trade is also the natural candidate within which states ought to account for their pursuit of fairness in trade, as well as for the realization of other principles that can be effectively pursued via trade instruments. Governments should participate in the WTO partly as account givers, partly as recipients qua representatives of their people. Within WTO structures, governments should explain how they seek to realize justice, subjecting themselves to scrutiny by other governments, WTO staff, and plausibly also NGOs or independent experts. States would be intermediately accountable to the WTO (which would be utilized to achieve effectiveness) but would ultimately be accountable to the global population. To be accountable to the WTO would mean to be accountable to other states organized within the WTO, but also to WTO staff and suitable NGOs. For instance, for the principle of justice in trade—that the distribution of gains from trade is just only if no country

enjoys gains that have come at the expense of people involved with the trade—states should have to give periodic reports on whether or not their benefits from imports or exports are tainted in this way. WTO expertise should help determine what kind of gains would count as tainted. NGOs and independent experts may also help with the problem that many governments do not represent their people. Care must be taken that NGOs increase the effectiveness of account giving rather than that of special interests. Effective account giving requires that the recipients be in a position to pass informed judgment and impose sanctions. Empowerment of poor members is essential, to make sure the WTO takes seriously its duties in pursuit of justice, and to make sure effective account giving occurs. Poor countries must have standing in the WTO. At least, they must be properly represented. This requires financial and logistical support, which richer members must provide.

Inquiries into what we ought to do to realize justice may call for new institutions. For trade, there already exists an institution we can charge with some relevant tasks. The WTO is only one of the organizations whose role we must reconsider in light of what pluralist internationalism requires. And formal organizations are only one among several kinds of entities in global administrative law whose role in the realization of justice we must either reconsider or explore in the first place. This paper has merely sketched a few themes from my own approach to these questions about institutions and the larger context of global justice into which those questions are embedded. *On Global Justice* develops these themes in detail. Needless to say, much work remains to be done.

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# Taking Institutions as They Are, or as They Ideally Ought To Be?

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June 30, 2013

DRAFT – PLEASE DO NOT CITE OR CIRCULATE WITHOUT PERMISSION

Note to the reader: The paper is about 12,500 words. If you are pressed for time, you can skip the last section on 'Interpretation', which brings it down to 8,000.

Imagine you were to ask the following question. What principles of social justice, if any, should apply to the European Union? Do European citizens have obligations of social justice that cross the borders of member states? If so, what are their grounds? In this paper, I want to explore a foundational issue that must be addressed *before* we can even begin to answer a question like this. The issue is this: To what extent, if any, should the justification and formulation of principles of social justice be responsive to facts about social relations and practices (e.g., facts about the EU)? If the justification of such principles should *not* be responsive to facts about the social relations and practices they are meant to govern, then European integration would only provide an instrument for realizing aims that are not EU-specific, and that could apply, in principle, to any political and social institution or system of institutions. But if, on the other hand, principles *are* meant to be responsive to such facts, we

need to know both *why* and *in what sense* they ought to be ‘responsive’. The aim of this paper is to show how and why principles of social justice can be, as I shall say, *practice-dependent*.

To show the importance of the question raised, let me reformulate it in more concrete terms. Imagine you are a *globalist cosmopolitan*. You believe that all persons deserve equal respect and consideration regardless of their place of birth, sex, age, race, or nationality. You also believe that the scope of all solidaristic obligations should, as a matter of political morality, be global in reach, and that the scope of the obligations does not depend on the existence of any social interaction. Such obligations hold among persons *as such*, and hence would hold even, let us say, in a pure state of nature (in which individuals do not stand in any social relationship). You therefore oppose those who believe that obligations of social justice only hold among citizens and residents of states, and *a fortiori* you also oppose those who believe they only obtain among fellow members of a nation.<sup>1</sup>

It follows that you would conceive of the EU as an instrument—along with all other international social and political institutions—for realizing a unitary globe-encircling pattern of distribution, whose principles we can know independently of any specific knowledge about the EU. On this view, the EU serves the ideal when it helps to bring us closer to the globally preferred pattern (primarily by functioning as a model to other regions for how to expand the scope and depth of solidaristic obligations beyond the state), and undermines it when it props up the interests of Europeans at the expense of those globally worse off (think of agricultural subsidies under the Common Agricultural Policy).

Now imagine you are a *statist cosmopolitan*. While you also believe that all persons deserve equal respect and consideration regardless of their place of birth, sex, age, race, and

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<sup>1</sup> E.g., Simon Caney, *Justice Beyond Borders* (Oxford: Oxford University Press, 2005); Kok-Chor Tan, *Justice without Borders* (Cambridge: Cambridge University Press, 2004); Richard Arneson, ‘Do Patriotic Ties Limit Global Justice Duties?’, *Journal of Ethics* 9 (2005): 127-50; Derek Parfit, ‘Equality and Priority’, *Ratio* 10 (1997): 202-21.

nationality, you believe this entails, at most, a commitment to human rights and a general duty to assist the global poor.<sup>2</sup> However, you do not believe the idea of equal respect and consideration entails that fundamental principles of social justice more demanding than humanitarianism must be global in scope. This is because you hold that obligations of social justice are only triggered in the presence of the kinds of extensive social interaction present among citizens and residents of states. One prominent representative of this view, Thomas Nagel, contends that obligations of social justice are only triggered among those who share in upholding and imposing a comprehensive system of societal norms backed by coercion.<sup>3</sup> Because international law—and, indeed, European law—is not backed by a centralized system of coercion, principles of social justice do not apply there. Statists of this kind need not be euro-skeptics; their position only commits them to the thought that cooperation among EU member states raises no distinctive issues of justice. As long as the EU does not undermine the capacity of states to secure domestic commitments to solidaristic redistribution, then the EU is, as it were, justice-neutral.

The position I have defended elsewhere is a version of *internationalism*.<sup>4</sup> Along with both statists and globalists, internationalists are cosmopolitans insofar as they believe that all persons deserve equal respect and consideration. They also share with statists the position that obligations of social justice are only triggered in the presence of relevant forms of social interaction. But, contrary to statists, they do not believe that international relations are, beyond a human rights/humanitarian floor, a justice-free zone. Obligations of social justice *do* apply

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<sup>2</sup> E.g., John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999); David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007); Thomas Nagel, 'The Problem of Global Justice', *Philosophy & Public Affairs* 33 (2005): 113-4; Mathias Risse, 'What to Say About the State', *Social theory and practice* 32 (2006): 671-98.

<sup>3</sup> Nagel, 'The Problem of Global Justice'.

<sup>4</sup> On the EU, see Andrea Sangiovanni, 'Solidarity in the European Union', *Oxford Journal of Legal Studies* forthcoming, 2013); on the state, see Andrea Sangiovanni, 'Global Justice, Reciprocity, and the State', *Philosophy & Public Affairs* 35 (2007): 2-39.

at the international level. The key element that distinguishes internationalist views is that the content and scope of fundamental principles of social justice *varies with the type and extent of social interaction involved*. Statism has a binary structure: either the relevant relations hold, and the full panoply of social justice obtains, or the relevant relations do not hold, and then only the humanitarian/human rights floor applies. Internationalism has a multinomial structure: different principles of social justice apply to different types of social and political interaction, depending on the kind of interaction that the institutions instantiate.

As a result of its more complex structure, internationalism faces a methodological challenge: How does one go about identifying the correct principles for different political and social institutions (such as the nation-state, or the WTO, or the EU)?

## **I. The central challenge**

We need principles because we need guidance. And we need guidance because we face a particular set of practical problems in the here and now.<sup>5</sup> To what extent should we conceive of those principles as dependent on the structure and nature of the problems? No one disagrees that such principles will ultimately have to be applied and implemented and adapted in response to the actual, contingent circumstances we face here and now. And no one disagrees that, in applying and implementing and adapting those principles, we won't be able to realize their demands to the fullest possible extent. There will have to be tradeoffs and sacrifices of all kinds, even in the best of cases (hence the need for what is referred to as 'non-ideal' theory). It is often said that things are very different, however, with respect to the *content*, *scope*, and *grounds* of the principles *themselves*. Principles and values<sup>6</sup> give us a critical

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<sup>5</sup> G. A. Cohen does not deny these claims. He does not deny that we need principles for guidance; rather, he denies that this fact affects their content, scope, or grounds in any relevant sense. This is an important and often overlooked distinction. More on this below.

<sup>6</sup> In the rest of the paper, I will no longer refer to principles *and* values. I will simply refer to principles. The distinction between the two is not important to the points made here.

perspective on which to judge the problems, whatever they are. To think of them as somehow constrained or otherwise dependent on the way the problems present themselves would vitiate and artificially circumscribe their very point. And, worse than that, it would entrench an arbitrary and unfounded status-quo bias into the very heart of moral and political theory.

This is clearest when the problems we face are occasioned by the unfolding of a practice. A practice is a system of conventional norms that assigns roles, positions, offices, and the relations among them. Marriage, friendship, the state, promising, boxing, the novel, games, parliamentarism, slavery, foot-binding, helotry, jury duty, human rights, and academic assessment are practices. How should we evaluate a practice? Evaluation comes in four different types. Evaluation can be *esthetic*—is the practice in question beautiful? Does the practice enable the production of beautiful objects and relations?; *pragmatic*—does it achieve its ends efficiently and effectively?; *ethical*—does it contribute to a good life?; or *moral*—can it be justified to those who would rather change or end it? In this paper, we are concerned primarily with evaluation from a moral point of view (although we will trace an important analogy to other forms of evaluation below). Imagine that we query a practice like traditional marriage and ask: Can the restriction of traditional marriage to heterosexuals be justified to homosexual couples who would like themselves to be married? And suppose someone claims in response that the principles appealed to in resolving the question should depend for their content, grounds, or scope on the nature of traditional marriage itself. Surely one could reply: But how can it be that the mere existence of traditional marriage can give it any normative standing? Wouldn't starting in this way arbitrarily bias the question against those who want to criticize the practice? Isn't the whole point of critical evaluation to allow us to step back from the practice?

One might then infer that the content, grounds, and scope of the principles one ultimately appeals to in evaluating *any* practice must be independent of the practice for just the

same set of reasons. To constrain the content, scope, or grounds of a principle to a practice is to give the mere existence of the practice a normative power that it could never have on its own. No principle or value can convincingly be defended by appeal to just the existence of a practice. There must be some further reason why the value or principle or norm that is part of the practice itself promotes some good end, or one we are bound to follow. Again it is worth recalling the distinction between the content, scope, and grounds of principles and their application to the ‘real world’: while of course such principles, once we know what they are, might be *applied* to practices like marriage, their normative standing lies, as it were, upstream. Call this the *External Principles Thesis* (EPT).

This general picture supports a distinction between, on one hand, *fundamental* principles whose basic formulation and justification must proceed entirely independently of facts about practices, and on the other, *rules of regulation* which are formed by applying fundamental principles to practices. On this picture, facts tell us ‘how much’ justice can be achieved in different situations, but they do not inform, in any relevant sense, what justice *is*.

Cohen has done the most to explore the implications of this distinction. He writes,

if a fact F enables more of J to be brought about than not-F does, it will then prove true to say that more justice can be achieved if F is true than if not-F is true. F and not-F will not determine what is (straightforwardly) just in different situations, but how much justice can be achieved in different situations. Facts [including facts about practices—A.S] thereby make a difference to what are the right rules of social regulation, rules the effect of whose operation may justifiably deviate from justice itself.<sup>7</sup>

Rules of regulation tell us what kinds of social relations and practices we ought to adopt for our world; such rules are devices for having certain effects given background empirical circumstances. It is natural to think that the correct rules of regulation should therefore depend on the facts. The set of correct principles of *justice*, however, must be independent and prior to the set of correct rules of regulation, precisely because they provide one among many standards

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<sup>7</sup> G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008), p.???

for those rules to live up to. It is important to emphasize how expansive Cohen's arguments are: by 'justice' Cohen means to include nothing less than all the moral and political principles comprehending the moral domain that Scanlon has identified as 'what we owe to each other'.<sup>8</sup> These claims are then buttressed by a regress argument, which I will refer to as the *Fact-Principles Thesis* (FPT), that purports to show that any affirmation of a fact-sensitive principle, P1, necessarily commits one to a fact-insensitive principle, P2, that explains why the facts ground principle P1. If we take the facts to refer to practices, then this argument also entails the conclusion that we reached earlier, namely that the mere existence of a practice cannot by itself give us a conclusive reason to do anything (unless there is some higher-level, external principle that tells us to do what the practice says).

The next stop on this train of arguments is the oft-mentioned division of labor between moral-political philosophy and the social sciences. Adam Swift and Stuart White are representative when they write,

It is for the empirical, descriptive/explanatory, social scientific disciplines to (try to) tell us which states of affairs can be realised by what means ... given where we are now. But it is for philosophy to tell us which of those states and means of achieving them are better and worse than one another.<sup>9</sup>

The idea is that any non-question-begging normative political and moral philosophy should at some point aim to justify and formulate *basic* or *fundamental* principles, namely principles which are not derived by application from any further principle or fact.<sup>10</sup> While of course political philosophers may themselves *apply* such fundamental principles to specific circumstances (such as, in Swift's case, the family), the normative standing of the higher-level principles *themselves* lies upstream from whatever they are being applied to. On this view,

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<sup>8</sup> Cohen, *Rescuing Justice and Equality*, p.???

<sup>9</sup> Adam Swift and Stuart White, 'Political Theory, Social Science, and Real Politics', in *Political Theory: Methods and Approaches*, eds. D. Leopold and M. Stears (Oxford: Oxford University Press, 2010), pp. 49-69 at p.???

<sup>10</sup> They may, however, be supported by networks of further values or facts as long as they are not derived from them. For example, they may gain support by being consistent and coherent with other fundamental principles and convictions one holds. See footnote xxx, below, for more on this point.

philosophers set out the fundamental questions and structure of values that ought to govern decision-making within any institution or practice or relation, and it is a further task, mostly left to practitioners or the ‘explanatory/descriptive’ sciences, to figure out how best to implement them.

Summarizing, we have the following set of claims:

- (1) The content, grounds, and scope of the principles that we use to evaluate a practice from a moral point of view cannot themselves be ultimately constrained or bound by the contingent properties of the practice itself. Otherwise, our affirmation of the principles would reflect an arbitrary status-quo bias. (The EPT)
- (2) Therefore, there must be *fundamental principles* whose content, scope, and grounds are independent of any practice, and *rules of regulation* that are the result of applying such higher-level principles to specific practices.
- (3) (1) and (2) are supported by the FPT, which holds that fundamental principles must be fact-insensitive, i.e., they must survive the denial of any facts (including facts about the practices to which they may be applied).
- (4) From (1), (2), (3): Facts (including facts about practices) tell us how much, say, justice (or freedom, legitimacy, equality, solidarity, etc.) can be achieved given the way the world is, but they do not tell us what justice *is*.
- (5) (1), (2), (3), and (4) support a division of labor between moral and political philosophers, whose primary task is to develop, formulate, and defend fundamental principles independently of the facts (including facts about practices), and practitioners and social scientists, who are meant to apply such principles to the ‘real world’ in full view of the facts.

From an uncontroversial starting point regarding the purpose of any critique of a practice, namely the EPT, we arrive to a sweeping claim about the basic nature and structure of normative moral and political philosophy. It is this overall pattern of argument that I want to challenge. I shall contend that (1) and (2) are innocuous, (3) is trivial, (4) doesn't follow and is in fact false, and (5) is misleading. As we shall see, the summarized pattern of argument overlooks the diversity of ways in which 'application' of higher-level principles and value-concepts enters into any plausible, substantive moral and political philosophy. Our main aim is to draw attention to this diversity. In the second part, I then seek to draw some methodological implications of our discussion by demonstrating the importance of *social interpretation* to any moral or political philosophy that takes such diversity seriously. In the process, I will show how facts about practices can enter into the justification and formulation of moral and political principles, and so answer the question with which we started.

## II. Three ways in which principles can depend on practices

Before turning to our main line of reasoning, we first need to be clear about three ways in which a principle might 'depend on' or be 'responsive to' facts about a set of practices. I make these distinctions because they are essential in locating the challenge posed by our initial train of arguments.

The general form of the practical principles we will be interested in is this: 'For some  $z$  and  $R$ , and for all  $x$  and  $y$ ,  $x$  and  $y$  ought to  $z$  if (or only if or iff<sup>11</sup>)  $xRy$ ', where  $R$  denotes a variable ranging over kinds of social relation. A social relation exists, in the sense I am using the term, if and only if individuals share either ongoing, relatively stable forms of interaction

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<sup>11</sup> The relevant social relation could state either a sufficient or a necessary and sufficient condition for the application of the principle. For example, one might hold that egalitarianism applies to all those who share a cultural identity and leave it open whether it might also apply among those not so related, or one might say that egalitarianism applies all *and* only to those who share a cultural identity. Both cases count as asserting principles with relational scope.

outside of any practice, or are joint participants in a practice (and such participation is common knowledge). Examples of the former include sporadic trade or loosely organized mutual protection. Examples of the latter include sharing a cultural identity, or cooperating in a system of mutual production, or being subject to a system of ongoing coercion, or being married, or being friends. The universal quantifier ‘for all  $x$  and  $y$ ’, in turn, specifies a particular *domain*. For *non-relativists*, this domain is usually taken to include all and only human beings, or all and only persons, or all and only sentient beings. For *relativists*, on the other hand, the domain will be bound by a particular, time-indexed cultural group. This is the first way a principle may depend on facts about practices: If one is relativist, the principles that apply will depend on what the members of that group (and hence participants in the set of practices constitutive of the group) happen to value. But there are many well-known problems with relativism, so I leave it aside for the rest of this paper. The more interesting question is how *non-relativist* principles might depend on practices. For the rest of the paper, I will therefore assume the domain for all the principles discussed to include all and only human beings, and so assume *arguendo* that relativism is false.

By *content*, I mean whatever particular actions or attitudes are specified by  $z$ . By *scope*, I will refer to the range of the social relation ‘ $xRy$ ’.<sup>12</sup> For example, if  $R$  takes cultural identity as a value (as in ‘for all human beings  $x$  and  $y$ ,  $x$  and  $y$  ought to distribute goods equally iff  $x$  and  $y$  share a cultural identity’), this is equivalent to saying that the scope of egalitarianism ranges over all and only those who share a cultural identity. This is the second way in which principles can depend on facts about practices: if a principle is triggered by the existence of a practice, then

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<sup>12</sup> The *extension* of a principle would, in turn, refer to the range of individuals in the actual world who fall under the principle’s scope. This last category is important in the global justice debates, since it will determine whether the principle has a global extension or whether the principle only applies to smaller subsets of the world’s population, such as only among citizens and residents of states. If, for example, all individuals across the globe shared a single cultural identity, then the relational principle just mentioned would have a *global* extension. I leave this fourth category aside in what follows since it specifies a way in which a principle has implications for practices rather than being dependent on them.

the principle depends, in this sense, on facts about the practice. We could then say that the practice provides the conditions in which the principle applies. I shall refer to principles that are only triggered in the presence of a social relation (whether practice-based or not), *relational*, and those that apply to human beings as such, independently of the social relations in which participate, *nonrelational*.<sup>13</sup>

By *grounds*, I refer to whatever justification is offered for a principle. A principle of egalitarian social justice with a relational scope might be justified by appeal to the existence of a set of social relations in conjunction with a higher-level moral principle or value. For example, the culturally specific relational egalitarianism mentioned above might be justified by appeal to a higher-level moral principle that instructs one to respect aspects of a person's cultural background that are constitutive of their identity, plus an account of how socioeconomic egalitarianism is essential to the self-understanding and cultural practices of members of a particular group. In this case, the grounds of the principle would (partially) depend on facts about the practice, namely facts about how socioeconomic egalitarianism is central to the cultural group's self-understanding. This is the third way in which principles might depend on facts about practices. As we will see in a moment, it is with regards to this type of practice-dependence that most of the action lies.

### **III. The *Facts-Principles Thesis***

The form of practice-dependence reflected in the distinction between relational and nonrelational principles is uncontroversial: no one denies that there are at least some relational principles. The more difficult question is whether higher-level relational principles can serve as final bases for lower-level principles, or whether all justification must ultimately bottom out in a

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<sup>13</sup> Notice that nonrelational principles can drop the 'xRy' from the specification of their principles (as in utilitarian principle: 'for all sentient beings  $x$  and  $y$ ,  $x$  and  $y$  ought to act so as to maximize the satisfaction of preferences').

*nonrelational* principle.<sup>14</sup> This is a question about the *grounds* of a principle and the place of facts (and, in our case, facts about practices) within it, and so it touches on the third way in which principles might depend on practices.

I now want to argue that the *Fact-Principles Thesis* (FPT) does nothing to establish the conclusion that all relational principles must ultimately presuppose a nonrelational principle from which they are derived. I don't in fact believe that Cohen would disagree, but it is important to clarify this point since much more follows from it than one might at first expect, and since it might appear, at first glance, that Cohen's argument can be used for just this purpose.

Let us unpack Cohen's argument a bit more carefully. The FPT states that whenever a fact supports a normative principle, it does so in virtue of a more ultimate principle that is not supported by any facts.<sup>15</sup> A fact counts as supporting a principle, for Cohen, when the denial of the fact would entail the denial of the principle. I will refer to this special kind of fact-dependence as fact-dependence<sub>c</sub> to remind the reader of its special sense. Suppose, for example, that the principle P, which states that we should keep our promises, is supported by a fact F, namely that only when promises are kept can people pursue their projects. From this it follows that if F is false—if, that is, people can pursue their projects whether or not people keep their promises—then the principle is false. The principle is thereby said to 'depend<sub>c</sub>', since the denial of the fact leads to the denial of the principle.

Cohen's thesis is then that the truth of any such fact-sensitive<sub>c</sub> principle must depend on some further, higher-level fact-independent<sub>c</sub> principle that explains *why* F supports P. In

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<sup>14</sup> The idea of 'bottoming out' in some principle or other seems to presuppose a foundationalist picture of justification. Cohen claims to be neutral with respect to the debate between foundationalism and coherentism or holism about justification, and I concede the point. My challenge to Cohen, in other words, doesn't depend on the truth of coherentism or holism (just as Cohen claims his does not depend on the truth of foundationalism).

<sup>15</sup> A normative principle, in turn, is a general directive that tells us what we ought (or ought not) to do.

Cohen's example, the higher-level principle is this one: we ought to promote people's projects. That further principle survives denial of fact F, namely that promise-keeping promotes people's projects. We ought, that is, to promote people projects whether or not promise-keeping is a good way of doing so. If the regress ends there (Cohen says, and I agree, that it must end somewhere), then the ultimate grounds for the principle of promising are not dependent on any facts. I believe the argument is sound.

But there is a crucial ambiguity at this point in the argument. Take the principle 'one ought to promote people's projects'. Is that principle relational or nonrelational? To answer this question, we need to know whether it applies to human beings as such, independently of any social relations they might participate in. Let us say that the principle is relational, and only holds among those who stand in some social relation R. If you do not stand in this relation with respect to me, I have no obligation to promote your projects. Must Cohen then say that there must be some still higher-level, *non*relational principle that explains why the principle only holds among those who stand in R? No, and for good reason: conditions of applicability are one thing, fact-dependence another. Cohen never denies that fact-insensitive, fundamental principles can come with scope restrictions. Cohen writes,

The "lovers of sights and sounds" in Book V of Plato's Republic think it suffices for saying what justice is to say what counts as just within the world of sights and sounds. They scarcely recognize the question: What is justice, as such? In a world where the facts are F, they believe that P constitutes justice, and they do not abstract even so far as to see that they believe, independently of the facts, principles of the form: if F then P. Plato thinks, and I agree, that you need to have a view of what justice itself is to recognize that justice dictates P when F is true. That is how justice transcends the facts of the world.<sup>16</sup>

This is exactly right. Principles of the form, 'if F, then P' are fact-*independent*. They are fact-independent because the truth of 'if F, then P' *survives the negation of F*. Negating the antecedent, after all, doesn't make a conditional false. Because the assertion of a conditional

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doesn't require affirming the antecedent, the principle 'if F, then P' would be true even in worlds where the facts F never materialize.

But if that is true, then one can easily make any superficially fact-sensitive<sub>c</sub> principle into a fact-insensitive<sub>c</sub> principle by simply rephrasing it as a conditional. For example, the fact-sensitive<sub>c</sub> principle, 'one ought to keep one's promises because it promotes people's projects' can simply be rephrased, without loss of meaning, as 'if promise-keeping promotes people's projects, then one ought to keep one's promises'. The latter principle is entirely fact-insensitive<sub>c</sub>: it would be true even if promise-keeping *doesn't* turn out to promote people's projects. There is also no sense in which the principle necessarily commits one to the further principle that 'one ought to promote people's projects'. The truth of that further principle can be left open. This is of course also true of the higher-level principle 'you ought to promote someone's projects only if social relation R holds between you and this other person'. This principle is true (*arguendo*) even if there are no (and will never be any) social relations R. And *a fortiori* it is also true of *any* principle that takes a relational form. And, again, it does not necessarily commit one to the principle that, say, 'one ought to seek out relations R'. That is left entirely open (and, indeed, may be false consistent with the affirmation of the relational demand). It may, for example, be entirely morally neutral whether one ought (or ought not) to seek out relations R.

To my mind, the possibility of simply recasting any fact-sensitive<sub>c</sub> into a fact-insensitive<sub>c</sub> principle makes the FPT trivial.<sup>17</sup> But even if the FPT isn't trivial, it is compatible with the claim that relational principles can function as *final* bases for other principles—as grounds, that is, that do not presuppose some further nonrelational principle. This has important and

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<sup>17</sup> A similar conclusion is reached by Thomas Pogge, 'Cohen to the Rescue!', *Ratio* 21 (2008): 454-75.

surprising implications for the third form of practice-dependence I isolated above, to which I now turn.

#### **IV. Two kinds of judgment, and the direction of justification**

So far we have distinguished three ways in which principles can be practice-dependent, argued that practice-dependence with respect to the *grounds* (but not *scope*) of a principle is controversial, and established that Cohen's FPT does not demonstrate that all relational principles must bottom out in a nonrelational principle. Where does this discussion leave us with respect to the *External Principles Thesis* with which we began?

A principle is *internal* to a practice (or type of practice) when its normative force depends on the existence of a particular practice. A good example is the culturally specific principle of socioeconomic egalitarianism: You ought to distribute equally because you are Swedish (and egalitarianism is a constitutive feature of Swedish national identity). It counts as internal because its normative force depends on the specific character and content of Swedish political culture. Had egalitarianism not been essential to Swedish identity and self-understanding, egalitarianism would not have applied. A principle is *external* to a practice when its normative force does not depend on the existence of a practice. A good example of an external principle is the higher-level principle that might justify the internal principle just mentioned, namely 'you ought to distribute equally only if you are a member of a political culture that is supportive of egalitarianism'. Note that this principle is relational but external. While its normative force does not depend on the existence of any specific cultural practice, its content (egalitarianism) is only triggered in the presence of the right kind of social relation. And general principles of reciprocity, about which we will have more to say below, such as 'one ought to give a fair return to those from whom one has voluntarily accepted benefits or from whom one has received benefits that one could not reasonably decline', are also relational but

external. Again, this is because the normative force of the principles does not depend on the existence of any one specific practice of reciprocity.

With these distinctions in hand, we can now restate the EPT: All *internal* principles must be ultimately justified by reference to an *external* principle. If we allowed internal principles to stand as the basis of a chain of reasoning, then we would have to allow that the mere existence of a practice, such as a specific culture, had a normative power it could never have. To the question, ‘Why ought socioeconomic egalitarianism only be taken to apply among members of *this* rather than *that* cultural group?’, we would either have to take a relativist stand on the domain of justice, or simply say that the internal principle applies because the practice says so. But why take the practice so seriously? The EPT urges us either to explain why (with reference to some external principle), or be saddled with an implausible and unmotivated conservatism.

The EPT strikes me as correct: all internal principles must ultimately be supported by an external principle. And I am also happy to grant an implication of the EPT, namely that all fundamental principles are external, and that we can call (if you like) all internal principles ‘rules of regulation’. But conceding the EPT as well as the distinction between fundamental principles and rules of regulation does nothing to establish that practices (or other facts) only matter in determining *how much* justice (or liberty, equality, etc.) can be achieved, but not in determining what justice *is*. On this view, practices (or other facts) are merely instruments or tools for realizing the states of affairs, relations, actions mandated by principles. This further claim ([4] above) not only does not follow from anything we have said so far but is also, I will now argue, false.

In making this point, I want to contrast two very different ways in which one might apply an external principle to a practice. Only the first is compatible with claim (4). The second

will allow us to demonstrate that claim (4) is false, and to clarify in what way practices can enter into the justification and formulation of moral and political principles.

I draw the distinction via a running example, namely filial obligations. It is often said that the existence of relationships between children and their parents strengthens (preexisting) negative and positive obligations, and sometimes generates new ones. Some examples include: It is worse, all else equal, to physically assault your father than a stranger; given a choice between saving your father and a stranger, one has an obligation to save one's father rather than a stranger; one has an obligation to take one's father in when he can no longer care for himself, but not to take in strangers; and so on. Call the set of all such lower-level filial obligations, O. What might justify the existence of such obligations?

Notice that to reply 'Because current cultural understandings of the family require one to discharge such obligations' would fail the EPT. If we believe that we ought to respect such obligations, we need to explain why. Is it because they are part of our identity? But then how do 'identities' generate obligations? Is it because of some other feature of the practice? What external principle, in other words, warrants our affirmation of such filial obligations?

*Instrumental.* *Instrumental* claims that acting according to O turns out, in the long run, better to promote realization of the utilitarian principle, 'one ought to maximize the aggregate well-being of all persons', than attempting to follow principle of utility directly. In Goodin's terms, the obligations O are assigned to children merely as an 'administrative device for discharging our more general duty [to maximize well-being] more effectively'.<sup>18</sup> This explanatory strategy is *instrumental* because the relations are means to realizing some independently specified end. There are no noninstrumentally relevant features of filial relationships that play a role in explaining why we have obligations O. The principle 'O if we

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<sup>18</sup> Robert E. Goodin, 'What Is So Special About Our Fellow Countrymen?', *Ethics* 98 (1988): 663-86 at p. 685.

stand in a relevant filial relationship' is just a means (in our world) of promoting aggregate well-being, and derives all its justificatory force from that fact.

Summarizing:

- (6) One ought to maximize the aggregate welfare of all persons.
- (7) If one stands in a filial relationship, acting according to obligations O better promotes aggregate welfare than the alternatives.<sup>19</sup>
- (8) One is a child in a filial relationship.
- (9) One has obligations O towards one's parents.

The scheme here is fully compatible with claim (4). Notice that the first premise is an external principle, the second a factual claim regarding the effect on aggregate welfare of following the internal norms of a practice, and the fourth a lower-level principle regarding what one, as a child, ought to do with respect to one's parents. (7) tells us 'how much' aggregate welfare can be achieved via various feasible options given the world as it is. The next schema we will consider works in very different way.

***Mediated deduction.*** *Mediated deduction* shows that O follows from a fundamental (and hence external) principle in conjunction with what I will call a 'mediating' principle and some empirical facts. A good example of this schema appeals to a higher-level principle of reciprocity:

- (10) If one has engaged in long-standing, mutual, and beneficial interaction, then one has an obligation to give a fair return to those involved;
- (11) Practice-mediated relations between children and parents in modern families normally give rise to long-standing, mutual, and beneficial interactions;
- (12) Given the nature and structure of such filial relations, the demand to give a fair return for benefits received generates and grounds a specific set of obligations O;
- (13) One is a child in a practice-mediated filial relationship of this kind.
- (14) One has obligations O towards one's parents.

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<sup>19</sup> This conditional obligation takes narrow scope (unlike normative requirements). The reason one can't wide-scope a conditional of this kind is straightforward: It would imply that if we ought to relate in way R, then we ought to act according to S (even if we don't *actually* relate in way R). This follows directly from the application of the distribution axiom common to both standard modal and deontic logic  $[O(p \rightarrow q) \rightarrow (Op \rightarrow Oq)]$ .

There are at least three ways in which this schema is different from *instrumental*. First, the facts stated in (11) do not tell us ‘how much’ reciprocity can be achieved given a set of feasible options. Rather, they state how modern family relations (normally) instantiate the types of relations mentioned in (10). Second, (12) states a further ‘mediating’ principle that specifies what a fair return requires among children and parents given the practice-mediated relations mentioned in (11). Third, the relation between the general principle of reciprocity stated in (10) and the particular, contextually fixed principle of reciprocity stated in (12) is, in *mediated deduction*, the relation of a genus to a species, rather than the relation of a means to an end, as in *instrumental*. (12) gives us an account of what reciprocity requires *for* a given practice, given the kinds of relations the practice creates and sustains.

The possibility of schemata like *mediated deduction* shows that claim (4) is false. Although *mediated deduction* is an instance of the application of a higher-level, external principle to a specific practice, the practice-mediated relations referred to in (11) and (12) are not in any sense *tools* or *instruments* for the realization of some states of affairs, or actions, or relations mandated by (10). They are not means for the realization of ‘more’ reciprocity, and they do not determine, in any straightforward way, ‘how much’ reciprocity can be achieved. Rather, the mediating principle (12) just tells us what reciprocity *is* given some specific practice-mediated set of relations.

Specific practices and the relations they constitute and regulate therefore have a crucial role to play in specifying fundamental moral and political principles. To see the point, consider some further examples of the schemata. From (10), for example, we could derive principles of reciprocity for friends, university colleagues, citizens, states, team members, etc. Consider:

- (10) If one has engaged in long-standing, mutual, and beneficial interaction, then one has an obligation to give a fair return to those involved;

- (11') Practice-mediated relations between long-term residents of a state normally give rise to long-standing, mutual, and beneficial interactions;
- (12') Given the nature and structure of the state, the demand to give a fair return for benefits received generates and grounds a specific set of obligations O';
- (13') One is a long-term resident of such a state.
- (14') One has obligations O' towards other long-term residents.

There are of course many reciprocity-based schemata like this (as many as there are different types of mutually beneficial, on-going relationship). The key point is that the obligations specified in variants of (12) will vary according to the nature and structure of the practices involved. What reciprocity requires among friends requires very different things than reciprocity among citizens, family members, and so on, precisely as a result of the different nature of the practice-mediated relations. We return to this point below, when we consider how to generate context-dependent versions of higher-level principles.

So far, we have focused on fundamental *relational* principles, where the relevance of practices will be most obvious. But there are also fundamental *nonrelational* principles whose application must adopt the pattern exemplified by *mediated deduction*. Consider:

- (15) One owes respect to all *x*;
- (16) Given the nature and structure of the (practice-mediated) doctor-patient relationship, the demand to show respect generates and grounds a specific set of obligations D (if one is a doctor) and P (if one is a patient);
- (17) One stands in a practice-mediated doctor-patient relationship (as a doctor);
- (18) One has obligations D.

(15) is a nonrelational principle (if anything is). It tells us to respect all human beings whatever our relation to them. But what respect requires will vary according to the types of social

relations one stands in with others. Again, what respect requires among doctors and patients is different from what respect requires among human beings as such, colleagues, friends, lovers, citizens, and so on. Each of these practice-mediated relations, furthermore, is not a means or tool for realizing ‘more’ respect. They are simply different relations in which respect plays a varying role (in the same way that reciprocity played a varying role in the previous examples).

At this point, an advocate of the argument with which we began might object: ‘But no one disagrees that *judgment* must be used in applying higher-level principles! *Mediated deduction* is just an instance of such judgment applied to specific practices. But the higher-level principles themselves aren’t internal to the practices in any way, which you have conceded!’ This response squarely misses the point. Of course one must exercise judgment in moving from (10) to (12), or from (15) to (16). The point is that the kind of judgment at stake in *mediated deduction* is very different from the one required in *instrumental*. Seeing how and why opens up a diversity of ways in which practices don’t just serve as tools or instruments for the realization of principles and values, but condition their very formulation and justification. The problem with the argument with which we began is that it leads us to overlook this diversity in kinds of judgment, and hence to treat ‘application’ or ‘judgment’ as a kind of black box, of lesser interest to the philosopher.<sup>20</sup> Judgment becomes something we employ either as practitioners, political and social actors, social scientists, or at the point we *cease* doing philosophy, and start doing something else.

That picture of the so-called division of labor (captured in claim [5]) couldn’t be more wrong-headed. Consider that very few contemporary moral and political philosophers actually spend much time focusing on the formulation and justification of what we have called, following Cohen, *fundamental* principles. Such fundamental principles are usually taken, in a

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<sup>20</sup> Oddly, the problem of judgment is seen as central to other areas of philosophy, but not so much in substantive moral and political philosophy.

very abstract form, as uncontroversial starting points for further reflection (or as summary conclusions). They are more like value *concepts* that only become *conceptions* of that value in the presence of particular contexts of action. This is obviously true of Rawls, where higher-level principles of reciprocity, impartiality, fairness, fraternity, and so on, are articulated, justified, and connected in terms of how they ought to regulate a well-ordered basic structure. But it is also true of Dworkin, for whom the fundamental values of equal concern and respect are interpreted in light of their role in a coercive order.<sup>21</sup> For Raz, similarly, the value of autonomy is explicitly defended as a value for a specific kind of modern pluralist society (hence the ‘social forms’ argument).<sup>22</sup> In his case, the higher-level value is something like human flourishing; autonomy then becomes a constitutive part of human flourishing only against the backdrop of a modern society. Feminists also fit the bill. Consider that many feminists defend higher-level values of non-domination or equal recognition in the context of, say, the family, or the modern workplace, or, alternatively, focus on how practices like patriarchy or pornography make impossible the realization of such values.<sup>23</sup> And finally we can say much the same thing of political realists, genealogists, and ideology critics, who can be understood as demonstrating how certain higher-level values that are championed by modern societies, such as freedom, are in fact subverted and undermined by the very practices that claim to realize them.<sup>24</sup> The latter two cases are what we might call *negative instances of mediated deduction*. They can be seen as showing *not* how higher-level values and principles ought to regulate a given set of relations but

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<sup>21</sup> See Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Harvard University Press, 2011); Ronald Dworkin, *Sovereign Virtue* (Cambridge: Harvard University Press, 2000), p. 6.

<sup>22</sup> Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986).

<sup>23</sup> See, e.g., feminists as diverse as Catherine A MacKinnon, ‘Sexuality, Pornography, and Method: Pleasure under Patriarchy’, *Ethics* 99 (1989): 314-4; Nancy Fraser, *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* (Minneapolis: University of Minnesota Press, 1989); Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989).

<sup>24</sup> See, for example, Raymond Geuss, *The Idea of a Critical Theory* (Cambridge: Cambridge University Press, 1981); David Owen, *Nietzsche’s Genealogy of Morality* (London: Acumen, 2007); Brian Leiter, *Nietzsche on Morality* (London: Routledge, 2002); Michael Rosen, *On Voluntary Servitude: False Consciousness and the Theory of Ideology* (Cambridge: Harvard University Press, 1996).

rather how such higher-level values and principles cannot possibly do so, at least not given current conditions. We return such negative forms of *mediated deduction* below.

The striking fact is that this is even true of Cohen himself (and indeed of all plausible forms of luck egalitarianism). Take, for example, the luck egalitarian axiom (which Cohen would endorse) that no one ought to do worse than anyone else through no fault or choice of their own. First, and perhaps surprisingly, notice that it is not plausibly regarded as nonrelational. This is easily demonstrated. Take friendship. Could anyone reasonably argue that one has an obligations to make friends with people who have fewer friends through no fault or choice of their own? What about lovers? Or the classic example of the ugly. Is it some kind of injustice if the ugly aren't compensated for their misfortune? Examples like this show that the axiom comes with applicability conditions. Indeed, the axiom works best (if it works at all) in the explicitly *socioeconomic* and *political* contexts typical of modern societies. This is, to my mind, what gives Cohen's own discussions in Part I of the 'incentives argument' so powerful. Principles like 'one ought not, *modulo* a personal prerogative, take more wages than the worst off save where such wages are required to compensate for special burdens'<sup>25</sup> are applications of the higher-level luck-egalitarian axiom to a specific context, namely the context of a modern wage economy. But such application fits *mediated deduction* not *instrumental*. The argument shows us what the luck egalitarian axiom requires for the specific socioeconomic context for which it is primarily tailored. It does not show us 'how much' justice can be achieved here and now. And it does little to justify the axiom itself (other than trying to convince the reader that she already accepts the axiom). Indeed, one way to read the argument is as a kind of ideology critique: there is nothing in the point and purpose of a modern wage economy or society (despite its paeans to freedom of contract) or in liberal left-leaning

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<sup>25</sup> See Cohen, *Rescuing Justice and Equality*, p. 401.

egalitarianism more generally that precludes Cohen's stringent interpersonal principle. Although I cannot demonstrate this conclusively here, I believe it is also true of Cohen's defense of the 'personal prerogative', which is clearly designed to allow for variation in the stringency of the principle's demands, especially in the context of personal pursuits and relationships. Explaining both the reasons for the personal prerogative as well as its variation over various domains would require some understanding of what makes personal relationships and pursuits special and worth protecting, and that requires, in turn, some understanding of the practices (such as the nature of modern occupational life and the family) in which they figure.

There are exceptions of course. Some examples include Singer's utilitarianism, Parfit's 'Triple Theory', Kamm's 'intricate ethics', Korsgaard, and Scanlon's *What We Owe To Each Other*.<sup>26</sup> In each of these cases, *mediated deduction* plays little or no role. Singer's practical ethics, for example, is a challenging, bullet-biting application of the principle of utility that relies exclusively on patterns of judgment like *instrumental*. It is also interesting that Parfit, Kamm, Korsgaard, and Scanlon's theories all verge on the metaethical. This is clearest with Korsgaard, for whom a major aim is to defend her constructivism against realist rivals, and, of course, Parfit spends more than three quarters of the two volumes discussing metaethical questions and the nature of reasons. This isn't a criticism, but it does show the very different kind of project that they are engaged in. Even with respect to a main area of substantive disagreement between Parfit/Raz and Scanlon/Kamm, namely aggregation of burdens across persons, the focus is more on how to incorporate intuitions about aggregation into the broader domain of morality

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<sup>26</sup> Derek Parfit, *On What Matters*, vol. 1 (Oxford: Oxford University Press, 2011); Frances Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harm* (New York: Oxford University Press, 2007); Christine Korsgaard, *The Sources of Normativity* (Cambridge: Cambridge University Press, 2004); Peter Singer, *Practical Ethics*, 2nd edn. (Cambridge, UK: Cambridge University Press, 1993); Thomas Scanlon, *What We Owe to Each Other* (Cambridge: Harvard University Press, 1998).

rather than about whether to do so.<sup>27</sup> It is unclear, furthermore, what kind or what degree of aggregation would be permitted in the kinds of real-world political and social contexts we might need such theories to illuminate. And surely the way such aggregation would enter would vary by context. Contrast how aggregation might enter into decisions regarding one's own children (assuming we have many!) and how they might enter the organization of a health service. Similarly, Parfit's own major contribution to political philosophy, namely prioritarianism, is also radically underspecified, since we know nothing about the weights we ought to assign improvements to the badly off in any calculation about what to do. All we know is that we ought to give *some* greater, noninstrumental weight to improvements to the badly off than to the well off. Even Scanlon, as is well known, leaves almost completely open the moral reasons that can serve to reject some principle when thinking in a contractualist way. Scanlon gives us a (non-exhaustive) overview of the general types of concerns that can enter the reasonable rejection test, including concerns about fairness, priority, and responsibility, but we aren't really told how they might enter in our deliberation about any specific principle. Again, these are not intended as criticisms. My aim here is simply to highlight the distinction between what I have called *theoretical* and *substantive* theories.

So we might draw a tripartite distinction in modern ethical theory. There are *metaethical* accounts that focus on the semantics, logic, meaning, and ontology of moral claims; *theoretical* accounts (such as the ones discussed in the previous paragraph) that aim to provide a first-order characterization of the moral domain and the procedures of reasoning and deliberation central to it; and *substantive* accounts that aim to specify what principles and values there are. My claim is that substantive accounts (with the possible and interesting exception of

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<sup>27</sup> See, e.g., the exchange between Scanlon and Parfit in *Ratio*, and Raz.

utilitarianism and perhaps pure libertarianism<sup>28</sup>) will need to employ, at some point, *mediated deduction*. As we have seen, this means that specific social relations and practices will play a central role in the justification and formulation of the principles at the heart of such substantive accounts.

Before turning to the methodological implications of this claim, I want to make a final point about the justification of fundamental, external principles. So far, I have accepted the EPT, and hence the claim that all internal principles must be supported by an external principle that explains, in part, why the internal principle binds participants in the practice. But what about the *justification* of the external principle? Consider that what we might call the *order of explanation* and the *order of justification* can come apart. So far I have assumed that the two go hand-in-hand: the justification and explanation of a judgment or a lower-level principle are the same. But this need not be the case.<sup>29</sup> In an inference to the best explanation, for example, some set of facts is taken as given, and we select the theory or account or claim that *best explains* the existence of the facts.<sup>30</sup> My wallet is gone. It could either be that someone has broken into my house and stolen it, or that my children have hidden it, or that I have misplaced it. Upon further reflection, I conclude that it must be that I have misplaced it (since my children have been gone, and there is no evidence of a break-in, and I am often absent-minded). In inferences like this, the facts function as premises, and the explaining theory is taken as the conclusion. Inference to the best explanation is pervasive in substantive moral and political philosophy. We often take some considered conviction or intuition as given (or given at least provisionally), and then seek the combination of values or theories or principles that

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<sup>28</sup> Though see Robert E. Goodin, *Utilitarianism as a Public Philosophy* (Cambridge, UK: Cambridge University Press, 1995), who argues that utilitarianism makes most sense in explicitly *public* contexts.

<sup>29</sup> Eva Erman and Niklas Möller (2013), 'Practice-Dependence and Practice-Independence: A False Dichotomy?' (unpublished) provides an instructive discussion of this point.

<sup>30</sup> Peter Lipton, *Inference to the Best Explanation*, 2nd edn. (London: Routledge, 2004).

best explains why we might think so-and-so.<sup>31</sup> We think slavery is wrong, or that we have a human right to bodily integrity, or that no one should die of starvation in a modern constitutional democracy, and we seek the principles or values that best explain such judgments given everything else we believe. In cases like this, the considered convictions are what we have called throughout this essay ‘lower-level’ principles, and the *explanans* ‘higher-level’ principles. While the order of support or justification flows ‘upwards’, the order of explanation flows ‘downwards’. Justification and explanation come apart.

This need not always be the case of course. Many inferences we make in substantive moral and political philosophy will be straightforward deductions (including *mediated deduction!*) from higher-level principles directly to judgments or lower-level principles that we have no independent reason to think are true or appropriate. This will often be the case when we extend some core value or principle to a broader and more controversial set of questions. We might argue, for example, that accepting a higher-level principle of fair reciprocity commits us to a much more stringent egalitarianism among fellow residents of a state than we might have otherwise thought was appropriate. But the point is that a more comprehensive substantive moral and political philosophy will also contain many abductive inferences of just the kind discussed in the previous paragraph. Although it would be fool-hardy to try to argue the point here, it seems clear that the vast majority of inferences in any major work of substantive theorizing are of precisely this abductive kind. And, indeed, it also seems clear that much of our confidence in what I have called ‘higher-level’ principles in fact stems from our much more secure confidence in the contextually grounded, ‘lower-level’ principles that are explained by them. A good example is the higher-level principle of reciprocity captured in (12). If anything supports the higher-level principle, it is the fact that so many human practices that we feel

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<sup>31</sup> See Norman Daniels, *Justice and Justification* (Cambridge: Cambridge University Press, 1996) on the role of inference to the best explanation in reflective equilibrium.

deeply committed to are shot through and through with particular and context-dependent structures of reciprocal exchange and recognition. Given the ubiquity of such practices, we infer the existence of some version of the higher-level, external, fundamental principle of reciprocity captured in (12): it is this principle that *best explains* our commitment to the reciprocal exchanges that are part of the practices. If I am right, this is yet another way in which the justification and formulation of fundamental moral and political principles can depend on practices.

In the next section, we trace the methodological implications of these arguments for the role of practices in the formulation and justification of principles. *Social interpretation*, once popular among communitarians like Walzer and Taylor, is due for a non-communitarian, quasi-Dworkinian resurgence.

## V. Interpretation

Judgment is needed when the rules run out. Not all conclusions (or intermediate steps on the way to a conclusion) can themselves be established deductively, and no rule can be self-applying (or have determinate, higher-order rules for its application). In the schemata discussed above, judgment is needed in assessing feasible options for their utility-quotient in *instrumental* and in moving from the higher-level principle of reciprocity to its contextually particular counterpart in *mediated deduction* (hence the ‘mediation’). Even if there are no determinate rules for judging correctly, there is *better* and *worse* judgment. Exercising our judgment is not the same as choosing from a set of options where the choice of one is as good as the choice of any other; judgment is meant to be non-arbitrary. Assuming that there is a true or otherwise more appropriate answer, better judgment is more *accurate* judgment. So while we cannot devise rules for getting the right answer, we can produce *methods* or *methodologies* that are more likely to produce such an answer than an untutored guess. These methodologies will

vary, of course, according to the types of inferences in which they will figure. In this section, I shall argue that, given some instance of *mediated deduction*, *social interpretation* is required to ‘get from’ higher-level, external principles to the lower-level internal principles appropriate for a practice. If I am right about how ubiquitous *mediated deduction* is in substantive moral and political philosophy, then this discussion should set a kind of program. In making explicit a method that is already implicit, I hope to highlight the significance of interpretation, and so to bring it back onto center stage. As we develop this argument, we will be able to give a fuller characterization of the way in which practices play a role than we have been able to do thus far.

What is interpretation? There is no such thing as interpretation *simpliciter*. All interpretation is relative to a point of view. Any interpretation requires some (implicit or explicit) understanding of what the interpretation is ultimately *for*. Suppose we are aiming to provide an interpretation of a painting. Why do we need the interpretation? Do we need it in order to inform the organization of an exhibition such as a retrospective? Do we need it as a part of a painter’s biography? Will the interpretation serve in a psychoanalytic study of the painter’s personality? Is it part of an anthropological study of the broader culture in which it figures? Do we want to understand the meaning of the painting as it was intended by its author? Or its meaning in a broader sense, as revealing a perspective on the world and our place in it (whatever the intentions of its author)? Most of the time the point of taking up the interpretive perspective is merely unreflectively assumed; there is rarely a need to reflect on it. The background context in which we search for an interpretation will structure our responses without our being aware of it. But once we become conscious of the range of questions we might ask, it becomes clear that, in each of these cases, what we ‘see’ in the painting will differ, sometimes quite dramatically. Depending on our interpretive perspective, certain properties,

materials, and aspects of the context of production will stand out, others will recede into the background. There is no such thing as interpretation *independent of a particular perspective*.

Knowing why we take up the interpretive perspective will point us in a direction and orient us, but it is not enough. If we reflect carefully on the process involved, we will notice the need for a *further*, higher-level layer of interpretation (which, again, in most cases we may remain unaware of). Return to our previous example: We take up the interpretive perspective because we are aiming ‘to write a biography’, or ‘compose a psychoanalytic study’, or ‘plan a retrospective’, and so on. But how do each of those aims constrain our interpretation? To answer this question, we need some further, more general understanding of *biography* as a genre, including its characteristic modes and styles and history, or an understanding of the special role of *retrospectives* as exhibitions of a particular kind, or a *psychoanalytic theory* within which to make sense of the artwork as part of a reconstruction of a painter’s personality. We then use that higher-level, general interpretation to generate the lower-level, particular interpretation. The higher-level interpretation aids us in picking out relevant features and discarding irrelevant ones; it helps us to organize the jumble of innumerable intrinsic and contextual properties, relations, and materials that *make up* the painting into a coherent narrative *about* the painting. Without that higher-level interpretation, the lower-level interpretation can’t ever begin.

In substantive moral and political philosophy, we take up the interpretive perspective with respect to a practice or set of practices, or an action, or set of relations. Our aim is explicitly *evaluative*. As discussed above, our aim in this paper is evaluation from a *moral* point of view, which requires setting out to examine whether we can justify some action, or practice, or set of relations to those who would like to change or end it. If we can, then we can proceed with the action, relation, or practice. If we cannot, then we must cease. But just as we needed a

characterization of, say, biography or psychoanalysis, etc., we need a characterization of the moral *values* (such as, say, justice) that we will use to structure our evaluation. Is the practice just, or legitimate, or fair, etc.?<sup>32</sup> The selection of such values will, just as in the case of esthetic interpretation, structure what properties of the practice will become relevant in our evaluation, and which can be disregarded.

This two-level structure is a general feature of all interpretation. Consider the interpretation of text or work of art in terms of an *emotion*. Gauguin's *Ondine I*, we might say, represents the tragedy of longing for something unattainable, or the destructive but overwhelming pull of desire, or fear of the unknown.<sup>32</sup> The painting is seen as falling under an emotion (or complex of emotions), as making sense in light of the emotion. The emotion functions as a kind of interpretive key in which to 'read' the painting. But what is an emotion, and how can it function as an interpretive *key*? Following Ronald de Sousa, we can understand emotions as kinds of narrative structured by what he calls 'paradigm scenarios'. Paradigm scenarios are the scenarios through which we understand what it is to feel an emotion (longing, love, fear, anger, and so on).

We are made familiar with the vocabulary of emotion by association with paradigm scenarios. These are drawn first from our daily life as small children and later reinforced by the stories, art, and culture to which we are exposed. Later still, in literate cultures, they are supplemented and refined by literature. Paradigm scenarios involve two aspects: first, a situation ..., and second, a set of characteristic or "normal" to type responses the situation, where normality is first a biological matter and then very quickly becomes a cultural one.<sup>33</sup>

Our repertoire of emotions is not just built up from adaptive agglomerations of primitive biological stimulus/response mechanisms. Formed in our past through our upbringing, refined and elaborated by the cultures and social contexts through which we navigate, the paradigm scenarios have an irreducibly social and developmental dimension. But they also have a *temporal* dimension, which is important for understanding the way in which such scenarios are

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<sup>32</sup> [http://2.bp.blogspot.com/\\_Nuta\\_CQvImI/TOuswabORgI/AAAAAAAAEWE/zle\\_2A4-xjY/s1600/Paul-Gauguin-In-the-Waves-1889.jpg](http://2.bp.blogspot.com/_Nuta_CQvImI/TOuswabORgI/AAAAAAAAEWE/zle_2A4-xjY/s1600/Paul-Gauguin-In-the-Waves-1889.jpg)

<sup>33</sup> Ronald De Sousa, *The Rationality of Emotion* (Cambridge, MA: MIT Press, 1990), p. 184.

like narratives. Scenarios have a beginning, middle and an end.<sup>34</sup> They have a characteristic evolution through and relationship to time, a dominant mood, rhythm and tempo. Love, for example, is not *love* if it is fleeting and momentary (but must love never ‘alter when it alteration finds’?). We employ the scenarios to interpret the significance and meaning of events, relations, interactions. They train our attention on certain aspects of a particular event or person or relation, suggest connections among different elements, produce an overarching framework. As de Sousa puts it, ‘when a paradigm scenario suggests itself as an interpretation of a current situation, it arranges or rearranges our perceptual, cognitive, and inferential dispositions’.<sup>35</sup>

The higher-level moral values deployed in the evaluation of practices, relations, actions have the same structure as such paradigm scenarios. We understand moral concepts like ‘justice’, ‘injustice’, ‘cruelty’, ‘reciprocity’, ‘solidarity’, and so on, not in terms of some particular instance of each concept, but in terms of their general properties, which will often involve temporally extended scenarios of just the kind at stake in our understanding of emotions. Such general properties are not, however, simply constructed by inductive generalization from particulars, or by seeking a set of necessary and sufficient conditions. They are better understood as constituted by characteristics shared by *paradigms* (hence the appropriateness of the name): the emotion or genre or value is best represented as a situation type united by a series of family resemblances.<sup>36</sup> The important point for our purposes is that the general interpretation of the paradigm scenario is not derived directly from the particular object we are interested in (though it may be subsequently shaped by it). In the moral and political case, we say that the higher-level moral value cannot be internal to the practice. Indeed, it must not be.

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<sup>34</sup> Velleman makes interesting use of this idea. See J. David Velleman, ‘Narrative Explanation’, *The Philosophical Review* 112 (2003): 1-25.

<sup>35</sup> De Sousa, *The Rationality of Emotion*, p. 186.

<sup>36</sup> Cf. debates in cognitive science about how categorical judgments underlying the use of concepts are made. See, e.g., E. Rosch, ‘Principles of Categorization’, in *Concepts: Core Readings*, eds. E. Margolis and S. Laurence (Cambridge, MA: MIT Press, 1999), pp. 189-206.

For *Ondine I* to be a representation of ‘longing’, it must be the case that our idea of longing has been shaped by situations, experiences, relations, texts, and so on, other than those relating to *Ondine I*. The same thing goes with a value like reciprocity, or justice, and its realization in a specific practice. That does not exclude that our general paradigm scenario of ‘longing’ may be decisively transformed from seeing *Ondine I*, just like our paradigm scenario of reciprocity may be transformed by reflection on, say, its role in a state. It also does not exclude that our experience of *Ondine I* could be decisively transformed by our characterization of longing, just as our reflection on the state could be decisively transformed by our characterization of reciprocity. But that possibility, of course, presupposes the point made here: we must have had a pre-existing understanding of ‘longing’ or ‘reciprocity’ for the transformation to make any sense.

This confirms the EPT from within an account of interpretation: there is no way to provide a defense or characterization of a principle or value *internal* to a practice without assuming its basis is *external* to the practice. It also gives us more structure in explaining how we ‘get from’ some higher-level value to its application within a practice, how, that is, we generate claims like (12) above. So far, we know that the first step in interpreting an object (or, in our case, evaluating a practice) is to specify some interpretive aim and some corresponding paradigm scenario to make sense of it. In the esthetic example, we first look at the painting and form a conjecture about the emotion (or set of emotions) that might best explain its appeal and meaning (given our aim, namely internal reflection). We say things like ‘This is clearly a painting about longing not sorrow’. In the moral and political case, we first look at, say, the state (or the EU or marriage), and form a conjecture about the moral values that might best help us to evaluate it (given the aim, for example, of evaluating its justice). This is equivalent to the step in which we decide what we want an interpretation of a painting for. We then need to

characterize justice in some way that will be relevant and useful for our evaluation. We might give a higher-level interpretation of justice, for example, as a kind of reciprocity, or respect, or fairness, or as set of duties that protects some further value, like autonomy. Already here, just as in the case of the painting, we will be guided by the general properties of the object we are concerned with to help us select among the very different aspects of justice as a value (e.g., it is not justice as a virtue we are concerned with; the state is an institution that comprehensively regulates social life; it is coercive, etc.). ‘Reciprocity’, ‘respect’, ‘autonomy’ and so on, are, like ‘longing’, our paradigm scenarios. We have some sense of what each of them are ‘like’ that we draw from our past, from our experience of each of them in different contexts, and from paradigmatic instances.

It is at this point that we must make a crucial decision, with important consequences for how we will proceed further. The crucial decision is whether our higher-level characterization of justice ought to *remain* external to the practice, and so treat the practice as an instrument for achieving a higher-level aim that can be specified independently of it, or whether we need to enter *into* the practice in order to specify what the principle requires. The former would lead us to a version of *instrumental*; the latter would require *mediated deduction*. For example, we might be committed already at the first stage to a nonrelational conception of global distributive egalitarianism. From this perspective, the state (as apart of a state *system*) can only be justified to the extent that it promotes a globally egalitarian distributive scheme. The internal, contingent properties of states are otherwise irrelevant. Things are very different if we are committed to a relational conception of distributive justice that requires further specification. While there are relational principles that would not require such specification—such as, for example, the

principle ‘distribute equally iff there is mutual assurance of general compliance’<sup>37</sup>—most relational principles do. Take our running example of reciprocity. According to the method we are reconstructing, we would now need to move *internal* to the practice in order to see what justice, now understood as embodying a kind of reciprocity, requires given the kinds of practice-mediated relations created by states.

How do we ‘enter’ a practice in the relevant sense? We do so by providing an interpretation of it from the perspective of our paradigm scenario, which, as I mentioned above, helps us in isolating the relevant features of the practices we are evaluating, and assemble them into a plausible overall view of, say, *longing-as-it-is-depicted-in-Ondine-I or reciprocity-for-long-term-residents-of-a-state*. We note, to continue our analogy, the vertical tower of water, the angle of woman’s body as she tumbles into the water, the anguish of her expression as she swallows her hand; we see each of these elements as organized by a particular conception of longing, that unites and connects them into a comprehensible whole. When we do so, we think of the painting as bearing properties that are *intentionally* connected into some kind of unity. Whether or not we seek some grounding in what *Gauguin* intended—there is no requirement to do so from within the aim given by ‘internal reflection’—we still think of the painting as an intentional object, as having a *point and purpose*.<sup>38</sup> It is not, we say, simply a random collection of strokes on a canvas, as if it had been composed by a fortuitous wind blowing paint on an abandoned canvas. Its point and purpose, furthermore, need not be single; it could be complex (as surely it is). But its complexity will still contribute to its meaning *as a whole*. It is much the same with the state. In the case of reciprocity, our interpretation will be

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<sup>37</sup> To apply this principle, all one needs to know is whether the practice in question satisfies the condition or not. I cannot argue this here, but I believe that all such principles are backed by higher-level relational principles that *do* require *mediated deduction*. In the example mentioned, there will be some higher-level principle that specifies why distributive justice *generally* requires mutual assurance, and some explanation for what it requires *specifically* in the context of the mutual assurance secured by states (but not clubs, etc.), which, in this example, is egalitarianism.

<sup>38</sup> On this point, see Dworkin, *Justice for Hedgehogs*; Ronald Dworkin, *Law’s Empire* (Cambridge: Harvard University Press, 1986).

directed towards the kinds of collective goods produced by the mutual production of a state's residents and citizens. Our interpretation will then give an account not only of *which* collective goods are produced by states but also *how* they contribute to the state's point and purpose. This interpretation need not be constrained by what residents' and citizens' joint intentions are (taken somehow as the actual intentions of a collective agent) any more than we need to be constrained by what Gauguin intended. The process of interpretation, as we have already discussed, is guided instead by our over-arching values, aims, and concerns. Let us say we interpret the state, when seen from the perspective of reciprocity, as providing a central class of collective goods whose main point and purpose is to set up and maintain the essential conditions for human flourishing. We can then go on to provide an interpretation of what a fair return requires among people who secure one another such essential conditions, just as we specified how longing is represented in *Ondine I*. And so we move from (10) to (12) in our schema.

With our contextually fixed principles in hand, we can now become *instrumentalists*. We now know what justice as reciprocity demands for citizens and residents. Armed with this knowledge, we can turn to any token-state, say, Britain, and wonder whether its institutions realize the demands that they create. If they do not, we can say that British law or policy or society is unjust, and seek to change it. British institutions are conceived of as instruments or tools for realizing the internal demands they themselves generate. Notice further that this is where the analogy to esthetic interpretation breaks down. The esthetic interpretation we engaged in with respect to *Ondine I* is not aimed to change the world (or the painting). While we were driven by some sense of the value of the painting (otherwise, it wouldn't be worth reflecting on its meaning), we were not narrowly trying to form principles for promoting or otherwise 'realizing' its goodness. Moral interpretation, of course, is concerned from the very

start with critique and criticism. But, as I hope to have shown, the special normativity of moral values represents no bar to taking their context-sensitivity seriously.

In concluding this section, I want to return to an objection. The objection is a familiar adaptation of the first argument we encountered, and wonders: What if a practice *in toto* must be dismantled or rejected or overthrown? Wouldn't the context-sensitive interpretation I have advocated make such rejection impossible? No. There are two ways such rejection can happen. First, we might decide that only a purely external perspective is possible with respect to some practices (e.g., torture).<sup>39</sup> There is nothing in the method or account of *mediated deduction* I have championed that precludes this possibility. Whether or not we ought to take such a purely external perspective depends on the substantive issues at stake, not on questions of methodology.<sup>40</sup> Second, we might engage in what we briefly referred to above as ideology or genealogical critique. We might take an internal value or principle at the center of the self-understanding of participants in some practice, and then aim to show that the value or principle, properly understood, cannot be realized by the practice in this or any other form; in order to realize the value, one must abandon the practice. Alternatively, and more radically, one might show that the practice actually *undermines* any basis for the value's realization. An example might be the idea of *wage slavery*. Here the ideology critic shows that the practice of capitalism undermines the very possibility of the freedom that it pretends to champion. Genealogical critique, similarly, serves to unmask the pretense that a practice contributes to the realization of some value internal to it by exploring the history by which the value became central to the practice. A paradigmatic example of such genealogy is Nietzsche's genealogy of

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<sup>39</sup> It is important to remember, however, that such an external perspective need not be nonrelational. It could be that there is a wider practice (e.g., the state) such that an internal relational principle (e.g., (12)-type reciprocity) precludes the narrower practice (e.g., torture).

<sup>40</sup> On this point, see Saladin Meckled-Garcia, "The Practice-Dependence Red Herring and Better Reasons for Restricting the Scope of Justice" (2013).

morality, which demonstrates how the practices central to the modern moral system actually work to sustain astounding levels of cruelty and promote the deadening of man's creative potential.<sup>41</sup> The key point for our purposes is that ideology critique and genealogy require the same forms interpretation that I have elucidated above. The interpretation of the practice is a crucial step in showing how it renders the realization of the external value impossible. Ideology critique and genealogy are therefore best understood, as I mentioned above, as negative instances of *mediated deduction*.

A schematic summary of the interpretive method outlined here may be useful:

- (15) Identify a target social relation or practice or object. (E.g.: the state, or *Ondine I*)
- (16) Why take up the interpretive perspective with respect to that social relation or practice or object? (E.g.: ... to evaluate the state in terms of distributive justice; ... to find a meaning that can provide depth and richness to inner reflection)
- (17) What paradigm scenarios best characterize the interpretive aim? (E.g.: distributive justice in the state is best understood in relational terms as a species of reciprocity; the inner-reflection meaning of *Ondine I* is best understood in terms of longing)
- (18) At this stage, one provides a general conception of justice as reciprocity, defending it, for example, against rival fully relational and nonrelational views, or a general conception of longing, defending it against other candidate paradigm scenarios for inner reflection.
- (19) Turn back to the target social relation or practice or object. What is the best understanding of the social relation or practice or object in terms of the paradigm scenario(s) identified in (3)?
- (20) At this stage, one uses the general idea of justice as a form of reciprocity to make sense of the relation between citizens and residents of a state as mutual producers of collective goods, or the paradigm scenario of longing to make sense of the specific elements of *Ondine I*—the vertical tower of water, the angle of her body as she tumbles into the water, the anguish of her expression as she swallows her hand. Here one works out the specific form reciprocity takes in the state or the form longing takes in the painting. The result will be a conception of reciprocity or longing much more detailed and textured than the general conception with which one started; but it will also be, for that very reason, not (or not readily) generalizable. *Reciprocity-in-the-state* (or *longing-in-Ondine I*) is very different than *reciprocity-in-friendship* (or *longing-in-Courbet's-Woman-in-the-Waves*), and very different again from the paradigm scenario of reciprocity or longing.

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<sup>41</sup> On Nietzsche and genealogy, see, e.g., David Owen, 'Nietzsche, Re - Evaluation and the Turn to Genealogy', *European Journal of Philosophy* 11 (2003): 249-7; Leiter, *Nietzsche on Morality*; Raymond Geuss, *Public Goods, Private Goods*, 2nd edn. (Princeton, NJ: Princeton University Press, 2003), Introduction.

## V. Conclusion

In this paper, I have argued that claim (1) (the EPT) is true and in any case innocuous. Claim (2) is merely definitional, and can easily be granted. Claim (3) (the FPT) is trivial. Claim (4) is false and claim (5), as a result, severely misleading.

In the process, I have identified four different ways in which fundamental principles can depend on practices. First, they can constrain the *domain* of a principle (e.g., relativism). I left relativism to the side in this paper. Second, they can have applicability conditions, and so the *scope* of a principle can depend on a practice or set of social relations. Third, and most controversially, the *grounds* of a principle can depend (in part) on the contingent properties of some set of practices. Here I claimed that, while it is true that ultimately all principles must bottom out in a fundamental and external principle, there are many fundamental, external principles (especially relational ones) that require context-sensitive interpretation in order to deliver determinate guidance. Fourth, I claimed that it is often our internal, practice-based commitments to values and principles that justify an appeal to the higher level principles that best explain them, rather than the other way around.

Once we had all this in view, we were in a position to see that the justification and formulation of fundamental principles in fact plays a small and largely insignificant role in what I called *substantive* moral and political philosophy. In the special sense of ‘fundamental’ that we have used here (adopted from Cohen), such philosophy spends most of the time *applying* fundamental principles to more specific contexts. The different ways in which one might apply higher-level principles deserves, I then argued, much more attention than it is has thus far received. Such diversity in modes of application has been overlooked largely as a result of claims like (4) and (5). I then went on to distinguish two patterns of application, namely *instrumental* and *mediated deduction*, and contended that it is rare to see (with the possible exception of Singer’s utilitarianism) theories which begin with a higher-level principle and then

proceed via an *instrumental* application of them to particulars. Most substantive philosophy proceeds rather, by way of *mediated deduction*, in which practices play an essential (if unavowed) role in moving from very abstract, higher-level principles to more determinate, lower-level ones. The final section of the paper went on to defend an interpretive method for generating, by *mediated deduction*, lower-level principles from higher-level principles in conjunction with specific practices. My aim there was to demonstrate that, if I am right, then interpretation must play an essential role in any plausible substantive moral and political philosophy. Making this role explicit, I hoped, would help to reframe current debates on both methodology and the role of facts in substantive moral and political philosophy.

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Kai Möller

## **From Constitutional to International Human Rights**

### **I. Introduction**

Part of what sparks the current philosophical discussion about international human rights is a mismatch between their great practical and theoretical importance on the one hand and what is perceived to be an under-developed grasp of their moral basis and structure on the other. Broadly speaking, two strategies, to which this paper will add a third, are currently employed in order to throw light on international human rights:<sup>1</sup> some approach them by starting from a moral theory of human rights as opposed to specifically *international* human rights, and then ask to what extent a proper understanding of human rights can help illuminate the phenomenon of international human rights.<sup>2</sup> Others focus more on the international sphere of which international human rights are a part, trying to derive a theory of international human rights from the role that phenomenon plays or ought to play in the sphere of the relations between states.<sup>3</sup> Nothing is wrong as a matter of principle with those approaches: a full-fledged theory of international human rights must surely make sense of both “international” and “human rights”; thus, what we are ultimately looking for is an integrated theory. It therefore seems plausible to assume that one can approach the project of developing a comprehensive theory of international human rights from different angles, just as one might reach the top of a mountain from different sides. In this paper, I will develop and propose a theory of international human rights, but I will choose another, previously largely unexplored route, namely one via the philosophy of national constitutional rights.

There are important structural similarities between constitutional rights and international human rights. In both contexts, compliance with fundamental (read: constitutional; human) rights is, loosely speaking, one of the important yardsticks of legitimacy, be it in the sense of constitutional legitimacy or in the sense of falling within the sphere of a state's sovereignty. Furthermore, the rights protected by national constitutions and international treaties look, on the whole, strikingly similar. This similarity does not end on the surface but goes all the way down. European lawyers who are acquainted with both national constitutional law of a jurisdiction that employs strong judicial review – such as Germany in its Basic Law – and the law of the European Convention on Human Rights know that the doctrinal tools, style of reasoning, and the outcomes produced by national constitutional courts on the one hand and the European Court of Human Rights on the other are very similar indeed. As is well known, when the United Kingdom decided in the late 1990s that it wanted to set up a system of constitutional judicial review, it did not design a new, national bill of “British”

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<sup>1</sup> See Allen Buchanan, ‘The Egalitarianism of Human Rights’, 120 (2010) *Ethics* 679, 680-82.

<sup>2</sup> James Griffin, *On Human Rights* (OUP 2008). See also John Tasioulas, ‘Taking Rights out of Human Rights’, 120 (2010) *Ethics* 647.

<sup>3</sup> Raz; Beitz

rights (although that is a project that continues to be on the table in the respective political discussions) but instead simply incorporated the European Convention on Human Rights into UK law;<sup>4</sup> thus effectively adopting the text of the European Convention together with the existing and future jurisprudence of the European Court of Human Rights<sup>5</sup> as part of its national constitutional law.

Structural similarities such as the ones mentioned above as well as historical and semantic links between the concepts of constitutional and international human rights make it promising to approach the project of developing a comprehensive theory of international human rights via an understanding of national constitutional rights. This route becomes even more appealing in light of the fact that in recent years there has been a wave of scholarship theorising constitutional rights;<sup>6</sup> thus, drawing on this work may prevent philosophers of international human rights from having to re-invent the wheel.

I will proceed by setting out some structural features of national constitutional rights in the next section. That section will show that it is misguided to believe, as many do, that national constitutional rights law rests to a considerable extent on contingencies specific to the national community which has adopted them. The opposite is true: conversations about constitutional rights are, on the whole, no less global in appeal than conversations about international human rights. Furthermore, the section will give an overview of those structural features of constitutional rights which in previous work I have labelled “the global model of constitutional rights”, and it will present the basics of a theory of that global model, focussing on the questions of the scope of rights (‘which interests ought to be acknowledged as grounding rights?’) and their permissible limitations (‘under what conditions is a limitation of a right legitimate?’). This will prepare the ground for the subsequent section, which takes the step from national constitutional rights to international human rights. It examines the case for a view held by many international human rights theorists, namely that whatever international human rights are, they are more minimalist than national constitutional rights (call this international human rights minimalism). Thus, the paper will ask whether there is room to make national constitutional rights more minimalist. My conclusion will be that there is no such room: any such attempt will either introduce arbitrariness (because, as will be shown, reducing the scope of interests protected as rights will necessarily involve the drawing of morally arbitrary thresholds) or will ignore the fact that constitutional rights are already as minimalist as coherently possible (because, as will become clear, they set up a reasonableness standard of justification, and treating policies which are less than reasonable as legitimate is morally unappealing). Thus, there exists neither the necessity nor the moral possibility to make constitutional rights more minimalist. It follows that the moral structures of national constitutional rights and

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<sup>4</sup> Human Rights Act 1998.

<sup>5</sup> Section 2 (1) of the UK Human Rights Act 1998: A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any  
(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights ... whenever made or given [...].

<sup>6</sup> See in particular Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002); Mattias Kumm, ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review’, (2010) 4 *Law & Ethics of Human Rights* 141; Mattias Kumm, ‘Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement’, in Pavlakos (ed.), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing, 2007), 131; Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012).

international human rights are identical. The fourth section will spell out some of the implications of this view.

## II. The moral structure of national constitutional rights

### 1. A global conversation about rights

In terms of their possible reach and appeal, contemporary discussions about constitutional rights are global. Thus, it is emphatically not the case that the moral demands of constitutional rights are inextricably linked and intertwined with a particular constitution with a particular interpretative history, adopted by a particular political community at a particular point in time. The insight that constitutional rights discourse is governed more by “free-standing” moral discourse about what rights and legitimacy require than by considerations relating to the history of a document or people is, however, still relatively young. As recently as 1996, Ronald Dworkin published his book *Freedom’s Law*,<sup>7</sup> which is a collection of essays dealing with important US Supreme Court decisions on abortion, euthanasia, hate speech and other controversial topics. The subtitle of this book is “The moral reading of the American constitution”, which makes clear that Dworkin perceived his book as a contribution to a specifically American discourse. Today, less than two decades later, an author who published a book dealing with problems as universal as the ones discussed by Dworkin and who restricted him- or herself to only one particular jurisdiction would rightly be accused of arbitrariness in the choice of his or her materials. Constitutional rights discourse has gone global.

A look at the structure of constitutional rights law around the world helps explain how this could happen. Courts around the world employ a two-stage analysis when determining whether an act by a public authority violates constitutional rights. At the first stage, they ask whether the act interferes with (limits, restricts) a right. If so, the second question is whether the interference is justifiable. The test that is almost globally<sup>8</sup> employed at this second stage is the proportionality test, according to which an interference with a right is justifiable if it serves a legitimate goal and is proportionate to that goal. In judicial practice, the first stage has become less and less important, largely as a consequence of rights inflation, that is, the phenomenon that more and more interests are protected as rights. Thus, the focus of the analysis has shifted to the second stage, and the proportionality principle which dominates that stage has become the by far most important doctrinal principle of constitutional rights law around the world. Interestingly, national constitutions do not give courts any guidance as to how to conduct the proportionality test. Constitutions normally do not even mention the term “proportionality”. Instead, they use phrases similar to that employed by the Canadian Charter of Rights and Freedoms, which stipulates that rights are guaranteed ‘subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’<sup>9</sup> The point of those rather vague

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<sup>7</sup> Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (OUP 1996)

<sup>8</sup> An important exception is the US jurisprudence. On the issue of whether the US Supreme Court applies proportionality under a different name, see Paul Yowell, ... See also Möller, *Global Model*, ...

<sup>9</sup> Canadian Charter of Rights and Freedoms 1982, section 1.

phrases is to release judges from interpretative constraints;<sup>10</sup> thus, when courts apply proportionality analysis, they are not usually bound by textual subtleties, nor are they bound by the history of the particular constitution they are interpreting. Rather, they engage in free-standing moral reasoning about what rights require, largely unguided by the constitution which they interpret.

## 2. *The global model of constitutional rights*<sup>11</sup>

While it is to be expected that different courts will often come to different conclusions when dealing with a particular rights issue – say, the question of whether or under what conditions hate speech may be prohibited, or whether assisted suicide must be permitted – at a more abstract level, a remarkable consensus about certain structural features of constitutional rights has emerged in recent decades. I have labelled this set of doctrines and phenomena ‘the global model of constitutional rights’; in this section I will briefly introduce its main features, which will pave the way for presenting, in the following section a theory of constitutional rights which fits and justifies these features.

The global model of constitutional rights is best introduced and explained by contrasting it with what I call the ‘dominant narrative’ of fundamental rights. The dominant narrative holds (1) that rights cover only a *limited domain* by protecting only certain *especially important* interests of individuals; (2) that rights impose exclusively or primarily *negative* obligations on the state; (3) that rights operate only *between a citizen and his government*, not between private citizens; and (4) that rights enjoy a *special normative force* which means that they can be outweighed, if at all, only in *exceptional circumstances*. Of these features of the dominant narrative, the general acceptance of the second – rights as imposing negative obligations on the state – has already eroded considerably, mainly because of the growing recognition of social and economic rights.<sup>12</sup> The third – limitation to the relationship between citizen and government –, while generally held to be true, does not normally attract much attention by rights theorists. The first and the fourth – special importance and special normative force – are still almost uncontroversial. However, under the global model of constitutional rights *all four* elements of this narrative have been given up – and often a long time ago. The doctrines and developments in constitutional rights law which have led to their erosion are rights inflation, positive obligations and socio-economic rights, horizontal effect, and balancing and proportionality.

### *a. Rights inflation*

Constitutional rights are no longer seen as only protecting certain particularly important interests. Especially in Europe a development has been observed which is sometimes pejoratively called ‘rights inflation’<sup>13</sup>, a name which I will use in a neutral sense as describing the phenomenon that increasingly, relatively trivial interests are protected as (*prima facie*)

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<sup>10</sup> Kai Möller, ‘Proportionality: Challenging the critics’, 10 (2012) *International Journal of Constitutional Law* 709 at 717.

<sup>11</sup> This section draws on ideas developed in greater depth in my book *The Global Model of Constitutional Rights* (OUP 2012).

<sup>12</sup> For a theoretical account of this development, see Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008), ch. 1.

<sup>13</sup> Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007), 126.

rights. The most extreme approach is that of the German Federal Constitutional Court, which has explicitly given up any threshold to distinguish a mere interest from a constitutional right. As early as 1957 it held that Article 2(1) of the Basic Law, which protects everyone's right to freely develop his personality, is to be interpreted as a right to freedom of action.<sup>14</sup> The Court provided various doctrinal reasons for this result, its main argument being that an earlier draft of Article 2(1) had read 'Everyone can do as he pleases' (*Jeder kann tun und lassen was er will*'), and that this version had been dropped only for linguistic reasons.<sup>15</sup> It affirmed this ruling in various later decisions; most famously it declared that Article 2(1) of the Basic Law included the rights to feed pigeons in a park<sup>16</sup> and to go riding in the woods.<sup>17</sup>

While other jurisdictions have not, to my knowledge, adopted such a far-reaching approach to the scope of rights, the phenomenon of rights inflation and the difficulty of finding a principled way to distinguish rights from mere interests have been widely observed. It is important to note that the broad understanding of rights does of course not imply that the state is prohibited from interfering with the right in question. Rather, as has been pointed out above, there is an important conceptual distinction between *an interference with* and *a violation of* a right: an interference will only amount to a violation if it cannot be justified at the justification stage. Thus, the broad understanding of rights at the *prima facie* stage must be seen in conjunction with the proportionality test which permits the limitation of *prima facie* rights when they are outweighed by a competing right or public interest.

#### *b. Positive obligations and socio-economic rights*

Rights are no longer regarded as exclusively imposing negative obligations on the state. But while most theorists of rights only started to reconsider their views on this issue following the growing acceptance of socio-economic rights (particularly their inclusion in the South African Constitution), constitutional rights law had given up the view that rights impose only negative obligations at least since the 1970s when the doctrines of positive duties or protective obligations became established. The idea is that the state is under a duty to take steps to prevent harm to the interests protected by (otherwise negative) rights. Thus, the state must, as a matter of constitutional rights law, put in place a system which effectively protects the people from dangers emanating from other private persons, such as criminal activities which threaten, for example, life, physical integrity, or property; and it must also protect them from dangers which do not have a (direct) human cause, such as natural disasters.

Furthermore and maybe more importantly, there is the aforementioned trend towards the acknowledgement of socio-economic rights, which obviously impose positive duties on the state and thus conflict with the dominant narrative according to which rights are concerned only with negative obligations. The most widely discussed example of this development is the South African Constitution, which contains in its sections 26, 27 and 29 rights to housing, health care, food, water, social security and education.

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<sup>14</sup> BVerfGE 6, 32 (*Elfes*).

<sup>15</sup> *Ibid.*, 36-37.

<sup>16</sup> BVerfGE 54, 143 (*Pigeon-Feeding*).

<sup>17</sup> BVerfGE 80, 137 (*Riding in the Woods*).

### *c. Horizontal effect*

Constitutional rights are no longer seen as affecting only the relationship between the citizen and the state; rather, they apply in some way between private persons as well. For example, the constitutional right to privacy may protect a person not only against infringements of his privacy by the state, but also against such infringements by his neighbour, landlord, or employer. The doctrinal tool which achieves this is called *horizontal effect* of rights, where ‘horizontal’ as opposed to ‘vertical’ indicates that rights operate between private persons. The first court to acknowledge horizontal effect was the German Federal Constitutional Court in its famous *Lüth* decision of 1953.<sup>18</sup> From Germany the concept travelled to other parts of the world. It has by now become a well-established feature of the global model of constitutional rights; one indicator of its success is that the new South African constitution explicitly endorses horizontal effect in section 8(2), which states in slightly awkward language: ‘A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’

### *d. Balancing and proportionality*

Contrary to the dominant narrative, it is not the case that constitutional rights generally enjoy a special or heightened normative force in legal practice. While it is true that some rights are absolute – for example the right to freedom from torture – most rights – including the rights to life, physical integrity, privacy, property, freedom of religion, expression, assembly and association – can be limited in line with the proportionality test. Proportionality has become *the* central doctrine of contemporary constitutional rights law, and has been accepted by virtually every constitutional court in Central and Eastern Europe and is increasingly employed in Central and South American jurisdictions.<sup>19</sup> According to the test as used by most scholars working in the field, the proportionality test has four prongs. First, a policy interfering with the right must be in pursuit of a legitimate goal; second, it must be a suitable means of furthering the achievement of the goal (suitability or rational connection); third, it must be necessary in that there must not be a less restrictive and equally effective alternative (necessity); and finally and most importantly, it must not impose a disproportionate burden on the right-holder (balancing or proportionality in the strict sense). Some courts have adopted tests that look slightly different on the surface; however, what all tests have in common is that at their core, there is *balancing exercise* where the right is balanced against the competing right or public interest, which implies that far from enjoying any special or elevated status over public interests, rights operate on the same plane as policy considerations.

## *3. Theorising the global model: between minimalism and maximalism*

### *a) The scope of rights: endorsing “rights maximalism”*

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<sup>18</sup> BVerfGE 7, 198 (*Lüth*). English translation from the web site of the University of Texas School of Law, [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/](http://www.utexas.edu/law/academics/centers/transnational/work_new/) [copyright: Basil Markesinis].

<sup>19</sup> Stone Sweet and Mathews, ‘Proportionality Balancing and Global Constitutionalism’, (2008-9) 47 *Columbia Journal of Transnational Law* 72, 112.

The global model does not endorse the once uncontroversial idea that the point of constitutional rights is to limit government and keep it out of our lives: that idea cannot make sense of the doctrines of horizontal effect and positive obligations and the increasing acknowledgment of socio-economic rights. The point of constitutional rights under the global model is not to *disable* government; rather it must be to *enable* every person to take control of his or her life. Constitutional rights protect the ability of persons to live their lives according to their self-conceptions; thus, they are based on the value of *personal autonomy*. For example, constitutional rights protect a person's right to engage in free speech, believe in and follow the precepts of her religion (important aspects of personal autonomy), control her private life (including her sexual and reproductive autonomy), to bodily integrity (partly a precondition for, partly an element of personal autonomy), and so on. This focus on autonomy not only explains the traditionally acknowledged set of civil and political rights in their negative dimension, it can further justify the existence of horizontal effect and positive obligations: from an autonomy-based perspective, what matters is not *who* violates the right but rather the adequate protection of the interest at stake. Finally, the autonomy-based approach makes sense of socio-economic rights such as the rights to food, healthcare, or education, which protect the preconditions of autonomy.

The crucial question for present purposes is the scope of protection offered by constitutional rights: should they cover a narrow or a broad range of autonomy interests? The first feature of the global model (rights inflation) suggests that an approach which regards rights as protecting *all* autonomy interests of a person – including those of trivial importance, such as feeding birds or riding in the woods (to use those famous German cases again) – sits best with the practice of constitutional rights law. Thus, the picture that emerges is that under the global model, all autonomy interests are protected as rights; however, this protection is not absolute or near-absolute; rather it can be limited as long as the limitation is proportionate. Is it possible to make sense of this arguably counter-intuitive proposition? It is indeed possible, but to do so, we must dispense of a dearly held view of almost all philosophers, who insist that fundamental rights protect only a narrow range of interests while having a special normative force which means that they can rarely, if ever, be outweighed by competing considerations. That model is flatly incompatible with the practice of constitutional rights law around the world, in particular with the global endorsement of the proportionality approach. Instead, I defend the following account of the point and purpose of constitutional rights. The main entitlement that a person has under the global model is to being treated with a certain *attitude*: an attitude that *takes her seriously as a person with a life to live*, and that will therefore deny her the ability to live her life in a certain way only when there are *sufficiently strong reasons* for this. Applied to the case of hobbies such as feeding the birds, this means that we should not ask whether the freedom to feed birds is an aspect of a narrowly defined set of especially important interests. Rather, we should ask whether the state treats a person subject to its authority in a way which is justifiable to her when the state prohibits, for example, her participation in the activity of feeding birds; and this will be the case only when there are sufficiently strong reasons supporting the prohibition. Thus, the point of constitutional rights is not to single out certain especially important interests for heightened protection. Rather, it is to show a particular form of respect for persons by insisting that each and every state measure which affects a person's ability to live her life according to her self-conception must take her autonomy interests adequately into account in order to be justifiable *to her*. Constitutional

rights law institutionalises a “right to justification”<sup>20</sup>, that is, a right to be provided with an adequate justification for every state action (and omission) that affects the agent in a morally relevant way.

*b) The structure of justification: “rights minimalism”*

To say that a person has a constitutional right to X, where X could stand for freedom of religion, freedom of expression, property, etc., means *not* that the state cannot, or at least not normally, limit X. Rather it means that when the state limits X it must provide sufficiently strong reasons for this: if the reasons supporting the limitation are sufficiently strong, then the limitation will be proportionate and therefore justified; if they are not strong enough, the limitation will be disproportionate and the right will have been violated. This raises the question of what the standard for “sufficiently strong reasons” is and ought to be in the domain of constitutional rights. Two candidate approaches suggest themselves. According to the *correctness standard*, when a state limits a right, it is justified in doing so only if its policy is the best possible – the correct – response to the social problem at hand. By way of contrast, under a *reasonableness standard*, the state acts legitimately when it chooses a reasonable, as opposed to the one correct, policy.

As an illustration, let us look at the problem of assisted suicide. Some people who are suffering from an incurable disease and who desire to kill themselves when their situation becomes unbearable know that when they reach that stage, they will no longer be physically strong enough to implement that plan on their own, although they could still do it with help from a partner, friend, or physician. However, it is precisely this assistance which in many, though by no means all, countries is illegal and punishable. The reason given for such policies is usually that allowing assisted suicide would lead to the risk of abuse, where weak and vulnerable patients are bullied into death or even killed by relatives or carers. Under the correctness approach, a state which limits the right to assisted suicide – which is part of the right to private life or privacy – is justified in doing so only where this limitation is, as a matter of substance, the best possible policy. Under the reasonableness approach, the limitation is justified if it is at least reasonable (though possibly not correct). Thus, let us stipulate that a ban of assisted suicide is an example of a policy which legislators can in good faith believe to be the best policy (ie it is reasonable), but which as a matter of moral fact is not the best policy. Under the correctness approach, we should consider this policy as one which violates rights, whereas under a reasonableness approach, we should accept it as justified.

Both as a matter of the current practice of judicial review around the world and as a matter of philosophical attractiveness, the reasonableness approach is preferable. The justification for this is controversial, however. Mattias Kumm points to the existence of reasonable disagreement: where such reasonable disagreement about the best policy exists, choosing one of the reasonable policies must be legitimate.<sup>21</sup> I have argued that the notion of reasonable disagreement, while relevant, cannot do all of the moral work and proposed that it is the principle of democracy which requires that a policy which is reasonable, as opposed

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<sup>20</sup> Kumm, Forst

<sup>21</sup> Mattias Kumm, ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review’, (2010) 4 *Law & Ethics of Human Rights* 141 at 168-70.

to correct, is regarded as constitutionally legitimate.<sup>22</sup> If we required the democratic process to come up with the best possible policy whenever it legislates in the domain of rights, this would, in light of the broad scope of rights under the global model, mean that often or indeed possibly always the outcome of democratic deliberations would be predetermined by the moral requirements of rights. There would be no room for democratic deliberation and good faith disagreement about policies; and this must be flatly incompatible with our understanding of democracy as a form of government where the people and their representatives debate and, usually, face a genuine choice with regard to the proper way to deal with a particular social problem. Thus, the value of democracy requires that we accept a reasonableness standard as opposed to correctness standard for assessing the justifiability of the limitation of a right.

This reasonableness standard is reflected in the jurisprudence of national constitutional courts. I do not have the space here show this point in depth; so a few observations must suffice. The Canadian Supreme Court has stated that ‘the legislature must be given reasonable room to manoeuvre’<sup>23</sup>, a phrase whose point is to indicate that the legislature need not find the one right answer to the rights question at stake. The German Federal Constitutional Court often uses a negative formulation, stating that the proportionality test is satisfied if the interference is ‘not disproportionate’ or ‘not out of proportion’.<sup>24</sup> So rather than requiring positively that the policy be proportionate, the Court demands negatively that it not be disproportionate; the effect of this is to give the necessary leeway to the elected branches. Occasionally the Court uses formulations that indicate even more clearly that the approach it uses is really a reasonableness approach, for example when it states that there must be ‘a relationship [between the seriousness of the interference and the weight of the reasons supporting the interference] that can still be considered as reasonable’<sup>25</sup>.

### *c) The emerging picture: between minimalist and maximalist approaches*

The picture which emerges is that national constitutional rights are at the same time minimalist and maximalist: they are maximalist with regard to the range of interests that they protect as rights, and minimalist with regard to the standard of justification which they demand with regard to the protection of those interests. While as a consequence of rights inflation *all* autonomy interests, including those of trivial importance, are protected as rights, a measure limiting a right is justified if supported by a reasonable, as opposed to the best possible, justification. The underlying idea here is that every state measure which affects a person in a morally relevant way – in other words, every state measure which affects a person’s ability to live his life according to his self-conception – triggers the duty of justification; and that the standard of justification must be a reasonableness standard in order to preserve a meaningful sphere of democratic debate about and choice between different reasonable policies.

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<sup>22</sup> Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012), 118.

<sup>23</sup> *R. v. Edwards Books and Art*, (1986) S.C.R. 713, 795.

<sup>24</sup> See for example BVerfGE 65, 1, 54.

<sup>25</sup> BVerfGE 76, 1, 51.

### III. From national constitutional rights to international human rights

With the above account of the moral structure of national constitutional rights in mind, we can now approach international human rights. As explained in the introduction, the working hypothesis of this paper is that the moral structure of national constitutional rights and international human rights will at least be related. Thus, the question to be addressed now is what modifications, if any, we have to apply to the theory of national constitutional rights presented above in order to make it a suitable theory of international human rights. My conclusion will be that we need no modifications whatsoever.

There are two objections which a theorist of international human rights could have to this view. The first is that national constitutional rights, unlike international human rights, reflect and are based on national idiosyncrasies and contingencies and are therefore not a suitable candidate for a theory of international human rights, which by its very nature must transcend such contingencies. However, as I have explained above, constitutional rights discourse is just as global as international human rights discourse; constitutions around the world contain broadly the same set of rights, and constitutional courts around the world employ the same doctrinal tools to interpret them, most importantly the proportionality test whose point is to enable a free-standing discussion of the moral justifiability of a policy. The idea that constitutional rights are or ought to be reflective of national idiosyncrasies to a large extent is simply wrong and ought to be abandoned.

The second and more promising objection is that constitutional rights are morally more demanding than international human rights. The idea is that constitutional rights incorporate and reflect a comprehensive set of legitimacy conditions for a policy or executive decision, whereas international human rights set only minimum standards. Correlative to this perceived distance between national constitutional rights and international human rights is a perceived distance between constitutional legitimacy and national sovereignty: not everything that is constitutionally illegitimate (read: that violates constitutional rights) also transcends the sphere of a state's sovereignty (and conflicts with international human rights): most scholars would hold that there is room for policies to fall within the sphere of sovereignty while at the same time violating constitutional rights.

Here are two important views from the literature which adopt this basic approach. The first talks about the relationship between constitutional and human rights, and the second focuses on the relationship between legitimate authority and national sovereignty. In *Justice for Hedgehogs*, Ronald Dworkin proposes a theory of both constitutional (in his terminology: political) rights and human rights. He writes:

"It seems widely agreed that not all political rights are human rights. People who all accept that government must show equal concern for all its members disagree about what economic system that requires ... But almost none of them would suggest that the many nations that disagree with his opinion are guilty of human rights violations ... Why not? Human rights are widely thought to be special and, according to most commentators and to political practice, more important and fundamental."<sup>26</sup>

The second quote, by Joseph Raz, deals with the corresponding point of the relationship between legitimate authority and national sovereignty. My interest here is not in legitimate authority but in constitutional legitimacy, and I have no space here to explore the

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<sup>26</sup> Ronald Dworkin, *Justice for Hedgehogs*, ???.

relationship between the two. However, Raz's basic intuition also works, I believe, if we replace his reference to legitimate authority with constitutional legitimacy.

"We must not confuse the limits of sovereignty with the limits of legitimate authority. The sovereignty of states sets limits to the right of others to interfere with their affairs. The notion of sovereignty is the counterpart of that of rightful international intervention. The criteria determining the limits of legitimate authority depend on the morality of the authority's actions. However, not every action exceeding a state's legitimate authority can be a reason for interference by other states, whatever the circumstances, just as not every moral wrongdoing by an individual can justify intervention by others to stop or punish it."<sup>27</sup>

Thus, according to the widely held view reflected in the above statements, there is a distance between constitutional legitimacy and constitutional rights on the one hand, and international human rights and state sovereignty on the other. This is the view that I will challenge in this section. My strategy will be negative: I will show that, starting from the theory of constitutional rights which I outlined in the previous section, there is neither a morally coherent way to create this distance, nor is there a need for it. It follows that if we want to protect human rights at the international level, we should accept precisely the same account of rights that is appropriate at the national level, and that the moral boundaries of constitutional legitimacy are the same as those of national sovereignty.

Structurally, there are two ways to tinker with the theory of constitutional rights presented in the previous section in order to make it more minimalist. First, one could try to reduce the range of interests protected as rights. Second, one could focus on the standard of justification (the reasonableness standard) and make this standard looser. I will consider both options in turn, concluding that none of them can be implemented without making the resulting account of international human rights morally unappealing.

### *1. Limiting the range of interests protected as rights*

I argued above that under the global model of constitutional rights, all of a person's (autonomy) interests are protected as rights. Thus, a person can, to employ two famous German cases again, successfully claim a right to feed birds in a park or to go riding in the woods. The underlying idea of this broad scope of rights is that every state action (and omission) which affects a person in a morally relevant way requires justification. To 'translate' this 'right to justification'<sup>28</sup> into a theory of rights, it is necessary to protect all autonomy interests of a person at the prima facie stage, and to assess the justifiability of their limitation at the justification stage, using the proportionality test.

Now, an international human rights theorist might respond by arguing that while it may be appropriate to protect such a broad scope of rights in the context of national constitutional law, it would be inappropriate to do so at the international level. Thus, the range of interests protected as rights ought to be drawn more narrowly, introducing a *threshold* which distinguishes rights from mere interests.

For this idea to succeed, however, it would have to be possible to identify a threshold which points to a principled distinction between those interests which do and those which do not attract the protection of rights. A first idea might be to draw the line in a *pragmatic* way: we

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<sup>27</sup> Raz, Human Rights Without Foundations

<sup>28</sup> Rainer Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach', 120 (2010) *Ethics* 711.

could say that only interests of, say, “fundamental” importance attract the protection of international human rights. But the problem with pragmatic approaches is precisely their pragmatic character, that is, the absence of principle. A second, more promising strategy would be to consider the existence of a *qualitative* difference between rights and mere interests. The most promising attempt in this direction has been made by James Griffin in his book *On Human Rights*. He argues that the threshold can be derived from the idea of personhood:

Human life is different from the life of other animals. We human beings have a conception of ourselves and of our past and future. We reflect and assess. We form pictures of what a good life would be ... And we try to realise these pictures. This is what we mean by a distinctively *human* existence ... And we value our status as human beings especially highly, often more highly than even our happiness. This status centres on our being agents – deliberating, assessing, choosing, and acting to make what we see as a good life for ourselves.

Human rights can then be seen as protections of our human standing or, as I shall put it, our personhood. And one can break down the notion of personhood into clearer components by breaking down the notion of agency. To be an agent, in the fullest sense of which we are capable, one must (first) choose one’s own path through life – that is, not be dominated or controlled by someone or something else (call it ‘autonomy’). ... [And] (third) others must not forcibly stop one from pursuing what one sees as a worthwhile life (call this ‘liberty’).<sup>29</sup>

Griffin tells us more about how demanding the right to liberty is:

[L]iberty applies to the final stage of agency, namely to the pursuit of one’s conception of a worthwhile life. By no means everything we aim at matters to that. Therefore, society will accept a person’s claim to the protection of liberty only if the claim meets the material constraint that what is at stake is indeed conceivable as mattering to whether or not we function as normative agents.<sup>30</sup>

Griffin’s idea is that “personhood” functions both as the basis of human rights and as a limitation on their scope: only those interests that are important for personhood are protected as human rights. However, this account does not work. Its failure is that the personhood approach does not offer a coherent way to delineate interests relevant for personhood from other interests. For Griffin, personhood requires autonomy and liberty (in my terminology, personal autonomy): basically, control over one’s life. But it requires only that kind of control over one’s life that is required by the value of personhood. This leaves open the question of what the test is for determining whether some instance of liberty (autonomy) is required for personhood. My suspicion is that it is simply “importance”. For example, Griffin explains that “the domain of liberty is limited to what is *major enough* to count as part of the pursuit of a worthwhile life”<sup>31</sup>. At another point, he defends a human right to gay marriage on the ground “of its *centrality* to characteristic human conceptions of a worthwhile life”.<sup>32</sup> Thus, it seems that the threshold of personhood simply refers back to a sliding scale of importance: an interest that is “major enough” or “central” will acquire the status of a human right. But such a sliding scale cannot, as explained above, do the moral work. The threshold would have to be between “not quite major enough” and “barely major enough” or “not quite central” and “barely central”. Then, under Griffin’s model, all that

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<sup>29</sup>James Griffin, *On Human Rights* (OUP 2008) at 32-33. Griffin’s second point, omitted in the quote, is about ‘minimum provision’ of resources and capabilities that it takes to be an agent.

<sup>30</sup>*Ibid* at 167.

<sup>31</sup>*Ibid* at 234 (emphasis added).

<sup>32</sup>*Ibid* at 163 (emphasis added).

separates an interest that is just below from one that is just above the threshold is a small difference in terms of importance or centrality. This small difference, however, cannot justify the great normative significance that for proponents of threshold models comes with one of them being a simple interest and the other a human right. I believe that this is a general problem of threshold theories that is not limited to Griffin's account.<sup>33</sup> If that is true, then the only possible conclusion is that the threshold requirement should be dropped and it should be acknowledged that the scope of international human rights, just as the scope of national constitutional rights, extends to *everything that is in the interest of a person's autonomy*. However, this being so, we must abandon the idea that by reducing the scope of interests protected as rights we can make sense of the wide-spread intuition that there is a distance between the moral demands of national constitutional rights and international human rights.

## 2. Lowering the standard of justification

The second structural possibility to construct a distance between national constitutional rights and international human rights is to relax the standard of justification. As explained above, under national constitutional rights, a policy limiting a right will be considered justified if it is reasonable (as opposed to correct). This means that to be constitutionally legitimate, the legislature does not have to find the best possible, or "one right", answer to the social problem it addresses; rather it acts legitimately if its answer is reasonable.

The importance of this point cannot be overstated. Much of the discussion about the justifiability of judicial review at the national level rests on the mistaken assumption that when courts adjudicate constitutional rights, they thereby remove the choice of policies from the democratically elected legislature.<sup>34</sup> This view is however at least an overstatement: courts do not remove choice as such from the legislature; they remove only the possibility to choose an unreasonable – disproportionate – policy. The choice between all possible reasonable – proportionate – policies remains with the legislature. When a court declares that a policy respects constitutional rights, it says nothing more or less than that the policy under consideration is reasonable; it does not pass judgment on whether it is correct (this is simply not the court's task). Conversely, where a court declares a policy a violation of constitutional rights, it decides that this particular policy is outside the scope of reasonable policies; but it leaves to the legislature the task of choosing a reasonable policy.

With this clarification in mind, let us turn to Dworkin's proposal as to how to delineate constitutional (political) from international human rights:

"We must ... insist that though people do have a political right to equal concern and respect on the right conception, they have a more fundamental, because more abstract, right. They have a right to be treated with the attitude that these debates presuppose and reflect – a right to be treated *as* a human being whose dignity fundamentally matters.

That more abstract right – the right to an attitude – is the basic human right. Government may respect that basic human right even when it fails to achieve a correct understanding of more concrete political rights ... We

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<sup>33</sup> For a similar view, cf. Joseph Raz, "Human Rights without Foundations", in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (2010), at 326; Dworkin, *Justice for Hedgehogs*, ...

<sup>34</sup> Jeremy Waldron, 'The Core of the Case Against Judicial Review', (2006) 115 *Yale Law Journal*, 1346 at 1386-1395.

ask: Can the laws and policies of a particular political community sensibly be interpreted as an attempt, even if finally a failed attempt, to respect the dignity of those in its power? Or must at least some of its laws and policies be understood as a rejection of those responsibilities, toward either its subjects at large or some group within them? The latter laws or policies violate a human right.

... The test ... cannot be satisfied simply by a nation's pronouncement of good faith. It is satisfied only when a government's overall behaviour is defensible under an intelligible, even if unconvincing, conception of what our two principles of human dignity require.<sup>35</sup>

As the above quote shows, Dworkin must believe that in the domain of constitutional (political) rights, legitimacy requires that government get it right, i.e. that it find the one right answer to the rights issue at hand. This can be contrasted with the domain of human rights which, according to Dworkin, require only that government act in good faith. As Dworkin explains, the good faith requirement is not a subjective but an objective test: it requires that the respective policy be defensible under an intelligible conception of what dignity requires. In light of this, I believe it is fair to Dworkin's intentions to equate "in good faith" with "reasonable": the function of the good faith requirement is to acknowledge a sphere of acceptable disagreement while nevertheless requiring that the policy at stake be objectively justifiable. This must in substance amount to a reasonableness standard: an unreasonable policy is not defensible as enacted in good faith or as intelligible, whereas a reasonable policy is defensible in this way.

Can we use Dworkin's idea to create a distance between national constitutional rights and international human rights under the global model? I believe that we cannot. Dworkin can create this distance in his theory only because the standard of justification in his account of constitutional (political) rights is 'correctness'. I cannot assess here whether this position is viable within Dworkin's theory of rights (I have my doubts). But on the assumption that it is, it is indeed a structural possibility for Dworkin to then relax the correctness standard which he uses for constitutional rights and adopt a reasonableness (good faith) standard for international human rights. By way of contrast, in the theory of constitutional rights which underlies the global model, the standard of review is already 'only' a reasonableness standard anyway; therefore any further relaxation of this standard would imply that international human rights have no objection to policies which affect people's rights and which are not even reasonable. 'Reasonable' means something like 'supported by adequate reasons'. It is implausible to hold that a policy which limits a person's human rights and which is not supported by adequate reasons nevertheless complies with human rights. In other words, we cannot go below the threshold of reasonableness, and given that this threshold is already employed by national constitutional rights, we cannot create a distance between national constitutional rights and international human rights by relaxing the standard of justification.

The above argument is directed at the relationship between national constitutional rights and international human rights. We can examine the same issue by contrasting constitutional legitimacy and national sovereignty. Remember Raz's claim, quoted above, that the two refer to different standards, with national sovereignty being wider than what he calls legitimate authority, and what I call constitutional legitimacy. Why is this so, for Raz?

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<sup>35</sup> Ronald Dworkin, *Justice for Hedgehogs*, 335-6 (emphasis in the original).

“As I see it, the core point, which is too complex to be dwelt upon here, is that much of the content of the moral principles which govern social relations and the structure of social organisation is determined by the contingent practices of different societies. Hence the principles which should govern international relations cannot just be a generalisation of the principles of justice which govern any individual society. How does this bear on the issue of state sovereignty? Directly it establishes a degree of variability between standards of justice and thereby variability in the precise content and scope of rights which apply in different political societies. This speaks for caution in giving outsiders a right to intervene in the affairs of other states. It also suggests the desirability of allowing political societies freedom from too close external scrutiny, to be free to develop their own rights-affecting practices.”<sup>36</sup>

By Raz’s own admission, this is only the sketch of an argument. In what follows, I will unpack and interpret the statement, and I will again replace Raz’s term of ‘legitimate authority’ with ‘constitutional legitimacy’; so what follows is the critique of a position which Raz presumably holds only partially. There is a close connection between constitutional legitimacy and “the principles of justice that govern any individual society”. But those principles of justice will vary from society to society. This is not so because of moral relativism (which Raz rightly rejects), or because whatever principles a society happens to accept make those principles just. Rather, it is because of what Raz calls a “benign social relativism”, according to which the principles of justice will be sensitive to social facts. Applied to the issue here, certain practices will have developed within a society, and the principles of justice which are applicable to that society will or at least may be sensitive to those practices. Hence it is not possible to simply take one society’s principles of justice and apply them to another society with different practices and structures; and given the close connection between justice and constitutional legitimacy, it is not possible to equate national sovereignty with any given society’s standards for constitutional legitimacy. In light of this, caution is required when assessing questions of justice from the outside, and no “too close external scrutiny” should be applied.

To illustrate this idea, let us take the example of the right to education, which Raz also considers in his paper, albeit in a different context. Let us say that in country A, people have a moral right against the state to be provided with education, but that in country B, people have no such moral right because, say, the social structures of that country are such that people can have a rewarding life without formal instruction, or because in that country education is provided by the family or clan and the state need not get involved. Thus, in country A, justice requires that the state provide education and in country B it does not. Thus, an international judge who is a citizen of country A and who is called upon to assess the human rights situation in country B could mistakenly believe that education is a human right (based on her experience at home); in order to avoid such mistakes she should adopt an attitude of caution, and additionally she should keep in mind the fact that societies need freedom to develop their own rights-affecting practices.

The first problem with this approach is the assumed link between constitutional legitimacy and justice. Constitutional legitimacy is not about securing justice. Rather, as explained above, it is about whether a policy is supported by adequate reasons: we may say, it is about whether a policy relies on a reasonable, as opposed to the one correct, conception of justice. In other words, a policy may be unjust but nevertheless constitutionally legitimate. This must be true because if constitutional legitimacy required justice, then there would be

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<sup>36</sup> Joseph Raz, ‘Human Rights without Foundations’, in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (2010), ...

no room for democratic disagreement about questions of justice – rather, only one, namely the one just, policy would be constitutionally legitimate; such an approach would be flatly incompatible with the value of democracy which requires the people or their representatives to engage in discussions and controversies about and ultimately hold a vote on what justice requires. This means that constitutional legitimacy leaves states a considerable room for manoeuvre: all it insists on is that a policy be a reasonable attempt at justice. From the point of constitutional legitimacy, states have an enormous leeway in working out which conception of justice works best for them, and they may take their structure of social relation, history, and social practices into account when doing so. There is no moral need, nor is there the moral possibility, to make this leeway even wider in the context of national sovereignty because doing so would imply awarding the dignifying label of “falling into the sphere of national sovereignty” to a policy which is not only unjust but which cannot even be defended as a reasonable attempt at justice. The pluralism and diversity which rightly ought to be cherished in the international arena must, to be morally defensible, be a diversity and pluralism of *reasonable* conceptions of justice, not one of unreasonable and therefore unjustifiable ones.

In light of this clarification, let us assess Raz’s two arguments about why sovereignty is wider than constitutional legitimacy. One of his points is that societies need freedom to develop their own rights-affecting practices, and that therefore international supervision ought not to be too intrusive. This argument is unconvincing: the freedom to develop one’s rights-affecting practices is surely valuable when used to develop rights-respecting practices. But what if a society uses it to develop rights-violating practices? Societies do indeed need freedom to develop their own practices, but the only freedom they need is to choose between different reasonable conceptions of justice, not the freedom to choose unreasonable ones; and, as pointed out above, policies based on reasonable conceptions of justice do not violate rights and remain within the sphere of national sovereignty.

Raz’s second point is that there are certain difficulties with outsiders assessing the requirements of justice in a given society. As a preliminary point, these difficulties are reduced but do not entirely go away when we replace ‘justice’ with ‘constitutional legitimacy’: they are reduced because it will often be easier, especially for an outsider, to assess whether a policy is reasonable than to assess whether it is correct; however, the problems still persist to an extent because the reasonableness of a policy will still be sensitive to local contingencies to some extent.

I believe that Raz has a valid point here, albeit one which leads him to draw an unattractive conclusion. Let us take the example of an international judge. It is true that an international judge cannot simply rely on the conception of constitutional legitimacy adopted in his home country and apply it to the society from which the case on his desk originates. Rather, he must ask the question of whether the policy at stake is legitimate under the standards of legitimacy of the society whose policy it is; and establishing this may on occasion be difficult or even impossible for him. However, the proper response to this problem is not to loosen the moral requirements of sovereignty but rather to acknowledge that sometimes an outsider’s empirical and/or normative knowledge is limited, and therefore to show a degree of deference towards the original decision-maker.

Dealing with this kind of uncertainty is the daily business of international courts such as the ECtHR, which has developed strategies and doctrines to do so satisfactorily. Its judgments usually contain long sections setting out the domestic context of the rights issue at stake; this enables the Court to assess whether the policy is justifiable within the respective domestic context. Furthermore and more importantly, the Court's doctrine of the *margin of appreciation* acknowledges and provides a way of dealing with the specific institutional limitations under which it, as an international court, operates. The classic statement of the margin of appreciation was set out in the famous *Handyside* case:

By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on [the question of whether a restriction of the right is necessary]. [...] [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context.

Consequently, Article 10 (2) leaves to the Contracting States a margin of appreciation. [...] Nevertheless, Article 10 (2) does not give the Contracting States an unlimited power of appreciation. The Court, which [...] is responsible for ensuring the observance of those States' engagements, is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision. (paras 48, 49)

The margin of appreciation doctrine enables the Court to defer to the national authorities of the respective member state in a situation where it has doubts about the justifiability of a policy but is simultaneously unable to convince itself of its unjustifiability (because of epistemic uncertainty). In such cases, the Court will often hold that the measure at stake lies within the margin of appreciation of the respective member state. It should be noted that the margin of appreciation doctrine is not only one of the cornerstones of European human rights law, but also one of the most difficult and controversial parts of it; and the Court is often rightly accused of taking recourse to it too lightly. So my goal here is not to wholeheartedly defend the Court's approach; rather it is to make the more limited point that there are indeed cases where the doctrine is rightly invoked because of epistemic uncertainty.

To give an example of a scenario where it is difficult and maybe impossible for the Court to establish the right outcome, let us consider the *Refah Party* case. Turkey banned the Refah Party which it considered extremist and a threat to Turkish democracy, in particular because of its right-wing Islamic agenda, which included, among other things, a proposal to introduce aspects of Sharia law. In a nutshell, one of the important issues at stake was whether Turkey was justified in taking a tough stance towards religious, in particular Islamic, parties, in order to protect its commitment to what has been labelled "militant secularism", which in turn was regarded by Turkey as a cornerstone of protecting its democracy from being undermined and eventually, to put it bluntly, slipping into an Islamic dictatorship. I regard this case as a paradigm example of the scenario Raz must have in mind, where it is extremely difficult if not impossible for an outsider such as an international judge to decide whether Turkey's action of dissolving the Refah party was justified, and the reason for this difficulty lies in the fact that normative considerations about the legitimacy of banning a political party are inextricably bound up with questions relating to Turkey's history, culture, and politics, which make it difficult if not impossible for an outsider to resolve the issue satisfactorily. So, to repeat, Raz has a point. But if I am given the task to resolve a mathematical puzzle which is too difficult for me, the response to my personal intellectual limitations cannot be to relax the standards of mathematical truth. Similarly, where an

international court is unable to determine whether a country's policy reflects a reasonable conception of justice, we should not respond by relaxing the moral requirements of sovereignty. Rather, we should acknowledge that the problem of epistemic uncertainty may on occasion lead international courts to defer to the respective national authorities – problematic and unsatisfactory as this may be –, and at the same time insist that sovereignty can be invoked only in support of justifiable (reasonable) policies.

### 3. Conclusion

Both strategies of creating a distance between national constitutional rights and constitutional legitimacy on the one hand and international human rights and national sovereignty on the other failed. To the extent that constitutional rights are “maximalist” in character by protecting all (autonomy) interests as rights, this cannot be abandoned without introducing arbitrariness, and to the extent that constitutional rights are minimalist by insisting not on a correctness but only on a reasonableness standard of justification, a further lowering of the standard is neither necessary nor coherently possible. It follows that national constitutional rights and constitutional legitimacy on the one hand and international human rights and national sovereignty on the other have the same moral structure. The next section will flesh out some of the implications of this view.

## IV. Implications

### 1. An alternative explanation of international human rights minimalism, and its limits

Many scholars believe that minimalism – be it an ‘absolute’ minimalism or a ‘relative’ minimalism (minimalism of international human rights in relation to national constitutional law) – is built into the moral structure of international human rights. However, the only defensible kind of minimalism is *pragmatic* and therefore *external* to the moral structure of international human rights. There are good reasons why much of international human rights *practice* focuses on preventing particularly egregious violations of human rights. But those reasons have nothing to do with the moral structure of international human rights; they simply reflect judgments about priorities.

While it is plausible to defend some form of minimalism on pragmatic grounds, we would however paint a one-sided picture of international human rights if we argued that all of it *is* or *ought to be* minimalist for pragmatic reasons. Pragmatic minimalism can be justified only to the extent that it is politically impossible or excessively costly to protect international human rights comprehensively. In other words, we should work towards a state of affairs where international human rights are comprehensively protected, and where it is not necessary to limit their practical reach to the prevention of only the worst human rights violations. In this sense the theory of international human rights proposed here is partly *aspirational*.

I say “partly” because there exists already one instance of a legal institutionalisation of human rights at the international level which broadly reflects the model I advocate: the European Convention on Human Rights. Approaching the jurisprudence of the European

Court of Human Rights with the ideas of human rights minimalism in mind would be futile: it is about as maximalist in character as even the most expansive system of national constitutional rights. First, we can identify rights inflation in the jurisprudence of the ECtHR: the Court tends to read even relatively trivial interests into the Convention, most often into Article 8 (the right to respect for private and family life). To give just one example, in a case involving residents near Heathrow airport complaining about the noise caused by night flights, the Court held that Article 8 also covers the right not to be affected by aircraft noise<sup>37</sup> – dismissively dubbed “the human right to sleep well”<sup>38</sup> by George Letsas. Second, the Court protects negative as well as positive obligations – in fact, it has more or less dropped the distinction between the two.<sup>39</sup> (It admittedly does not, at least not comprehensively, protect socio-economic rights, which were deliberately left out of the Convention.) Third, the Court applies the proportionality test and, by and large, has no scruples about declaring a measure of a member state disproportionate and therefore in violation of human rights. To give, again, just one example: the Court recently ruled against the United Kingdom for failing to protect the right of an employee of British Airways to openly wear a small cross during work, arguing that BA’s interest in maintaining a certain corporate image was outweighed by the applicant’s right to manifest her religion.<sup>40</sup> While a comprehensive analysis of the Court’s jurisprudence is beyond the scope of this paper, it is fair to say that its approach to human rights is structurally extremely close to that of national constitutional courts. This being so, it cannot be argued that the model of international human rights which I propose in this paper cannot work in practice. It does, by and large, work in practice, namely in the member states of the Council of Europe, and not only does it work *somehow*; rather, the jurisprudence of the Court in charge is widely and rightly regarded as the poster child of international human rights law.

## 2. What’s the point of international human rights law?

If, as I argue, the moral structures of national constitutional rights and international human rights are identical and if we should work towards a state of affairs where the international order protects fundamental rights as well as some national constitutional courts already do, then this leads to the question of the point of this additional layer of rights protection. At first glance, an institutionalised mechanism for the protection of international human rights which relies on the same standards as national constitutional courts may seem odd and an unnecessary complication and duplication of responsibilities.

There is, however, nothing suspicious about the fact that under the model advocated here, national constitutional courts and international human rights courts apply the same standards of review. The international mechanisms for the protection of human rights will only kick in when something has gone wrong at the national level. Thus, if one were to adopt a minimalist approach to international human rights, then the international actors would only become active after the national level has failed to deliver even this minimum standard. In the model advocated here, the international actors would interfere when the

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<sup>37</sup> Hatton v. U.K.

<sup>38</sup> Letsas

<sup>39</sup> Add example.

<sup>40</sup> Eweida v. U.K.

respective national constitutional court made a mistake and accepted a policy as complying with the requirements of constitutional legitimacy (which are identical to those of national sovereignty) when in reality it violated them. Thus, the point of international human rights law is to *police the boundaries of a state's sovereignty*.

A further question is whether there is a moral obligation on states to create legally institutionalised mechanisms for the protection of international human rights. I believe there are, and I will focus on two moral reasons for states to sign up for a system of international human rights protection. The first centres on each state's duty to ensure and improve its own legitimacy in relation to its citizens.<sup>41</sup> One important aspect of its legitimacy is its respect for its citizens' fundamental rights. There are good outcome-related reasons to hold that an adequate institutionalisation of fundamental rights will provide not only a national level of constitutional protection but include an additional international layer as well.<sup>42</sup> First, the international layer may stabilise a country's long-term commitment to the values of democracy, the rule of law, and fundamental rights, and may make it harder for forces seeking to undermine or destroy its democratic culture to succeed. In a national context, the integrity of a constitutional court is most under threat when the governing parties seek to undermine its work, for example through the appointment of judges who support the government's ideology, the tinkering with procedural rules, or constitutional amendments. While it is true that international courts, too, operate in an environment which involves political pressure (this is clearly visible in the case of the ECtHR which suspiciously often backtracks from its own jurisprudence when faced with resistance from national governments), it will be impossible for any one national government gone astray and acting in isolation to do serious damage to an international court. Second and independently, there is reason to assume that international courts will sometimes reach better outcomes compared to national constitutional courts. National constitutional courts and international courts have their respective weaknesses and strengths. Among the strengths of a well-designed national constitutional court is that its judges will have more adequate ways of acquiring the relevant empirical knowledge on which the correct outcome of legal cases, including human rights cases, often depends, and that they will have a deeper understanding of the principles of justice applicable to their respective society. An international court will find it more difficult to access the relevant empirical data; and, as discussed above, will also on occasion find it more difficult to assess the justifiability of a state's practices from the outside. In the case of the European Court of Human Rights, this often leads the Court to adopt a relatively high degree of deference towards the respective national authorities, which potentially leads to an under-protection of human rights. There are however also important ways in which an international court may be better placed to engage in judicial review: the human mind often leads us to trust what we are familiar with, and therefore in the case of a national constitutional court, the judges' intimate knowledge of their legal order may on occasion preclude a fresh and unbiased assessment of the law at stake. In such situations, an international court, as a body mostly made up of judges from

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<sup>41</sup> On a state's obligation to improve its own legitimacy see Dworkin, 'A New Philosophy for International Law', (2013) *Philosophy & Public Affairs* 1, 17.

<sup>42</sup> I leave open the further question of whether there are *outcome-independent* reasons (that is, reasons which do not rest on the assumed ability of international courts to improve the overall level of rights protection) which necessitate the existence of a right to a hearing before an *international* court. For the national context, such a claim has been made by Alon Harel, ... and Mattias Kumm, ...

other jurisdictions, may be more adequate and in a better position, relatively speaking, to identify certain pathologies of the politics and policies of a national community.

The second reason for joining an international system for the protection of human rights can be derived from a state's obligations to people living *in other states* and can be explained in the following way. Human rights flow from a fundamental status of human beings which they possess simply by virtue of their humanity; we may call this status 'human dignity'. Violations of human dignity are a moral concern for everyone; this proposition is the basis of the view, assumed by this paper, that the sovereignty defence does not hold in the case of a violation of human rights: a violating state cannot claim that its violation of human rights is not the business of other states. Thus, every state is under a moral obligation *to take adequate steps* in the international arena to ensure that the human dignity of people living in other states is respected. One important way of discharging this moral obligation is to participate in international systems of human rights protection that are likely to lead to an improvement in human rights compliance *in those states*. Thus, even a country whose democratic and rights-respecting culture is of such a high quality that in terms of improving its level of rights protection at home it has nothing to gain from joining an international system of rights protection will be under a moral obligation to participate if by doing so it contributes to a more effective protection of human rights abroad. For example, the current debate in the United Kingdom about whether the country should leave the Council of Europe centres almost exclusively on the question of what the UK may get out of staying or leaving, and usually neglects the fact that whatever the answer to that question may be, the more important consideration relates to the UK's obligation to contribute to making the ECHR a success across Europe and improving human rights compliance in other member states with a less impressive democratic and rights-respecting culture than that of the UK.

Which steps are adequate and therefore morally required will of course be a difficult question, and will crucially involve strategic considerations as to the likely success of the scheme under consideration in improving human rights compliance in the long run. Assume that the measure under consideration is a regional human rights treaty which includes the right of individuals to petition an international court with the final authority on questions of interpretation – in other words, a scheme similar to the ECHR. Where the international situation is such that it can be expected that the newly created court will, on the whole, function well and improve the compliance of the participating states with the demands of human dignity, a state will be under an obligation to participate in this scheme even if its rights situation at home does not need improvement and can be considered entirely stable even in the long run. It owes this duty not to its own citizens but to the people of other states whose dignity is not currently adequately respected, or who live in states whose democratic and rights-respecting culture is not sufficiently mature and needs the stabilising effect of this treaty in order to keep the country on a dignity-respecting course. By way of contrast, where the international situation is such that it could be expected that the treaty under consideration would not contribute to more respect for dignity in the respective region – for example because one would have to expect that many of the participating countries would send incompetent or corrupt judges to sit on the new court, or because there is no sufficient prospect of the new court's judgments being obeyed – no such obligation would arise. (However, in such a situation, other obligations would of course exist, the crucial question being which steps are likely to improve compliance with human

rights over time.) Thus, importantly, my argument is not that whatever the state of the world or the respective region, international human rights courts ought to be set up everywhere. Such courts are only one of a range of potential measures to stabilise a region's respect for human rights in the long run, and they should only be used where there is a reasonable chance of them succeeding with their work. That said, where the conditions are sufficiently favourable, there is an obligation to introduce them, for the reasons given above.

The above argument claims that states have an *obligation* to take adequate steps to protect human rights inside as well as outside their own borders. The point can be pushed further: I will claim that the creation of an international court of human rights will, under certain conditions, itself be a matter of human rights. The argument to this effect proceeds in two steps and is structurally similar to, though substantively different from, establishing the existence of a moral right under Raz's interest theory of rights. Raz has famously argued that a right exists where a person's interest grounds duties in others. In a structurally parallel way, I claim that a person has a right if someone else is under an obligation which is grounded in that person's status; and this right will be a human right if the status under consideration is the status of human dignity. Thus, a person has a human right to the creation of an international human rights court if states are under an obligation to create such an institutional protection of human rights and if this obligation flows from that person's human dignity. The obligation to create an international human rights court, where it exists, is, as argued above, grounded in the status of human dignity of especially those people whose human rights are at risk of not being adequately respected in their home states in the present or the future. This establishes the possibility of the existence of a human right to the creation of an international court of human rights.

## **V. Conclusion**

This paper has demonstrated that international human rights have the same moral structure as national constitutional rights and, in particular, that the wide-spread view that international human rights are more minimalist than national constitutional rights cannot be maintained. As has been shown, international human rights minimalism is neither coherently possible, nor is it desirable in the interests of a reasonable pluralism and diversity at the international level. It follows that minimalism can, if at all, only be justified pragmatically, as a necessary setting of priorities in order to tackle at least the most urgent human rights problems. But we should try to limit the need for this pragmatism, and the aspiration expressed by the theory of international human rights endorsed here is that of a world where the same level of rights protection that today already exists at the national level in many countries is also endorsed and effectively institutionalised at the international level.

## **On The Monist Structure of Legal Obligations**

### **A. The Workings of Constitutional Pluralism (CP)**

1. **What is it:** Constitutional pluralism is *the idea that state practices realize a scheme of constitutional principles, which can legitimize the legal obligations generated by those practices. Whilst the scheme remains the same, its realization is not monotonic (monist or dualist): sometimes it is realized better through supranational institutions and other times by domestic ones. Yet the realisation is structured by the same scheme of principle itself* (Kumm, 2012).

CP rejects the idea that monist or dualist interpretations of state practices with respect to international law are equally plausible or, at least the idea, that there is no further level for adjudicating between them. In the standard pluralist understanding there is no way to say whether (or when) monism or dualism should take precedence: the standard understanding endorses a pluralism that is unprincipled or random (e.g. Kadi in the first instance court and the ECJ). The standard picture amounts to a *deep* pluralism, which features at the very grounds of legal obligation (Kumm 2012).

Instead CP proposes that all state practices, at any level, in order to make sense as legitimate sources of legal obligation, must be read in the light of the same set of substantive (moral principles). These principles determine when a monist or dualist reading of supranational law is the appropriate one – appropriate is the reading that ‘realizes’ the relevant principles in the ‘best’ manner (‘best’ in this context may require for its determination an act of balancing). Thus, ‘monism’ and ‘dualism’ succeed each other in a principled manner. As a result the pluralism generated is shallow; it relates to the concrete manifestations of a set of substantive principles.

**2. Some problems.** Despite its effort to escape statism, CP remains wedded to the idea of the state: only state action is salient in triggering off the appropriate set of constitutional principles. This new twist on statism gives rise to two possible objections:

- a. The objection from the pluralism of principles: how come that different levels/bodies of international law realize the same principles of political morality? This would seem rather unlikely, given that the idea that states bound themselves through consent is ingrained in any statist understanding of legal obligation.
- b. A second objection comes from the range of principles that CP purports to capture: in most versions it leaves out principles of distributive justice (Kumm). This point can be postponed for present purposes, however it should not be forgotten.

Let me flesh out point a):

The objection to CP on behalf of the statist model would run something like this: states do two very different things when they engage in coercive practices domestically and when they engage in practices of consent at the supra-national level. It is only the former that require appeal to substantive moral principles (in order to generate

genuine obligations for the citizens-coerced); in the latter, all states do is to conclude agreements with an eye to furthering their goals (this is even accepted by non-statists like Nagel 2005).

According to the objection, when the BVerfG says ‘Solange...’ it does not mean; ‘I am dissenting because the German legal practice realizes better the common principles of Europe for all of us’ – it simply states: ‘I am dissenting because I am evoking the principles that best justify my practice vis-à-vis the subjects of Germany’.

The objection stands even if we interpret the state practice of consent as being itself *coercive*: again here, because it passes through<sup>1</sup> the state, the practice will be coercive only vis-à-vis the subjects of that state: In this case also, the scope of ‘solange’ of the BVerfG would be restricted to principles that underpin German domestic practices and capture German citizens only, not everyone in Europe.

So the question persists: How come it is the same scheme of principle that governs domestic and supranational state practice? It would remain possible, in other words, that obligations on states rest on different principles at different levels of state practice, given that all that grounds obligation are the sayings and doings of state officials.

## **B. The Workings of Principled Monism (PM)**

I propose to spell out in more detail the reason why state practices, at any level, have a ‘moral’ impact, along the lines of triggering off the kind of substantive principles which CP argues they do (plus those principles it argues they don’t!).

One fruitful way of doing that is to focus on the question about the grounds of legal obligation. Approaching our topic from that angle offers the opportunity to establish a connection between state action and the morality of autonomy, which arguably provides the background against which facts of state practice acquire normative significance *qua* obligation-imposing norms. In this case, the moral impact of state practices is explained as the impact exerted by the coercive practices of states on the autonomous agency of those who stand in the receiving end. Autonomy is that which rationally determines facts about practices (i.e. non-normative facts) as having normative significance (Greenberg 2004).

A bridging argument will be offered, which will show that state coercion is not special for triggering off moral reasons (principles). Focusing on what precisely is coercive about state practice, I will suggest that other practices/contexts of interaction between agents are capable also of triggering off the same moral principles which ground obligations between the agents involved. Importantly, I shall claim, coercive relations are not exhausted by a specific type of fact (facts about state practice) but rather involve a distinct structure of demanding of someone to do something for the wrong kind of reason. I will call this structural account of coercion *the normative conception of coercion or NCC* (part C of the paper).

In effect, the proposed line of argument will aim to ‘reduce’ facts about state practice to normative contents that impose genuine obligations (reasons). Lifting the ‘veil’ of

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<sup>1</sup> More accurately: it is still state action that determines to what extent instances of consent count as coercion.

statism will encourage us to stop counting state action as bedrock condition for the existence of legal obligation. This ‘deconstruction’ will go hand in hand with a fresh understanding of legal obligation: On the proposed understanding legal obligation is of the kind that pertains between agents who engage in joint projects/activities. The ‘density’ of such contexts of interaction between agents is on a par with that of domestic legal practices. However, their *scope* extends beyond any single legal order (domestic or international).<sup>2</sup>

### **C. Two Conceptions of Coercion**

In this part I focus on the understanding of the role of coercion that underwrites CP, which in many ways is responsible for obfuscating the link between coercive relations and principles of political morality.

There is a venerable tradition in legal and political philosophy which argues that legal institutions (institutions of basic structure more generally) generate genuine obligations only to the extent to which they coerce citizens legitimately. In Dworkin’s words law is about the legitimate exercise of institutional coercion. Call this the standard picture of coercion.

The standard picture assumes that coercion triggers off principles of political morality in virtue of its purporting to direct the action of autonomous agents: those can be properly directed iff the coercive direction ‘relies’ on sound/correct principles which govern independently the relation between the agents. Along these lines, there exists a legal obligation only if coercion ‘activates’ correct principles.

Now a surprising conclusion of this line of thought is that absent state coercion somehow the principles which govern the relations between agents remain inapplicable or, to use a figurative expression, ‘silent’. This generates a paradox: for all along, under the standard picture, coercive imposition by the state was not grounding the relevant principles. It was merely ‘triggering off’ or ‘activating’ them. Accordingly, one could plausibly assume that the relevant principles were grounded elsewhere – or in different ways.

But the assumption, if true, generates a fresh worry: in virtue of what are these principles supposed to enter the lives of the relevant agents? How are they supposed to become salient in their relations in the absence of state coercion? In other words even if state coercion is not necessary for grounding the said principles, it might still remain necessary for making them salient. Were that true, the absence of the state would be crucial for the existence of those principles in our lives even though not necessary for their existence *simpliciter* (i.e. in determining existence conditions for those principles).

I will suggest that state coercion is not necessary either for the grounding of the obligations that pertain to our interaction as persons or for the salience of those principals to our particular interactions. The upshot of this line of argument will be

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<sup>2</sup> At this juncture there exists a surprising and potentially refreshing parallel to be drawn between debates in legal philosophy, concerning the grounds of legal obligation, and those debates in political philosophy that seek to specify the site and scope of the basic structure as a condition for distributive justice.

the claim that there exist legal obligations antecedently of whether states coerce us. For, I will claim, coercion is on the cards independently of any facts about the state.

Let me first go in some more detail into the workings of state coercion. I shall assume, together with the standard picture theorist, that the principles that ground legal obligation do not depend, for their own grounding on institutional coercive facts. Accordingly I will focus primarily on the role of facts of coercion in making those principles salient to our lives. I will claim that salience is not grounded in any intrinsic properties of state coercion, but instead in the manner in which state coercion directs the actions of persons (the ‘how’ question). In this respect I will put forward a *structural account of coercion* which will be independent of state institutions. This conception of coercion, for which I will coin the term *Normative Conception of Coercion (NCC)*, will demonstrate that there exist instances of directing action which are coercive independently (or on the side) of instances of state coercion.

Let us first think through how the state coerces in the standard picture of coercion. Uncontroversially, state directives take the form:

D: A, otherwise S

Two cases may be distinguished:

a) Good case scenario (legitimate action-direction): A is backed by a sound principle (or, is the instantiation of a valid principle). In that case if an agent does not comply with D then S follows non-problematically. Notice here, that all is really happening is to connect a sound reason for action (or incentive) A to an appropriate consequence C. This can be the case also in many other contexts outside instances of state coercion.

b) Bad case scenario (illegitimate action-direction): there is no sound reason that backs D. Now we get a case of aligning a ‘bad’ reason (incentive) with what may or may not be an appropriate consequence C. The standard account of coercion would want to say that this is an instance of illegitimate coercion, on the grounds that the salient principles governing the relevant domain of action do not generate good reasons for the imposition of the consequence S (assume here for a moment that state sanctions are the right way for directing actions, other things being equal).<sup>3</sup>

In both scenarios, the standard theorist would want to claim that it is state imposition that makes the right principles (i.e. those principles that govern the relevant domain of action) salient. But why should state imposition be privileged in playing that role? I think that *any other* instance in which an incongruence between reasons (incentives) and direction (or consequences) occurs, is capable of making salient the principles that apply to the domain. I would like to call these instances coercive also, and attribute to them a common structure (cf with Burra 2013). Take for example an instance of blackmail (arguably paradigmatic of coercion):

B: If you don’t sleep with me (A), I will fire you (S)

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<sup>3</sup> I will return to this point later.

Here too we have a case in which the wrong kind of reason/incentive is aligned with a consequence which in itself might not be wrongful (firing someone is appropriate if they consistently fail to turn up for work). Plausibly, the structure of coercion is exactly about that: namely, about aligning the wrong kind of reason/incentive with a demand (which may otherwise be appropriate). When we do that, we are not generating sound reasons for the subject whose compliance we demand. In the blackmail example, this is easily illustrated if we re-write **B** as the reason the coercer proposes to be governing the domain of her interaction with the coercee: **R'**: "There is a reason to fire someone if they refuse to sleep with you". But this is like carving the normative domain in the wrong joints: there is no reason such as **R'** because **R'** is gerrymandered. In conclusion, it is precisely this structure and not any fact about state enforcement that is coercive.

Now we can see clearer how the structure of coercion can account for salience. What renders certain principles salient with respect to any instance of action-direction (demand) is a constraint that we avoid replicating the structure of coercion. In other words that we avoid aligning incentives with demands in a manner that fails to 'refer' to a sound reason governing the relevant domain of action (in our blackmail example that domain would be labor relations).

Here is a more formal expression of the said constraint:

C: A should not (do y, believe that her y'ing will lead B to x and that this fact is a reason to y and fail to believe with justification that A's y'ing will facilitate B's coming to x on the basis of her recognition of reasons to x that she has independently of A's y'ing).<sup>4</sup>

Several implications of this view are worth examining:

1. Coercion is not wrongful in itself. The structural account merely says that when coercion is on the cards, wrongfulness is determined by the principles which govern the relevant domain of action (in more technical language, the structural account is buck-passing).
2. The structural account shows that coercion is *relational*. This relates to two further features: i) coercion requires that the parties involved are engaged in some reciprocal or joint activity (if I am not employed by you, you are not coercing me by threatening to fire me); b) relatedly, the salient principles of the domain that determine the wrongfulness of the situation are joint obligations to which both parties are subjected.

What does all this tell us about law?

First off, that state enforcement is not necessary for coercion. On the structural account (N.C.C.) any instance of directing the actions of others by aligning the wrong kind of incentive with a consequence/demand may count as coercive (see Kadi).

Second, the principles that determine the wrongfulness of the coercive situation are joint obligations of the kind that applies to all parties that partake of the coercive

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<sup>4</sup> A.J. Julius 'Getting People to do Things', MS version 20 April 2009 (in file with author) 7-9.

structure. [Further: these principles have enforceability as part of their content; this means: they prohibit/prescribe some conduct *enforceably* – which concretely means that the coerced has an enforceable claim that the coercer be made to do or refrain from an action. Notice here that enforceability does not imply enforcement.] I call these principles enforceable joint obligations of basic structure (E-JOBS), but would also be happy to call them legal obligations. My conjecture is that enforceability is what legality is about (I expand on this point in section d.1, below).

Finally, a word on enforcement, or the actual possibility to impose obligations on those who fail to comply. In this context we need to rely on institutions (e.g. courts), which ensure that obligations be not enforced unilaterally by agents. For, unilateral instances of enforcement would anew be replicating the structure of coercion as described earlier. Such institutions are under a requirement that they enforce obligations with equal respect (I expand on this point in section d.2, below).

## D. Legal Obligation beyond the State

In this section I adumbrate the

### d.1 Reasons that satisfy <C>:

- Obligations of basic structure (rather than legal obligations).
- They are joint obligations: when I realize R – I realize it for everyone.
- Such obligations are enforceable obligations ('everyone ought to Fi enforceably'). [Enforceability here does not presuppose an actual possibility of enforcement. It is part of the content of the obligation. As such it differentiates this kind of obligation from other kinds of obligations: like strictly moral, etc].
- Contrast between lying *simpliciter* and lying within an exchange.
- In sum these obligations are Enforceable Joint Obligations of Basic Structure (EJOBS).
- *Reciprocracy (or proto-democracy): the existence of EJOBS indicates that there is a logical space of reciprocal reasons, which is conceptually distinct/prior from democratic institutions – plausibly, democratically enacted obligations will be a 'good case' of instantiation of EJOBS*
- *for it succeeds in treating everyone with equal respect by realizing joint principles for all.*
- Any practice (e.g. at global level) that operationalizes EJOBS creates an obligation for every participant to 'comply with the practice or rationally persuade others to change the practice' (AJ Julius, 'Public Transit').
- (Cf with institutionalized civil disobedience and conscientious objection (Kumm 2012)).
- Any such practice is likely to generate more stable EJOBS when it treats the parties to the scheme of EJOBS with equal respect.

### d. 2 Enforcement

- What is (actually) enforced is the obligation to comply with the/some practice that realizes EJOBS.
- (Actual) enforcement – being itself an instance of a-d-a – is subject to constraint <C>: it must itself be a practice that treats the participants in a manner that is appropriate to their status as subjects of a practice of EJOBS. This requires here, that the practice of enforcement: 1) relies on a practice of

EJOBS and 2) treats participants with equal respect (by enforcing a consistent scheme of obligations to every participant).

- Usually in the national context the practice of EJOBS and the practice of enforcement overlap – but at global level they often come apart. Here the search for the ‘appropriate’ practice takes the form of contestation between different practices that operationalize the same principle.
- When multiple practices of EJOBS are in play (global level), the act of adjudication/enforcement opens up the possibility of rationally demonstrating which amongst them realizes ‘best’ the relevant EJOBS.
- Democratic practices have a presumption of ‘correctness’ (realizing EJOBS that meet constraint <C>).

<b>SCHEMA: A-D-A -&gt; (C) -&gt; EJOBS -&gt; Enforcement</b>
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### **E. The Big Picture of the Account**

- Focus on the grounds of legal obligation
- What grounds obligation does not depend on any particular type of institutional fact (state based) – the Normative Conception of Coercion.
- A unified scheme of grounds – a unified scheme of obligations - the iceberg metaphor.
- A distinction between grounding and enforcement.
- ‘Monism’ at the level of grounding; ‘pluralism’ at the level of enforcement.
- No ‘global state’ just ‘global’ obligations.
- Existing institutional arrangements handle enforcement; obligation to develop appropriate institutions of enforcement.

#### Literature

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# Global Constitutionalism and the Cosmopolitan State: An Integrated Conception of Public Law

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(FORTHCOMING: INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, FALL 2013)

## ABSTRACT

If the point of constitutionalism is to define the legal framework within which collective self-government can legitimately take place, constitutionalism has to take a cosmopolitan turn: It has to occupy itself with the global legitimacy conditions for the exercise of state sovereignty. Contrary to widely made implicit assumptions in constitutional theory and practice, constitutional legitimacy is not self-standing. Whether a national constitution and the political practices authorized by it are legitimate does not depend only on the appropriate democratic quality and rights respecting nature of domestic legal practices. Instead, national constitutional legitimacy depends, in part, on how the national constitution is integrated into and relates to the wider legal and political world. The drawing of state boundaries and the pursuit of national policies generates justice sensitive externalities that national law, no matter how democratic, can not claim legitimate authority to assess. It is the point and purpose of international law to authoritatively address problems of justice-sensitive externalities of state policies. In this way international law helps create the conditions and defines the domain over which states can legitimately claim sovereignty. States have a standing duty to help create and sustain an international legal system that is equipped to fulfil that function. Only a cosmopolitan state - a state that incorporates and reflects in its constitutional structure and foreign policy the global legitimacy conditions for claims to sovereignty – is a legitimate state.

## THE NATURE OF THE DEBATE ABOUT CONSTITUTIONALISM

It has become widespread for international lawyers to describe international law as a whole<sup>1</sup> or specific international regimes<sup>2</sup> as a constitutional system. Yet, the use of constitutional language for describing and assessing legal and political practices beyond the state remains a subject of considerable dispute.<sup>3</sup> Even though the tone and commitments encountered in these debates suggest that something important is at stake, it is not entirely

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<sup>1</sup> For representative examples, see generally JAN KLABBERS ET AL., *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* (2009) (examining to what extent the international legal system has constitutional features comparable to those found in national law); Andreas L. Paulus, *The International Legal System as a Constitution*, in *RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE* 69 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009) [hereinafter *RULING THE WORLD?*] (exploring constitutionalization of the international legal system). For a brief history of constitutional language in international law, see Bardo Fassbender, *'We the Peoples of the United Nations': Constituent Power and Constitutional Form in International Law*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 269, 270-73 (Martin Loughlin & Neil Walker eds., 2007).

<sup>2</sup> The focus of the discussions has been on the United Nations, the European Union, the World Trade Organization and the international human rights regime. See *RULING THE WORLD?*, *supra* note 1, at 113-232.

<sup>3</sup> See generally NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* (2010) (exploring the limitations of the constitutionalist approach to the "postnational" legal order); PETER L. LINDSETH, *POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION-STATE* (2010) (arguing that the supranational framework of the European Union has failed to achieve constitutional legitimacy in its own right).

clear what the stakes in the debates about the “magic C-word”<sup>4</sup> are. What is this debate about? How should we understand the intensity and commitment characteristically associated with the different positions in this debate?

The disagreement is clearly not empirical. Scholars generally agree about the relevant facts. Nobody doubts that international law evolved considerably after World War II and again after the end of the Cold War. It is not disputed that there are features of international law that bear some resemblance to features associated with domestic constitutional law. In part, these are formal. There are elements of a hierarchy of norms in international law. They range from *ius cogens* norms – peremptory norms that states may not deviate from even by Treaty - to Article 103 of the U.N. Charter, establishing the priority of the U.N. Charter over other agreements. In part, they are functional: there are multilateral treaties that serve as regime-specific constitutional charters for institutionally complex transnational governance practices. And, in part, they are substantive: human rights obligations have long pierced the veil of sovereignty that kept the relationship between the state and its citizens from the purview of international law. The individual has long emerged as a subject of rights and obligations under international law. There are international human rights courts established by treaties that authorize individuals to vindicate their rights before international courts. International law even criminalizes certain types of particularly serious human rights violations. These are features more characteristic of modern constitutional systems than of the traditional paradigm of international law as the law among states.

Constitutional skeptics do not deny that international law exhibits these features, but they insist that this does not justify describing international law in constitutional terms.<sup>5</sup>

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<sup>4</sup> See Eric Stein, *The Magic of the C-Word*, 18 EUSA REV. 1, 1-5 (2005).

<sup>5</sup> Among the most sophisticated skeptics is Dieter Grimm, *The Achievement of Constitutionalism and its Prospects in a Changed World*, in *THE TWILIGHT OF CONSTITUTIONALISM?* 3 (Petra Dobner & Martin Loughlin eds., 2010). Unlike Grimm, most skeptics are not scholars focused on thinking hard about international law and its theoretical foundations, but constitutional scholars comfortably inhabiting the conceptual and normative domestic constitutional universe in which international law operates primarily as an irritation, perhaps alarming, but probably best ignored.

Constitutionalism, they insist, is not just connected to certain formalities, functions, or substantive elements. It is connected to something more ambitious. In the tradition of the French and American Revolutions, it is a normatively ambitious project of establishing legitimate authority among free and equals. A trinitarian commitment to human rights, democracy, and the rule of law—we might say—is the dogma of the constitutionalist faith. Legitimate authority in this tradition is widely believed to require “We the People” as the constituent power constituting and limiting public power by way of establishing a constitution that is the supreme law of the land. Constitutionalism is about establishing legitimate supreme authority for free and equals engaged in a collective exercise of self-government. There is no genuine political community on the global level capable of establishing a democratic system of constitutional self-government. And, given the absence of a sovereign state on the global level, the institutional infrastructure that could make such a project effective is also lacking. So, unless someone is engaged in political advocacy for a global constitutional state—a normatively contestable and probably practically futile endeavor for the time being—it is misleading to use the language of constitutionalism to describe international law.

Superficially, there appears to be an easy way to resolve this debate. If this were a mere debate about the use of words, we might simply distinguish between Big C and Small c constitutionalism. Big C constitutionalism—constitutionalism on the domestic level, involving “We the People” establishing a constitutional framework of self-government claiming supreme authority within the framework of the sovereign state—does not exist beyond the state. Small c constitutionalism on the other hand—legal practices sharing some structural features of Big C constitutionalism, but less centralized, more fragmented, imagined without reference to either “We the People” or a sovereign state—can and does exist on the international level. Once such a clarification is made, is there anything more to be said?

But of course this way of resolving the issue will not satisfy either side. Big C constitutionalists are skeptical about the claims of legitimacy that Small c constitutionalists are implicitly making when they describe international law in constitutional terms. They believe that constitutional rhetoric is used to cover up what they see as a significant normative problem with recent tendencies of international law: the increasing divorce of international law from the legitimating anchor of state consent. Think of the spreading and increasing power of international institutions, the softening up of the requirements of state practice for the identification of customary international law, the emerging of a plethora of courts and tribunals with the jurisdiction to adjudicate questions of international law, and the increasing tendency of international human rights law to circumscribe how states should relate to their citizens. It appears as if the generation and interpretation of international law is increasingly taken away from the control of states. States are more and more likely to find themselves subject to international legal obligations they have not specifically consented to, and many of those obligations concern regulatory issues or rights questions traditionally addressed only by domestic institutions. For Big C constitutionalists this is a problem, because they believe that the taming of law and politics by way of national constitutional procedures and constraints constitutes an achievement that is now in the process of unravelling,<sup>6</sup> as international public authority<sup>7</sup> is increasingly exercised outside of the state. The act of state consent is believed to connect national constitutional values and commitments to the generation of international law, bestowing whatever legitimacy it might have on it. International law is derivative in regards to legitimacy. International law derives its legitimacy from the consent of states. This understanding of the foundation of international law has significant implications for the interpretation and progressive development of international law. Insisting on a link to national

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<sup>6</sup> For a collection of essays exploring this theme, see generally *id.*

<sup>7</sup> For analyses of the spread of international public authority, see generally JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* (2005); *DELEGATING STATE POWERS: THE EFFECT OF TREATY REGIMES ON DEMOCRACY AND SOVEREIGNTY* (Thomas M. Franck ed., 2000); *THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS: ADVANCING INTERNATIONAL INSTITUTIONAL LAW* (Armin von Bogdandy et al. eds., 2010).

institutions in the generation, interpretation, and enforcement of international legal norms becomes a central preoccupation.<sup>8</sup> From this perspective, the talk of constitutionalism beyond the state misleadingly tends to cover up the legitimacy deficit of an international law in which the link to state consent becomes more attenuated and the threat this constitutes to the achievements of domestic constitutionalism.

Conversely, Small c constitutionalists insist that the legitimacy of international law does not depend on tracing international legal obligations back to the specific consent of obligated states. Rather, they insist that the legitimacy of international law is not simply derivative, but to some extent stands on its own. Both in terms of operation and legitimacy, the international legal order can be described as an “autonomous” legal order that should be interpreted and progressively developed to better realize the constitutional values it is founded on.

At its heart, the debate about the constitutional character of international law should be understood as a debate about how to understand the conditions of constitutional legitimacy. Big C constitutionalists are right about two things. First, constitutionalism should be understood as a normatively ambitious project of establishing legitimate authority over persons that are ultimately conceived as free and equals. This indeed gives rise to the trinitarian formula of the constitutionalist faith: a commitment to human rights, democracy, and the rule of law.<sup>9</sup> But there is deep and interesting disagreement about how that

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<sup>8</sup> This has been the common theme of all “Revisionist” writing on the law of foreign affairs in the US. *See* Curtis Bradley, John Yoo, Jack Goldsmith, Eric Posner.

<sup>9</sup> Note how this concept of constitutionalism is not shared by societal constitutionalists such as, most prominently, Gunther Teubner. *See, e.g.*, GUNTHER TEUBNER, *CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION* 1-3 (2012) (criticizing traditional constitutionalism and its limitations in addressing transnational constitutional challenges). Teubner’s is a sociological, systems-theory informed understanding of constitutionalism. It is well equipped to identify cohesively structured social practices and describe the dynamics and relationships between such practices. Societal constitutionalism provides a prism that helps normatively focused constitutionalists develop a sociologically enriched understanding of the world they are trying to assess. But societal constitutionalists do not participate in the project of working out the implications of a shared normative commitment to the idea of free and equals governing themselves through law. They do not provide an account of constitutionalism that interprets the heritage of the French and American revolutions for the purpose of gaining a better normative understanding of the world of law we inhabit, in order to move it closer to where it should be. As sociologists Societal Constitutionalists bracket questions of justice.

commitment is to be understood in more concrete terms. Competing interpretations of the constitutional heritage of the French and American Revolutions as they relate to international law compete with one another. Both Big C and Small c constitutionalists share a common constitutionalist grammar in their understanding of the conditions of legitimate authority. They may both insist that a constitutional justification of authority requires public power to be legally constituted and constrained, appropriately participatory, and rights-respecting. They disagree, however, about how these ideas should be worked out when it comes to assessing the relationship between national and international law. They disagree on whether international law should be conceived in derivative terms. Is the consent of states the foundation of international law? Does international law derive its legitimacy from the consent of states? Should it be a core concern that international law is interpreted and progressively developed to ensure that national institutions, the sole conveyers of constitutional legitimacy, remain in charge? Big C constitutionalists are inclined to insist on all of these things, whereas international constitutionalists insist on a negative answer to all of these questions. International constitutionalists insist that a proper understanding of the constitutional tradition requires international law to be understood, interpreted, and progressively developed in a way that allows international legal and political practices to play a more independent role.

But what role exactly should that be, and how should it be justified in constitutional terms? Reading the literature, it is relatively clear that most international constitutionalists tend to favor more international law, stronger international institutions, more compulsory jurisdiction for courts, more participatory possibilities for individuals and members of an international civil society, more mechanisms ensuring respect for human rights by states, and so forth. However, much of this writing takes the form of relatively formal arguments analyzing treaties, court decisions, or legal documents generated by international institutions.

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(Luhmann claimed that systems theory provided a way to overcome and move beyond questions of justice, which he referred to as “old-European.”) Focusing on the conditions under which justice can be established between free and equal persons is, however, the core preoccupation of constitutionalist thinking in the tradition of the French and American Revolutions.

International constitutionalists often assume the posture of conventional positivist analysts, even as they are believed to be engaged in a deeply important normative project. On a more abstract level they tend to be against, or want to move beyond, sovereignty and the state—indeed the sovereign state is often the *bête noir*. They may instead insist on human dignity as the foundation of international law.<sup>10</sup> And they may point to interdependencies and make functional arguments about the need to provide global public goods that states cannot provide by themselves.<sup>11</sup> But whereas there is rich and theoretically sophisticated literature in normative constitutional theory about the basic institutions and ideas underlying domestic constitutionalism, as well as how these ideas and institutions connect to concrete issues and problems, there is relatively little equivalent literature that brings to bear normatively rich constitutionalist thinking in international law.

The following sections will begin with an argument that analyzes what exactly is wrong with Big C constitutionalism in order to develop some basic ideas about the foundations of public law in the constitutionalist tradition. Big C constitutionalists are right to connect the idea of constitutionalism to a normatively ambitious project of establishing legitimate authority. But the idea of sovereignty as ultimate authority—a conception of constitutionalism tied to the coercive institutions of the state and a conception of legitimacy and democracy reductively tied to the self-governing practices of “We the People”—is deeply misguided. It aggrandizes and misconstrues national constitutional practice and sells short legal and political practices beyond the state. It misconstrues the basic commitments underlying the constitutionalist tradition of the French and American Revolutions. This article will then analyze how national and international law have to be conceived, in constitutional terms, as mutually supportive and complementary. International lawyers are right to insist on

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<sup>10</sup> See generally PATRICK CAPPS, HUMAN DIGNITY AND THE FOUNDATIONS OF INTERNATIONAL LAW (2009). The focus on human dignity as the foundation and purpose of IL was also shared by the New Haven School. See generally MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (1980).

<sup>11</sup> See generally ERNST-ULRICH PETERSMANN, INTERNATIONAL ECONOMIC LAW IN THE 21<sup>ST</sup> CENTURY: CONSTITUTIONAL PLURALISM AND MULTI-LEVEL GOVERNANCE OF INTERDEPENDENT PUBLIC GOODS (2012).

the constitutional nature of international law. But they should acknowledge more openly that their construction is ultimately informed by a competing conception of legitimate authority, one that provides a different interpretation of the constitutionalist tradition, an interpretation that is directly in conflict with Big C constitutionalism and that is considerably more ambitious than Small-C constitutionalism. These lawyers would do well to more strongly emphasize the deep interdependencies between national and international law. International law is neither derivative, nor is it autonomous. National and international law form an integrative whole.

## II. AGAINST BIG C CONSTITUTIONALISM AND FOR THE COSMOPOLITAN TURN IN CONSTITUTIONALISM

Contrary to the precepts of Big C constitutionalism, national constitutional legitimacy is not self-standing. The legitimacy of national constitutions is not only a matter between “We the People” and the national constitution. National constitutional legitimacy depends, in part, on how the national constitution is integrated into and relates to the wider legal and political world. Domestic constitutional law has to be embedded in the right way in an appropriately structured international legal system for it to be legitimate. One of the core purposes of international law is to create and define the conditions under which a sovereign state’s claim to legitimate authority is justified. States have a standing duty to help create and sustain such conditions and an international legal system that is equipped to fulfil that function. The relationship between domestic and international law is neither one of derivation nor of autonomy, but of mutual dependence. National and international law are mutually co-constitutive. The constitutional legitimacy of national law depends, in part, on being adequately integrated into an appropriately structured international legal system. And the legitimacy of the international legal system depends, in part, on states having an adequate constitutional structure. The standards of constitutional legitimacy are to be derived from an integrative conception of public law that spans the national-international divide.

There can be no self-standing national constitutional legitimacy because the practice of constitutional self-government within the framework of the sovereign state raises the problem of justice-relevant negative externalities.

The fact of interdependence has often been invoked as a generic argument in favor of international law. But as will become clear, interdependence itself is not an argument against Big C constitutionalism or for the development of an international law that has the features Small c constitutionalists focus on and Big C constitutionalists tend to be critical of. It may be true that international law is a means to reap the benefits of better cooperation and coordination between interdependent actors. But this would merely provide a functional argument for states to sign up for certain kinds of international cooperative endeavors. It would not, without further argument, undermine the claim to authority that is implicit in Big C constitutionalism.

The issue is different, however, when not just any externalities, but *justice-sensitive* externalities are in play. National sovereigns can claim no legitimate authority to address questions involving justice-sensitive externalities unilaterally. Given the fact of reasonable disagreement between states about how those externalities should be taken into account, any claim by one state to be able to resolve these issues authoritatively and unilaterally amounts to a form of domination. It is the point and purpose of international law to authoritatively resolve these concerns by way of a procedure that involves the fair participation of relevantly affected stakeholders, and it is the duty of states to support and sustain the development of an international law that is able to effectively fulfil such a function. In the following, I will first discuss how the presence of justice-sensitive externalities undermines claims to legitimate national constitutional authority. I will then focus more closely on three different kinds of externalities, the normative concerns they raise, and the structure that international law needs to have to be able to address these concerns adequately.

*A. Why Do Justice-Relevant Negative Externalities Undermine Claims to Legitimate Authority?*

There is no doubt that a wide range of national policy choices implicates justice-sensitive externalities. Consider the following four examples: first, a state decides to intervene militarily in another state; second, a state decides to embrace nuclear power stations not far from state borders and decides on nuclear safety standards that adjacent states claim are dangerously low; third, a state decides what level of carbon-dioxide emissions strikes the right balance between concerns about global warming and economic competitiveness; and, fourth, a state decides how to allocate resources and sets priorities for law enforcement to either clamp down or not to clamp down on transnational organized crime. In all of these cases outsiders may be affected in a way that raises concerns about whether their interests have been appropriately taken into account or whether others have unjustly burdened them.

Below, I will describe and more closely analyze different kinds of externalities and the justice-related problems they raise. Here, the question is what follows from the fact that state policies often have justice-sensitive external effects. What follows is, first, that a state has a duty to be aware of those externalities and take them into consideration when conceiving and implementing national policies to avoid doing injustice. This requires state actors to conceive of themselves as something more than just participants in a practice of national self-government focused on and concerned with how public policies affect national constituents. Instead, when enacting policies that generate justice-sensitive negative externalities, states have a duty of justice to also act as trustees of humanity.<sup>12</sup> For a state's policies to be just, they need to adequately take into account the legitimate interests of effected outsiders.

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<sup>12</sup> Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. (forthcoming 2013) (manuscript at 7-8), available at <http://ssrn.com/abstract=1863228>. See also Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT'L L. 513 (2009) (arguing that the concept of sovereignty should derive not from the state as such but from the rights and interests of humanity).

But that alone is not enough. There is a second consequence. The range of questions over which a state can plausibly claim legitimate authority is limited to questions that do not raise issues of justice-sensitive externalities. A constitution established by “We the People” can only claim legitimate authority over a domain in which there are no justice-sensitive externalities. A state would overstretch its claim to legitimate authority and, in effect, insist on a relationship of domination with regard to those who are externally affected, if it does not accept the restriction of its authority and help support a constitutional system of international law that is adequately equipped to address these issues. It is not sufficient for a state to attempt to do justice to outsiders by way of respecting their legitimate concerns in the policy formation process. The existence of external justice concerns challenges the authority of “We the People” and limits the authority of national constitutions. Furthermore, it grounds the obligation of a national community to support, help develop, and subject itself and its constitutional system to the authority of an appropriately structured system of international law, which defines the boundaries of legitimate sovereign authority.

To understand this concept, it is useful to think about the grounds for legitimate authority in the domestic context. Under what might be called the “standard account” of legitimate authority within the constitutionalist tradition of the eighteenth century,<sup>13</sup> the starting point is the problem of establishing just relations between free and equal persons. The establishment of just relations between people is continually hampered by two problems. Because of these problems, it is not sufficient for each actor to publicly profess allegiance to justice, but requires something more—the subjection to constitutional authority. Why is that necessary? Why can we all not just agree to do the right thing and get along?

First, there is the problem of *motivation*. By themselves, individual actors might not always be motivated to do what justice requires when they experience a conflict between what

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<sup>13</sup> These themes are central to the understanding of law in the political philosophy of Hobbes, Rousseau and Kant, among others. For a useful overview of these issues, see SAMANTHA BESSON, *THE MORALITY OF CONFLICT: REASONABLE DISAGREEMENT AND THE LAW* 121-203 (2005).

they might want to do and what they might recognize as an obligation of justice. The institutionalization of a constitutional system seeks to add nonmoral incentives—the threat of institutionalized sanctions of some kind—to support and stabilize justice-respecting behavior. The threat of sanctions has a double role in this regard. First, the addressee of the law has an additional incentive not to defect from a commitment to justice in the face of what may appear to be other competing interests because of the threat of sanctions. The threat of sanctions makes it easier to fight temptations and weakness of the will to ignore requirements of justice. Second, the threat of institutionalized sanctions provides an assurance of reciprocity. The threat assures that an actor seeking to comply with duties of justice will not end up the “sucker” when, in a reciprocal relationship, the other side takes advantage of justice-compliant behavior but refuses to comply with its obligations.

Second, there is an *epistemic* problem. Even if we assume all relevant actors to be motivated in the right way, they might still disagree about what justice actually requires. There is no procedure that guarantees that even well-informed and appropriately disposed intelligent actors agree on specific questions of justice. Given disagreement over questions of justice, appropriately structured procedures need to be put in place to authoritatively determine what claims of justice are to be recognized as valid. The alternative would be to have the more powerful side dictate and enforce its conception of justice against the weaker side. That, however, would be a form of domination. It would privilege one side over the other without good reason. (Reasons simply invoking facts about power relationships do not count as good reasons in the constitutionalist tradition, and both sides, we are assuming, *claim* to have justice on their side.) The actors are, therefore, under an obligation to establish and subject themselves to a system of constitutional authority that provides appropriately impartial and participatory procedures to resolve these disagreements and ensures that the results are not unreasonable, but are justifiable to all concerned. These, in a highly stylized form, are

some of the key steps for the justification of legitimate authority within the liberal-democratic constitutionalist tradition.

If the arguments relating to justice-sensitive externalities that are standard fare in philosophical accounts of the duty of individuals to help establish and subject themselves to appropriately structured constitutional authority on the state level are correct, the problem replicates itself in the relationship between states.<sup>14</sup> Questions of justice also arise between independent self-governing actors. These questions often become contentious because of the interplay between mixed motivations and epistemic problems, leading to disagreement and distrust. The history of foreign policy—even of powerful liberal democracies—provides ample illustrations of disregard and bias against outside interests, even if it were the case that liberal democracies do a better job of taking into account those interests than other forms of government.<sup>15</sup> Given that statesmen have an incentive to focus on the concerns of national constituents, the structural bias of national political processes with regard to questions of justice-sensitive externalities is obvious enough. Furthermore, even though states are obligated to do justice with regard to individuals whether or not there are appropriate assurances of reciprocity,<sup>16</sup> there are many obligations under international law that exist only subject to the condition of reciprocal compliance.<sup>17</sup>

Furthermore, the kinds of justice questions that arise in relation to negative externalities of national policies are clearly issues on which there is often reasonable disagreement. Even if reasonable people might agree that the appropriation of territory by

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<sup>14</sup> For the first development of this, see IMMANUEL KANT, PERPETUAL PEACE 128-36 (M. Campbell Smith trans., 1917) (1795).

<sup>15</sup> It is reasonably well established that democracies tend not to go to war with each other. For an overview of the debate and literature relating to the “Democratic Peace” thesis, see generally STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED (2011). Moreover, there seems to be a correlation between liberal democracies, opening up markets to participate in the global economy, and the degree of multilateral legal integration as reflected in membership in international institutions. *Id.*

<sup>16</sup> This is recognized also under positive international law with regard to certain obligations. *See, e.g.*, Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, art. 50, Annex, U.N. GAOR, 56th Sess., U.N. Doc. A/56/49 (Vol. 1) (Dec. 12, 2001).

<sup>17</sup> In case of noncompliance a state can take countermeasures, in the form of non-performance of its obligations vis-à-vis the noncompliant state. *See, e.g., id.* arts. 49-53.

way of military force is a violation of another sovereign's right, what kind of measures may be used to retaliate against violations of legal obligations by another state? What kind of weapons may they seek to acquire? What kind of counterterrorism effort is minimally necessary to meet protective obligations? What level of pollution of a river is acceptable upstream given downstream usage? What level of carbon-dioxide emissions is acceptable in light of the consequences of global warming? These kinds of questions give rise to debates in which actors might reasonably disagree about what exactly justice requires in a given context.

Because of the pervasiveness of reasonable disagreement, these are not the kinds of issues that a state's constitutional system, no matter how internally democratic, can claim legitimate constitutional authority over. Claiming authority to resolve questions of justice concerning outsiders, who per definition have no equal standing in the domestic policy formation process, is an act of domination. The enforcement of a conception of justice by a powerful actor or a hegemonic coalition of actors against others making competing claims is an act of domination if those hegemonic actors refuse to subject themselves to an impartial procedure providing equal participatory opportunities for those whose reasonable justice claims are implicated. With regard to issues concerning justice-sensitive externalities, each state is under a standing obligation to support, help further develop, and subject itself to a constitutional system of international law that is equipped to authoritatively address these issues. Such a system would have to provide an impartial and appropriately participatory procedure to resolve these issues in away that is reasonable and justifiable to all concerned. The point of such a system of international law is to define the domain over which states can legitimately exercise sovereignty and "We the People" can claim self-governing constitutional authority.

### *B. Three Kinds of Externalities*

Given the centrality of justice-sensitive externalities for understanding the limits of national constitutional authority and the purpose of international law, a closer analysis of the

concept and its main practical manifestations are in order. More specifically, I will distinguish between three kinds of externalities. Each type of externality raises distinct normative concerns and accounts for specific structural features of international law. Here, it must suffice to describe these externalities, the kinds of justice concerns they raise, and the basic features that international law must have to adequately address them.

### *1. Establishment of Borders*

The first kind of justice-sensitive negative externality is structural. It is linked to the fact that a people governing itself within the institutional framework of the state requires the establishment of borders. The claim to self-government—to use the territory within the state borders as is deemed desirable by “We the People” organizing their lives together—has an external corollary in the claim to a collective right to *exclude others* from crossing the borders and entering.<sup>18</sup> States generally claim a sovereign right to freely determine whom they let in and whom they refuse to let in. Importantly, this restricts the liberty of those intending to cross a state boundary and seeking to move to the territory of another state, whether to find a better life for themselves or any other reason. How can such exclusion be justified? What justifies the coercive force someone might encounter at the border when they seek to enter without meeting whatever requirements happened to have been established nationally?

The claim to sovereignty over territory by “We the People” can be, and has been, analogized to the claims to property over land by individuals in a domestic society, claiming the right to exclude others from its use. Generally, arguments in favor of a world divided into distinct and separate sovereign states focus on an array of benefits for assigning special responsibility to a group of persons to a specific piece of land.<sup>19</sup> This is not the place to engage the rich literature on these issues. But any successful justification for a right to exclude outsiders seeking entry satisfies the Lockean proviso that there has to be “enough and

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<sup>18</sup> This issue has spurred a rich literature in recent years. *See generally* AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (2009); David Miller, *Immigrants, Nations, and Citizenship*, 16 J. POL. PHIL. 371 (2008); Mathias Risse, *On the Morality of Immigration*, 22 ETHICS & INT’L AFF. 25 (2008).  
<sup>19</sup> *See generally* DAVID MILLER, *ON NATIONALITY* (1995); JOHN RAWLS, *THE LAW OF PEOPLES* (1999).

as good left in common for others.’<sup>20</sup> Even though every appropriation of property is a diminution of another’s rights to it, it is justifiable for so long as it does not make anyone worse off than they would have been without the possibility of such appropriation. The standard of “as good” in the context of claiming exclusion from territorially based practices of self-government requires that the person denied entry must have access to the territory of a state where, at the very least, his or her rights are not violated in a serious way. In order to justify excluding someone from a state that person must have access to some other state that does not violate his or her rights. Anything else could not plausibly qualify as good enough in the relevant sense. If State A meets this requirement, it succeeds in creating the preconditions for the legitimate assertion of State B to exclude those individuals from State A seeking entry into B. When in a concrete situation an individual finds herself subject to a state that clearly does not fulfil its sovereign obligations to respect, protect, and fulfil her rights and then decides to exercise her right to exit that state and to seek entry elsewhere, it is not clear how the exclusion of such a person could be justified.

Thinking about borders and the right to exclude in this way helps to highlight the importance of two core features of international law. On the one hand, international law seeks to create the conditions for the legitimate exercise of the right of a sovereign to exclude. All states are required by international law to respect, protect, and fulfill the human rights of those subject to their jurisdiction. On the other hand, international law limits the sovereign right to

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<sup>20</sup> ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 175 (1974). This Lockean Proviso was reintroduced into the modern debate about the original appropriation of property by Nozick’s work and refers to John Locke’s argument in the *Second Treatise of Government* that the recognition of a right to appropriation of property did not do injustice to others now precluded from making use of the appropriated land. *Id.* at 174-82. Locke argues as follows: “Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough, and as good left; and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his enclosure for himself: for he that leaves as much as another can make use of, does as good as take nothing at all. No body could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst: and the case of land and water, where there is enough of both, is perfectly the same.” JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 33(C.B. Mcpherson ed., Hackett Publ’g Co. 1980) (1690).

exclude in cases where these conditions are not met, particularly in the case of refugees.<sup>21</sup>

Note how this way of conceiving of international human rights law provides a hard ground for why international law concerns itself with how states relate to their citizens. The reasons we have to make it a concern of ours that rights are respected everywhere is not just solidarity with all members of the human community. It is also in our interest to ensure the necessary preconditions for the justifiability of our national exclusionary practices.

## 2. [*Justice sensitive externalities of national policy*]

Besides the fact that states establish borders and claim the right to exclude, there are justice-relevant externalities related to states implementing national policies, burdening outsiders with harms, and threatening harm or risks. These externalities range from the obvious to the more subtle. On the obvious end of the spectrum, there are states that embrace an aggressive, expansionist foreign policy. An imperial policy of domination and expansion subverting the political and territorial independence of neighbors is obviously not justified, even when such a policy enjoys widespread democratic support in the aggressor state and that state has a well-structured national constitutional system. Less obvious examples raise significantly more pervasive concerns and do not concern foreign policy directly. Think of the establishment of nuclear power plants near the border with insufficient safety standards applied by the jurisdiction that these reactors are stationed in. Or, think about carbon-dioxide emission standards that contribute to global warming, whose detrimental effects may be moderate in the polluting jurisdiction, but which might lead to severe droughts causing starvation, or severe flooding resulting in the necessity to relocate millions, or even the wholesale sinking of island-states elsewhere. Less dramatically, imagine an upriver riparian

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<sup>21</sup> See Convention Relating to the Status of Refugees, art. 1, July 2, 1951, 189 U.N.T.S. 137. Art. 1 as amended by the 1967 Protocol of United Nations Convention Relating to the Status of Refugees defines a refugee as a person who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence . . . is unable or, owing to such fear, is unwilling to return to it.” *Id.*

state polluting a river to such an extent that it imposes severe harms downstream within the territory of the downriver state. Finally, and more subtly, extraterritorial effects raising justice concerns may also be connected to states failing to exercise their responsibility to prevent their territory from being used as a base to organize, plan, and inflict harm in other jurisdictions by other actors. Justice concerns are not merely raised by negative externalities of state action, but also by omissions that result in the failure to realize positive externalities when the state has a responsibility to act. Here, the issues raised include failing to undertake adequate counter-terrorism efforts by effectively granting safe harbor to terrorist organizations or failing to crack down on other forms of organized crime.

Given that these are areas in which states lack legitimate authority to effectively control what may or may not be done, there is no injustice done to states when they are subjected to legal obligations without having consented to them. On the contrary, there are deep legitimacy questions connected to the capacity of individual states to effectively veto the emergence of universally binding obligations in contexts where the behavior of an individual state raises justice-sensitive externality concerns. Thankfully, international law has developed capacities to generate universally binding legal obligations that overcome the blocking power of individual states that refuse to give their consent. With regard to the use of force and questions of peace and security, the U.N. Security Council has interpreted its competencies broadly and functions, albeit often unsatisfactorily, as a world legislator operating by qualified majority vote in areas concerning threats to international peace and security.<sup>22</sup> Furthermore, in many cases involving these types of concerns,<sup>23</sup> international courts and tribunals have interpreted the requirements for customary international law in a way that

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<sup>22</sup> See Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175, 175 (2005).

<sup>23</sup> See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757 (2001) (arguing that the standards for determining whether CIL exists with regard to a particular issue might be sensitive to the particular function that international law needs to fulfill in the respective area). For similar ideas focused on the role of national courts engaging international law more generally, see also Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241 (2008).

reflects the underlying purpose of international law. When justice-sensitive externalities are in play, judges tend to interpret the requirements of CIL as if these requirements reflect the idea of a decentralized informal quasi-legislative qualified-majoritarian process, not the idea of implied consent by states.<sup>24</sup> The real problem in this area is not that there is no state consent requirement for obligations to be generated. There is no problem when, instead of consent, there is a fair procedure involving adequate participatory procedures for states that can generate new obligations. The real problem is the extent to which powerful states remain in a position to veto jurisgenerative efforts. The veto claimed and exercised by the five permanent members in the Security Council raises more legitimacy issues than any erosion of the consent requirement. To address these concerns, creative interpretative proposals aimed at qualifying the veto right and narrowing the capacity of individual states to block otherwise universally binding decisions point in the right direction.<sup>25</sup>

### 3. *[Externalities of national policies that do not raise justice concerns]*

All the examples above describe externalities that raise justice concerns. A wide range of externalities, however, do not. Outsiders have no claim of justice against a state's political community to *generally* take into account their well-being when making a decision that has external effects. Outsiders have a right not to be unjustly harmed by a state, but those governing themselves within the framework of the state have a right not to be required to make themselves an instrument of the well-being of others. Much could be said about why this is so and what exactly follows from this,<sup>26</sup> but here it must suffice to put forward a couple of basic distinctions and examples for illustrative purposes.

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<sup>24</sup> The legitimating idea of consent of states in international law could be analogized to the idea of consent in domestic constitutional theory. Individuals are subject to the laws of the land, whether or not they have explicitly or implicitly consented to them. Consent is only relevant in the sense that liberal political philosophy refers to: the idea of "reasonable consent" remains an operative ideal standard for assessing claims of justice. Actual consent matters only in a limited domain, where individuals are in authority and can control the obligations they have with regard to others: the domain of private law contracts.

<sup>25</sup> See, e.g., Peters, *supra* note 12, at 539-40 (arguing that a veto cast under certain circumstances should be regarded as null and void).

<sup>26</sup> For a discussion of the role of deontological restrictions in various areas of the law, see generally Mattias Kumm & Alec D. Walen, *Human Dignity and Proportionality: Deontic Pluralism in Balancing* (N.Y. Univ. Sch.

First, the failure to realize positive externalities—an omission by a state—is a justice concern only in cases where there is a positive duty of justice for the state to act. A state is under a positive duty, for example, to ensure there are no harms emanating from its territory.<sup>27</sup> Here, the relevant externalities concern justice claims by outsiders.<sup>28</sup>

There is no general duty of a state, however, to take into account and further the welfare of outsiders in the same way they would insiders. When debating whether more money should be spent on social security to strengthen those that are weakest in domestic society, it is not plausible to insist that first money has to be spent to raise the level of those worst off globally up to that of those worst off nationally. It does not constitute unjustified discrimination that national social security benefits are not available to every person on the globe. Nor is a state acting in a way that raises justice concerns when it adopts a national economic policy that is focused on increasing national welfare, but that has a more dubious global effect. States are not under a general duty to ensure that outsiders benefit as much from state policies as nationals. They are trustees of humanity only to the extent outsiders can make plausible claims of justice that a state is required to respect. Beyond that, states have special obligations toward their own citizens and rightly make their well-being the paramount concern.

Second, even the infliction of negative externalities does not always constitute a justice-sensitive externality. There is no injustice done to outsiders, for example, when a state engages in protectionist policies and denies or prohibitively taxes market access of certain goods and services. There is no justice claim against another political community to make itself a means for realizing economic benefits for others. Even if a state, at time T1, opened its

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of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 13-03, 2013), *available at* <http://ssrn.com/abstract=2195663>.

<sup>27</sup> For a good overview on the way this principle operates in the area of environmental international law, see generally JULIO BARBOZA, *THE ENVIRONMENT, RISK AND LIABILITY IN INTERNATIONAL LAW* (2011).

<sup>28</sup> This is also true when those harms are brought about not directly by state action, but by private actors, such as terrorists or other forms of organized crime.

borders for certain trades and, later, at time T2, unilaterally closed them again, thus imposing severe losses on outside traders who had relied on making such trades, these are not negative externalities that raise justice concerns. Just like a shopkeeper has no claim of justice against a patron who decides from one day to the next to no longer patronize his shop, the importer has no claim to justice against a state deciding to close its borders to a certain kind of trade. In these types of cases the actions of one state merely changes the circumstances another state finds itself in.<sup>29</sup>

When there is a high level of interdependence—situations in which subjects mutually find themselves subjected to the infliction of externalities by outsiders—states have an interest to coordinate policies and cooperate with one another to maximize the welfare of their constituents and ensure pareto-optimal policies. This is, of course, what most countries have done across a wide range of goods and services to mutually profit from more open markets within the context of the World Trade Organization (WTO) or other regional trade regimes. Once a country has legally committed itself bi- or multilaterally to grant access to certain goods and services, the situation changes. In such a context, the negative externalities connected to a failure to comply with contractual obligations generally constitute justice-relevant harms. But they do so only because of violations of agreed commitments and not independently from such commitments. In such a context, voluntary legal commitments are constitutive of plausible justice claims.

This, then, is the proper domain of consent-based interactional treaty law. Here, treaties are the functional equivalent of private law contracts in domestic law. Consent is not the foundation of international law, but there is a domain in which sovereign states can claim to be free to do as they deem fit and subject themselves only to obligations they have freely accepted. There is a domain in which consent is rightly regarded as constitutive of legal obligations. This is the domain over which a sovereign has authority.

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<sup>29</sup> See, e.g., ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* (2009).

Note, however, that the exact scope of that domain may not only be contested, but may even be unstable. Whether externalities are justice sensitive is not always a simple issue. Agreements of a certain density and duration may well become the source of associational moral duties that go beyond the specific terms of the agreement. The more dense and more demanding mutually agreed upon frameworks of cooperation are, the more demanding the justice obligations that flow from such a practice are.<sup>30</sup> What justice requires is, to some extent, practice dependant.<sup>31</sup>

In practice, this means that, much like in private contract law, freedom of contract is and should be constrained and structured by other, not necessarily consent-based, legal norms seeking to further justice or welfare-enhancing policies. It would suggest, furthermore, a hierarchical relationship between international legal obligations understood to fall within the domain of this private law paradigm and international legal obligations more appropriately interpreted as quasi-legislative. But, whereas in domestic law, contracts between individuals are generally void when they are in violation of general legal rules, the situation is more complex in international law. While states cannot validly enter into treaties violating *ius cogens* norms,<sup>32</sup> all duties established under the U.N. Charter take precedence over other treaty obligations,<sup>33</sup> and bilateral treaties cannot change the general legal obligations a state is under with regard to third parties.<sup>34</sup> Yet, there is no general rule that invalidates bilateral treaties that are in violation of quasi-legislative multilateral treaties or rules of customary international law seeking to realize global public goods.

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<sup>30</sup> See generally Andrea Sangiovanni, *Solidarity in the European Union: Problems and Prospects*, in *PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW* 384 (Julie Dickson & Pavlos Eleftheriadis eds., 2012).

<sup>31</sup> See Miriam Ronzoni, *The Global Order: A Case of Background Injustice? A Practice-Dependent Account*, 37 *PHIL. & PUB. AFF.* 229, 230-31 (2009). See also Sangiovanni, *supra* note 30, at 409 & n.70.

<sup>32</sup> Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

<sup>33</sup> U.N. Charter art. 103; Vienna Convention, *supra* note 32, art. 30, ¶ 1.

<sup>34</sup> Vienna Convention, *supra* note 32, art. 30, ¶¶ 4-5.

But notwithstanding these and other complexities, which could barely be gestured to here, the point is that not all negative externalities of national policies raise justice concerns. Interdependence alone is not itself sufficient to establish the duty of a national community to take into account the effects of their actions on outsiders. Only justice-relevant externalities can do so.<sup>35</sup>

### III. CRITICISMS AND THE CHALLENGE OF SOCIETAL CONSTITUTIONALISM

The idea of self-government of free and equals lies at the heart of the tradition of liberal-democratic constitutionalism. The guiding ideal of global order this gives rise to is a world of liberal democratic constitutional states, collectively subjected to the authority of international law.<sup>36</sup> The point of international law is to authoritatively define the conditions under which sovereigns can govern themselves as well as provide the legal space for sovereigns to coordinate their activities and cooperate as they deem fit. The relationship between domestic and international law is neither one of derivation nor of autonomy, but of mutual dependence. National and international law are mutually co-constitutive. The constitutional legitimacy of national law depends, in part, on being adequately integrated into an appropriately structured international legal system. And the legitimacy of the international legal system depends, in part, on states having an adequate constitutional structure. The standards of constitutional legitimacy are to be derived from an integrative conception of public law that spans the national-international divide.

What this article has tried to do is to provide a rough general outline for the reconstruction of the foundations of contemporary public law. Many of the core structural features of international law can be explained and justified by reference to the cosmopolitan construction of public law described here: the role of human rights law, the emergence of multi-lateral global governance practices, the emancipation of international law from the

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<sup>35</sup> How exactly this distinction is best fleshed out and made operable lies beyond the scope of this article. See generally RIPSTEIN, *supra* note 29.

<sup>36</sup> See KANT, *supra* note 14. See also Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995).

strictures of state consent, the functional reconceptualization of sovereignty in terms of responsibilities and participation, as well as the constructive constitutional engagement of liberal democracies with international law. Yet, these are exactly the features that Big C constitutionalists point to as symptomatic of international law's legitimacy deficit, features of international law that threaten democratic constitutionalism. But all of that is mistaken. Tying together a commitment of self-government, democracy, the state, sovereignty, and supreme legal authority in this way, Big C constitutionalism misguidedly aggrandizes the authority of sovereign states to the detriment of international law. Those who engage international law through the prism of such a theory seek to interpretatively connect international law more closely to the consent of states and the enforcement of international law to the political endorsement of national political majorities. Doing so not only assumes that "We the People," organizing themselves within the boundaries of a state, can establish the kind of self-standing authority that they cannot. It also prevents international law from fully developing its potential to help create and define the preconditions for the exercise of legitimate sovereignty. Big C constitutionalism is a misguided interpretation of the constitutionalist tradition. It sells short the cosmopolitan perspective inherent in the idea of self-government of free and equals and misunderstands the demanding task of international law—to first establish the conditions under which a state's claim to sovereignty can be legitimate.

As is appropriate for a reconstructive account of the foundations of existing international law, the assumptions underlying the argument presented here are largely conventional. The argument takes for granted a commitment to the principle of sovereign equality of states. It does not engage the idea of a world state or any other institutionally transformative project, but takes as a given the commitments to self-government and sovereign equality as they are inscribed in a number of foundational norms in international law.

Critics may charge that the focus on the state misses fundamental features of actual legal practice. Societal constitutionalists in particular might point to forms of sectorial private ordering in the world economy that are not captured by what remains a state-focused account of public law.<sup>37</sup> Is it a coincidence that the paper does not mention any of the genuinely constitutional questions relating to data-gathering of major Internet companies, the regulatory structure of the banking system, or the legitimacy issues arising out of the emergence of a largely state-free administrated system of *lex mercatoria*? The response to this challenge is twofold.

First, questions of private ordering do indeed raise constitutional issues. When states establish global markets through bilateral and multilateral treaties, they face a challenge to ensure that economic practices taking place within the framework of private contractual and self-regulatory norms do not develop destructive tendencies that unjustly impose costs on outsiders. The financial crisis from 2008 onwards, and the regulatory responses that have followed, should indeed be regarded as a challenging constitutional case study for the assessment of global private ordering. Societal constitutionalists are right to insist that traditional constitutionalists, even those writing about international law in constitutionalist terms, tend to neglect questions of private ordering.

I am more skeptical and am not sure how to understand the claim made by Teubner that these challenges present themselves and should be thought about as existing outside of the institutionalized sector of politics.<sup>38</sup> Why is the challenge not to appropriately institutionalize adequately participatory political processes that allow for these issues to be addressed? Why would the kind of constitutionalist approach alluded to here not provide the right kind of critical conceptual framework? Take as an example the banking crisis. In part, the crisis was the result of bad domestic regulation, which, in principle, can be fixed by good

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<sup>37</sup> See TEUBNER, *supra* note 9, at 8-9.

<sup>38</sup> See TEUBNER, *supra* note 9, Ch. 1.

domestic regulation. This is simply a case of policy failure. Of course, given the global structure of financial markets, the significant externalities of systemic banking failures in major economies, and collective action problems in the context of regulatory competition, the case for state cooperation and partial establishment of international standards or guidelines is strong. This is something the Basel Committee has done, the G-20 has discussed but failed to do, and the European Union has been actively pursuing.<sup>39</sup> Of course there is much that could be said in assessing the adequacy of these venues and the procedures used or results achieved from a constitutionalist perspective. Furthermore, any critical perspective would highlight the mistaken economic assumptions that have informed deregulation and models of risk-management in previous decades, as well as point to the capture of regulatory institutions by banks and a global banking class. All of this is clearly of great importance. What is less clear is how the banking crisis, or other questions relating to the constitutional structure of private order, challenges the kind of constitutional perspective developed here.<sup>40</sup>

There are a number of other central issues the article has not grappled with. It has not spelled out exactly what the consequences of embracing the integrated conception of public law are for the interpretation and progressive development of international law in any particular domain. It has not traced the implications of an integrative conception of constitutionalism for the adequate structure of the constitutional law of foreign affairs.<sup>41</sup> It has not made much of what is often described as the fragmentation of international law, with different legal regimes following their own internal rationality with relative disregard for the

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<sup>39</sup> The Third Basel Accord (or Basel III) is a global, voluntary regulatory standard on bank [capital adequacy](#), [stress testing](#) and [market liquidity risk](#). It was drawn up by the [Basel Committee on Banking Supervision](#) after the financial crisis in 2010/2011. In June 2012 the EU Commission introduced a proposal for a Directive establishing a framework for the recovery and resolution of credit institutions and investment firms allowing for troubled financial institutions to be wound down, see COM(2012) 280/3.

<sup>40</sup> For a discussion of the European financial crisis informed by the constitutionalist paradigm defended here, see Mattias Kumm, *What Kind of a Constitutional Crisis Is Europe In and What Should Be Done About It?* (Soc. Sci. Research Ctr. Berlin, Discussion Paper No. SP IV 2013-801, 2013), available at <http://bibliothek.wzb.eu/pdf/2013/iv13-801.pdf> (the report was part of a testimony before the European Parliament's Committee on Constitutional Affairs).

<sup>41</sup> See Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State*, in *RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE*, *supra* note 1, at 258.

outside. Nor has it faced the challenge, whether and on what grounds it is plausible to believe that an international law that meets constitutionalist requirements can be effective. More specifically, it has not addressed the question of what follows from the fact that the world of states is not confined to established liberal democracies, but also includes powerful and less powerful authoritarian regimes, new and old democracies struggling with authoritarian nationalist tendencies, developing democracies with deep postcolonial suspicions of an ambitious international law, and a considerable number of failed or failing states. These are important questions that need to be addressed.

The point of this article, however, is considerably more modest. It seeks to discredit certain basic widespread ideas relating to the self-standing nature of domestic constitutional authority, tying together “We the People”, self-government and state sovereignty, that have shaped and continue to shape the legal imagination of constitutional lawyers. Those who embrace these ideas tend to settle into a dogmatic slumber of self-congratulatory hubris with regard to the achievements of national constitutionalism, while promoting skepticism about international law. They attribute legitimacy to domestic constitutional practices that should raise concerns about domination and disregard of outsiders’ claims. They impose limits on what international law might become in the name of deeply misunderstood ideas of democratic legitimacy. And they fail to take seriously international law for what it already is—an integral part of our highly imperfect constitutional universe.

RONALD DWORKIN

A New Philosophy for  
International Law

I

When I was last instructed in international law—at Oxford in the 1950s—the first and most lively question, bound to appear on the examination paper together with tedious questions about navigable bays, was existential. Is there any such thing as international law? Or does the subject we were being asked to study actually not exist? Is what some academics and state department officials call international law not law at all but only common practices that no state is really legally bound to continue practicing?

You may well ask: Why does this matter? Isn't the only important point really whether there are rules that nations do follow in their dealings with one another? And that nations join in criticizing and if possible punishing other nations that do not follow those rules? Does it really matter whether we call these rules "law"? Or whether we say, instead, that in certain ways they are like the rules of more familiar national legal systems?

The question whether it matters is deeper and more difficult than may first appear. I reserve it for discussion later. In any case, the question whether there is international law seems no longer to trouble anyone. Almost everyone assumes that there is international law and also assumes that it includes, for example, the Charter of the United Nations and the Geneva Conventions—or at least some of them. But nothing has actually changed. The old grounds for challenge remain; they are only ignored.

Editor's note: Professor Dworkin died while this article was in the late stages of revision. The editors would like to thank Liam Murphy and Samuel Scheffler for their help in finalizing the article for publication on Professor Dworkin's behalf.

The existential challenge remains important, however. Even though almost everyone agrees that "international law" is really law, and that the rules and principles set out in documents of that kind are part of it, the question of *why* these documents constitute some kind of legal system is crucial because how these rules and principles should be interpreted hinges on it. Interpretive issues are both controversial and dramatically important. Nations and lawyers disagree, for instance, about the legal status of associates of Al Qaeda and the Taliban under the Geneva Conventions, and whether there is such a thing as an enemy noncombatant who is not covered by those Conventions. I will later discuss another celebrated interpretive issue: whether the NATO intervention in Kosovo, without the consent of the Security Council of the United Nations, was a violation of international law.

First, however, we should notice why many people did doubt, half a century ago, that there was any such thing as international law. This was not because the rules and practices were very different from what they are now, but because a certain philosophical theory of what law is, called "legal positivism," was more popular. This theory holds that whether a law exists is fundamentally a question of historical fact. Law exists only when some person or group has created that law. Legal philosophers who regard themselves as positivists have disagreed about who those law-making people are, and how they make law. Different answers to these questions have been influential in different times. John Austin, a nineteenth-century legal philosopher, answered by proposing a definition of law: law is by definition, he said, the command of an uncommanded commander, a sovereign with absolute power over some territory. If Parliament, with the Queen's consent, has unlimited power, the Queen in Parliament is the uncommanded commander in the United Kingdom. But since there is no such sovereign body commanding the parliaments of all the nations, it seems to follow from Austin's theory that there is no international law.

By the middle of the last century, however, another legal philosopher, H.L.A. Hart, had introduced a more sophisticated version of positivism. He denied that law always depends, as Austin had said it did, on the commands of an uncommanded commander. In the United States, Hart pointed out, no institution is such an absolute sovereign. He described, instead, a more general set of social facts that give rise to law. He said that law exists when the "bulk" of the officials of a political community

have come to accept, as rules they have an obligation to follow, two kinds of rules: “secondary” rules, which stipulate how law is created, enforced, and identified, and “primary” rules, which are created and identified when those secondary rules are followed. Hart insisted that one secondary rule, which he called the community’s “rule of recognition,” serves in any legal system as the fundamental test of all the rest of the secondary and primary rules of that system. His theory thus preserved the core principle of legal positivism: what the law of a community actually is depends on nothing more than a contingent aspect of its social and political history. Political or personal morality has nothing to do with it.

Notice that under any version of legal positivism the law of any particular political community is bound to have “gaps.” Written and spoken defamation are subject to different rules of civil damages, and no official may have declared, either way, whether false statements videotaped at a political rally should be treated as written or spoken. So those whose job it is to enforce the law—judges, for example—must have what legal positivists call “discretion” to fill in the gaps by legislating, retrospectively, themselves.

Hart himself raised the question whether so-called international law really counts as law on his new test. However, though he phrased that question in the traditional way, he actually changed the subject.<sup>1</sup> He asked a question for social scientists: whether there is any system of practices that can sensibly and usefully be described, for their sociological or anthropological purposes, as international law. That is very different from the doctrinal question posed to the lawyers and judges who practice international law: the question, for instance, whether the intervention in Kosovo was legal under international law. Hart approached his sociological question by conceding, first, that the distinction between primary rules and secondary rules could not be made in the international realm. He found nothing comparable to what he understood as the familiar secondary rules of domestic law—general rules of legislation, for instance—in the international sphere.

That was nevertheless not decisive, he said, of the question whether it would be helpful for theoretical and practical purposes to include international law within the more general concept of law. He suggested, at

1. See the introduction to Ronald Dworkin, *Justice in Robes* (Cambridge, Mass.: Harvard University Press, 2006).

least, that it might be. His analysis was therefore like the recent discussions among astronomers whether it would be sensible to continue to use the word “planet” in such a way as to make Pluto a planet.<sup>2</sup> But interpretive doctrinal questions, such as whether the Kosovo intervention was legal under international law, cannot be answered by considering whether it would be useful to speak of an international law. For such doctrinal questions, we need an account that helps us decide not whether it would be useful to speak of international law as a sociological category, but what international law holds on particular issues.

Many contemporary international lawyers have tried to do what Hart did not: construct a doctrinal account of international law from his version of positivism.<sup>3</sup> They assume that a sovereign state is subject to international law but, on the standard account, only so far as it has *consented* to be bound by that law, and they take that principle of consent to furnish an international rule of recognition. This is a firmly positivist view of international law because whether a state has consented to a particular rule is just a matter of history. Positivism in that version seems to be now generally accepted by practitioners and scholars of international law. Contemporary textbooks and manuals of the subject (at least those I have consulted) uniformly cite Article 38 (1) of the Statute of the International Court of Justice, established by the United Nations, which they take to state an international rule of recognition. This Article reads:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the

2. See Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass.: Harvard University Press, 2011), pp. 165–66.

3. See, e.g., Samantha Besson, “Theorizing the Sources of International Law,” in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010).

various nations, as subsidiary means for the determination of rules of law.<sup>4</sup>

True, international lawyers also speak of what they call *ius cogens*, or “peremptory norms” that cannot be canceled by treaty or even by decisions of the United Nations. However, the Vienna Convention on the Law of Treaties brings these, too, under the umbrella of consent:

For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>5</sup>

Law for nations, on this view, is grounded in what nations—or at least the vast bulk of those that others count as “civilized”—have consented to treat as law. Signatories to a treaty are assumed to have consented to its provisions being law for them just by their signature. States that have assumed, in their practices, that certain rules are law for them have in that way consented to the rules being law for them. If enough states to constitute “the international community of States” have recognized fundamental rules as preemptory and nonnegotiable, then these rules are preemptory and nonnegotiable for the whole international community. If there is evidence that a general practice is very widely accepted as law, or that it is recognized by all civilized nations, then it is law for all nations. The scheme has one apparent advantage. Since it bases law on consent, it solves an apparent paradox born of the modern state system. How can a sovereign state nevertheless be subject to law? It answers: because it (or at least almost every state) has accepted, in the exercise of its sovereignty, to be bound by that law.

But the scheme has several defects as a proposed rule of recognition that are finally fatal. First, it offers no priority among the different

4. See <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>. It would be nice to treat section (d) of this account as granting power to academic philosopher kings in international affairs. Law is what NYU’s international law group says it is. I assume, however, that the clause is only meant to allow the International Court to appeal to academic interpretations of the other clauses, so we must concentrate on those.

5. See [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

sources it recognizes. Must treaties yield to general practices? Or vice versa? More important, though it is founded on the idea of consent, it sometimes binds those who have not consented. It offers no explanation why states that have not accepted a rule or principle as law may nevertheless be subject to it because the bulk of other states, or of “civilized” states, have accepted it. It offers no standard for deciding how many states must accept a practice as legally required before the practice becomes “customary” and therefore binding on everyone. It offers no guidance as to which states are sufficiently civilized to participate in that essentially legislative power. Or which norms are peremptory. These latter difficulties stem from the scheme’s perfectly understandable ambition to extend the ambit of international law beyond those communities that have explicitly consented to its principles to include those that have not. International law could not serve the purposes it must serve in the contemporary world—disciplining the threat some states offer to others, for example—unless it escaped the straitjacket of state-by-state consent. But yielding to that ambition seems to undermine the axiomatic place of consent in the scheme, and thus its assumed jurisprudential foundation.

However, I shall set that unsolvable problem aside for now to concentrate on difficulties that infect even the core of the scheme—the propositions that treaties create law for signatory nations and that the constraints that nations have accepted as law in their practices and statements are thereby made law for them. We should notice, first, that the interpretive strategies licensed by this jurisprudential core are particularly unhelpful. If a constraint is part of international law for particular nations only because they have consented to it in either of those ways, then the master interpretive question must be: what is it most reasonable to assume that these nations, whose consent made the principle law, understood that they were consenting to? That question may in many cases be answered satisfactorily by the plain meaning of the text (though interesting issues may arise about translation). But in many cases, the text will not be decisive.

Here is an example I mentioned earlier as an important question of interpretation. Article 2 (4) of the United Nations Charter provides that:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political

independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.<sup>6</sup>

How should we understand the phrase “territorial integrity or political independence” in this provision? Does a humanitarian intervention undertaken by a group of states, as by NATO in Kosovo (or Libya), violate territorial integrity or political independence if its sole aim is to stop genocide or crimes against humanity without any change in boundaries or constitution? The most natural reading says yes: any invasion or bombing violates territorial integrity. But some prominent international lawyers have disagreed,<sup>7</sup> and there is room for disagreement. Does dropping humanitarian aid packages over a disaster area violate the territorial integrity of a state whose government has not approved it? Drones carefully targeted to kill a terrorist chief without the government’s permission? Does territorial integrity require an effective government in place over a defined territory? Perhaps there is no territorial integrity to be respected in Syria as I write, so that intervention would not violate Article 2 (4).

It seems very unlikely that all the states that created the United Nations in 1945, or that joined that organization since, shared answers to all these questions when they joined. It also seems unclear whose opinion, among the different officers or citizens of these states, counts as manifesting a state opinion. Nor has there been sufficient practice by nations or statements by their foreign ministries to provide a firm answer. Nor does there seem any disposition among states to accept, in the spirit of a positivist approach to law, that a body applying international law, like the International Court, should be deemed to have discretion to impose whichever answer it wishes.

If the theory that consent is the ultimate basis of international law were persuasive, then we would quickly come to an interpretive dead end on such questions. Fortunately it is not persuasive, even if we set aside the difficulty that sometimes nations are treated as bound by rules

6. See <http://www.un.org/en/documents/charter/chapter1.shtml>.

7. See, e.g., Alicia L. Bannon, “The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism,” *Yale Law Journal* 115 (2006): 1157–65; and Michael Reisman and Myres S. McDougal, “Humanitarian Intervention to Protect the Ibos,” in *Humanitarian Intervention and the United Nations*, ed. Robert B. Lillich (Charlottesville: University of Virginia Press, 1973), pp. 175–77.

to which they have not consented. There are more fundamental problems. Consider, first, the proposition that international law is created for nations, without any formal treaty, when they accept that certain constraints on their acts and policies are required not just by decency or prudence but as a matter of law. This assumes that in some way nations decide for themselves whether some constraint they accept *is* imposed as a matter of law and not just decency. What principle—what “rule of recognition”—do they supposedly follow in making that discrimination? It won’t do to say that they follow the principle that what they regard as law is law. They need some other standard to decide what they should regard as law.

Suppose we say: they accept the principle that what other nations accept as law is law. But then the other nations that each nation treats as making law for it need a test of what to treat as law for themselves. Our explanation must break out of the circle somewhere. Suppose we say: the requirement means that law is created by convention, by the fact that each nation accepts some constraint because and only so long as other nations do. But not all conventions generate obligations; there are many conventions of convenience that people are morally free to disregard when they wish so that the convention ends. When do conventions create legal obligations? The idea of customary law presupposes that there is some different, more basic principle at work, in the identification of international law, or at least that the subjects of international law think there is some such principle at work. We need to ask: what is that more basic principle? If we find an answer, it is that more basic principle, not the fact of consent, that provides or is thought to provide the grounds of international law.

Now consider the claim, even more fundamental for the consent thesis, that treaties create international law for the parties to those treaties. Treaties are signed at a particular time: the all-important United Nations Charter nearly seventy years ago. Nations change dramatically over such periods of time. Boundaries change, regimes and constitutional structures change. We personify states when we treat them, rather than their citizens, as the subjects of international law, and we might therefore be tempted to say that just as individual people are bound by promises long after they make them, so are states, in spite of all these changes. But the fiction of a continuing national person, as distinct from its structure of government and its individual citizens, cannot bear that

weight. It seems unfair that people should suffer serious disadvantage only because politicians chosen by entirely different people under entirely different constitutions signed a document many generations ago. We cannot justify that disadvantage by any analogy to the law of contract: contracts cannot bind people not parties to them. True, the domestic law of some states makes treaties a continuing obligation of the state. The American constitution, for example, declares treaties part of "the Supreme Law of the Land." But what domestic law creates it can destroy: a state would not be bound by international law if it were free, through its domestic legal processes, to unbind itself.

We need an explanation why the citizens of contemporary Ruritania have an obligation under international law that cannot be canceled by any new Ruritanian political process. It does not serve to declare that international law contains a more basic principle—*pacta sunt servanda*—that treaties must be respected over generations. What makes that more basic principle part of international law? It would, once again, be circular simply to reply that states consent to that principle when they sign treaties. Compare the familiar institutions of promising. As many philosophers have pointed out, there is mystery in the bare assumption that promising creates obligation. How can an individual change his moral situation just by speaking a runic phrase? If we want to explain why promises do create moral obligations, we must point to different, more basic moral principles that a promise invokes. Philosophers have suggested a variety of such principles.<sup>8</sup> We must look for similar, more basic principles within international law.

## II

I draw this conclusion: we cannot take the self-limiting consent of sovereign nations to be the basic ground of international law. The temptation to do so is understandable. It makes international law compatible, as I said, with the doctrine of state sovereignty. It also resonates with a very popular conception of political legitimacy: that coercive dominion can be justified only by the unanimous consent of those subject to that dominion. That conception of legitimacy generated the social contract tradition in political philosophy and the artificial conceptions of consent that were necessary to sustain that tradition. I have argued elsewhere

8. I discuss several of these in *Justice for Hedgehogs*, chap. 14.

that these accounts all fail and are anyway unnecessary because consent is neither a necessary nor a sufficient ground of legitimacy.<sup>9</sup> We must locate the source of political obligation elsewhere: in my view, we must locate it in the more general phenomenon of associative obligation.

Return to the distinction I drew earlier between two concepts of law: a sociological concept, useful to social scientists deciding how most conveniently to classify law as one type of system of social control, and a doctrinal concept that figures within the operation of such systems by allowing people to invoke a special kind of right or obligation. We share the sociological concept as what I have called a *criterial* concept: we can sensibly agree or disagree in the application of such concepts because we share roughly the same criteria of application. The concept of a triangle is also a criterial concept: we share that concept because we use the same test—a three-sided figure—for deciding what is or is not a triangle. Some criterial concepts are vague, however. We share roughly the same tests of application for the concept of a book, but in some cases these shared tests are not decisive. We may, if this proves convenient either practically or theoretically, agree to stipulate a more precise sense of "book." That is what astronomers did for the concept of a planet, and what Hart proposed to do for the concept of international law.

The doctrinal concept of law is very different. It is not a criterial but an *interpretive* concept: we share it not by agreeing about tests for application but by agreeing that something important turns on its application and then disagreeing, sometimes dramatically, about what tests are therefore appropriate to its use, given that its application has those consequences.<sup>10</sup> Any theory about the correct analysis of an interpretive political concept must be a normative theory: a theory of political morality about the circumstances in which something ought or ought not to happen. Since the doctrinal conception of law is interpretive, we provide a theory of the grounds of law by posing and answering questions of political morality.

That, to my mind undeniable, fact poses the most general problem of jurisprudence. We know that there is a difference, often profound, between what the law is and what it ought to be. But if what the law is

9. *Ibid.*

10. This is only a crude statement of the character of interpretive concepts. See *ibid.*, chap. 8, for a fuller and more accurate account.

itself depends on a moral theory, then how can we make that distinction? In *Justice for Hedgehogs*, and earlier work, I offered this answer (which I here state roughly): we identify the law of a community by asking which rules its citizens or officials have a right they can demand be enforced by its coercive institutions without any further collective political decision. Americans have the right, on demand, to the benefits that past congressional legislation, properly interpreted, awards them. They may also have the right that future legislation improve those benefits, but they have no right that the coercive force of the state be used to secure those further benefits unless and until that future legislation is actually adopted. We count the former right a legal one; we count the latter, if it exists, a moral one. We articulate law, then, as part of political morality—but very much a distinct part. We ask: which political rights and obligations of people and officials are properly enforceable on demand through institutions like courts that have the power to direct coercive force? That is a moral question whose answer is a legal judgment.

This very abstract account of the relation between law and morality must not obscure how the distinction actually works in practice: in how judges and academic lawyers identify particular rules of law in concrete circumstances. They do not ask themselves basic questions of political philosophy about which rights are properly enforceable on demand. They begin in answers to those questions that they take to go without saying. They agree, in America and most other places, that only the political constitution, legislation pursuant to that constitution, and past judicial decisions can create rights enforceable on demand. There is often controversy about how particular constitutional clauses, statutes, and precedents should be interpreted, but that controversy does not challenge the sole authority of these sources.

The value of the abstract account lies in the possibility it provides of justifying—or challenging—these settled working assumptions. We justify them—if we can—through a political theory that combines an attractive conception of political legitimacy together with a convincing conception of the special political virtue of fairness, one that makes history, convention, and expectation particularly pertinent to the identification of rights that are enforceable on demand, and to the isolation of those rights from other political rights, including some that contradict them, that are not enforceable on demand. (Some purported legal systems cannot be justified in that way. Then we face the complex

interpretive question whether such systems give rise to any genuine legal rights.)<sup>11</sup> That is much better than simply taking the settled practices as brute facts or seeking some mythical social-fact rule of recognition they all supposedly exemplify.

It is better, among other ways, because these justifications cast an interpretive shadow. They encourage theorists to refine their theories of constitutional and legislative interpretation, for instance, by asking which interpretive methods best serve democracy and fairness so understood. I do not mean, to repeat, that judges interpreting statutes must explain, in each case or ever, why the best theories of democracy and fairness support their interpretive methodology. Their training and experience, supplemented, we might hope, by some academic curiosity, will form their working and largely unexamined methods. It does mean, however, that those judges who interpret the most critical constitutional clauses, particularly those who write books explaining their methods, should be more sensitive to these questions than they seem to be.<sup>12</sup>

### III

How far can we construct an international jurisprudence on the same understanding? How far can we treat international law as a part, but a very distinct part, of what morality and decency require of states and other international bodies in their treatment of one another? We must abandon the positivistic, supposedly consent-based jurisprudence of international law: that is flawed beyond redemption. We should return to what I take to be a golden age of the subject, seventeenth-century European politics, to an at least partially moralized conception of international law. But we face a problem. We can draw that distinction easily for national legal systems because we find institutional structures there that provide an appropriate vocabulary. These structures broadly distinguish between courts, which have the responsibility and power to enforce rights and obligations on demand, and other sorts of political institutions, like legislatures, that do not. So we can helpfully frame our basic political question in institutional terms: we can ask what rights

11. See my discussion in Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986), chaps. 6–7; and Dworkin, *Justice for Hedgehogs*, chap. 19.

12. See, e.g., Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul, Minn.: Thomson/West, 2012).

courts have the responsibility and right to enforce. But no such structure, in any but the most rudimentary form, is yet in place in the international domain, and none can be expected soon.

Here is my suggestion. Let us imagine (though initially not in much detail) an international court with jurisdiction over all the nations of the world. We imagine that cases can be brought before that court reasonably easily and that effective sanctions are available to enforce the court's rulings. Of course that is fantasy upon fantasy, at least for the far foreseeable future. But bear with me.

If we can imagine such a court, even as fantasy, then we can frame a tractable question of political morality. What tests or arguments should that hypothetical court adopt to determine the rights and obligations of states (and other international actors and organizations) that it would be *appropriate* for it to enforce coercively? This is a moral question but a special one because judicial institutions with compulsory jurisdiction and sanctions at their disposal are subject to special moral standards of legitimacy and fairness. They have no right to declare and enforce general standards of comity, decency, or wisdom. We can identify a general theory of what it would be appropriate for such an institution to enforce as the foundation of international law.

Is it a serious objection to this counterfactual exercise that there is not—and in indefinite foreseeable circumstances cannot be—a court of that character? No international court can now deploy effective coercion without the cooperation of powerful nations who would, as a practical matter, refuse to submit to a court of the power we are imagining. I offer the counterfactual exercise only as a way of providing a scheme for identifying international law, not, at least in the first instance, as a way of persuading anyone to accept that law. Of course, it would be an important part of the exercise whether a hypothetical court would be right in endorsing its own hypothetical authority. Perhaps there are sound reasons of political legitimacy why such a court should not exist. In the next section I will explain why I think it would be legitimate, and answer in a very general, abstract way the question of what standards and methods it would be appropriate for it to adopt if it did exist.

But, in advance, we should distinguish two issues about the practicality of a theory of international law. First, is it sensible to try to develop a theory of the grounds of international law that is unlikely to be accepted by powerful nations because their power would be limited if they

accepted it? It seems so, for various reasons. First, even powerful nations now claim to defer to international law: they appeal to their conception of what that law requires or permits to justify their actions. The Bush administration repeatedly declared that international law permitted its treatment of terrorist suspects, for example. It would be important to undermine such claims by showing that a much more persuasive account of international law contradicts them. Second, a time may come, sooner than we suppose, when the need for an effective international law is more obvious to more politicians in more nations than it is now. Climate change, for example, may provoke that shift in opinion. It would be a shame if lawyers and philosophers had not improved the jurisprudential discussion of international law before that day arrived. If the standing theories of international law are radically defective, as I have suggested they are, we have at least an intellectual responsibility to propose a better one.

Second, does the fact that a legal theory is unlikely to be generally accepted soon show that it is not only impractical but wrong? There are two reasons why we might think so. The first is conceptual: if we accept the positivist account of international law, which bases law on consent, then of course a theory to which almost no one is likely to consent is obviously a false theory. But we reject that account. The second is internal: a better theory, which grounds international law on moral principle, may show that a particular claim of international law is unsound if there is no prospect of general endorsement. Later in this article I defend the importance of a principle of salience in international law. In some circumstances, this principle makes the authority of more concrete principles depend on the prospect of wide acceptance. The effect of this second kind of impact of acceptance on law is retail, not wholesale. We must wait and see.

#### IV

Most conventional international law treatises begin by describing the traditional subjects of international law.<sup>13</sup> The world is divided, in the

13. It is a further defect of the conventional approach that the "subjects" of international law—the entities to whom its rights and duties attach—must be defined exogenously. Commentators simply stipulate that only the kinds of political community contemplated in the Westphalian system count as subjects. That cannot be made true,

conventional story, into sovereign states, each of which is in principle immune from interference by other states. None of these states is permitted to impose rulers on any of the others, or to dictate its religion or laws or policies. The sovereign power of each of these states can be limited only by the voluntary acts of its own institutions. This regime is often called the “Westphalian” system of international order; the name assumes that the system was initially established in a series of seventeenth-century European treaties grouped under that name. The Westphalian system was created out of the interests of hereditary monarchies intent on substituting economic competition for the bloody religious conflicts that had marked the previous century.

It is important to notice that the system balkanized not only sovereignty but political legitimacy as well. In and after the seventeenth century, political philosophers, statesmen, religious leaders, and revolutionaries asked fresh questions about political power. The old assumption that hereditary monarchs have an absolute right to govern, at least in the temporal sphere, was gradually replaced by a starkly different assumption: that coercive political power is consistent with the dignity of citizens only if it can be justified not just in pedigree but in substance—in the way it is exercised—as well. Competing theories of legitimacy were constructed and debated; these finally settled into theories about the best conceptions of democracy and of the rights of individual citizens in a democracy. But all these theories were confined to arrangements within sovereign states. John Rawls offered his influential theory of justice as limited to the basic structure of an individual state, for example.

However, the modern question—what justifies coercive political power?—arises not just *within* each of the sovereign states who are members of the Westphalian system but also *about* the system itself: that

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without the circularity discussed in the last section, by the unanimous consent of the very states who are assumed to exhaust the pertinent population. Under the different approach I describe in the remainder of these remarks, the question of application is internal to the body of law developed. The imaginary court I describe can recognize as a sensible and justiciable question, for instance, whether multinational corporations are subject to its jurisdiction and rulings. They answer that question by exploring the principles they recognize as structuring the law they are charged with enforcing. See my brief discussion, provoked by a very helpful conversation with Sam Scheffler, at <http://www.justiceforhedgheogs.com/human-rights/>.

is, about each state’s decision to respect the principles of that system. For those principles are not independent of but are actually part of the coercive system each of those states imposes on its citizens. It follows that the general obligation of each state to improve its political legitimacy includes an obligation to try to improve the overall international system. If a state can help to facilitate an international order in a way that would improve the legitimacy of its own coercive government, then it has a political obligation to do what it can in that direction. Of course that obligation demands only what, in the circumstances, is feasible. It does not require any state to ignore the division of the world into distinct states and suppose that it has the same responsibilities to citizens of other nations as it has to its own. But it does require a state to accept feasible and shared constraints on its own power. That requirement sets out, in my view, the true moral basis of international law. It therefore also states the basic interpretive principle that the hypothetical court I imagined should use in deciding what international law now requires.

We should now notice the different ways in which individual states fail their responsibilities to their own citizens when they collectively accept the benefits and burdens of the pure unrestricted sovereignty that the Westphalian system gives them: when they accept, that is, that states are forbidden to interfere in or with the conduct of other states, come what may. A coercive government is of course illegitimate if it violates the basic human rights of its own citizens. Any state, even one that has so far been just and benign, therefore improves its legitimacy when it promotes an effective international order that would prevent its own possible future degradation into tyranny. Germany had an obligation to facilitate an international order—a more effective League of Nations, perhaps—that could have prevented its Nazi future. So did the United States, which signally failed in that obligation.

A state is also defective in its legitimacy when it cannot protect those over whom it claims a monopoly of force from the invasions and pillage of other peoples. Any state therefore has a reason to work toward an international order which guarantees that the community of nations would help it to resist invasion or other pressure. There is a mirror-image problem in the Westphalian system that threatens legitimacy in a different way. People around the world believe they have—and they do have—a moral responsibility to help to protect people in other nations from war crimes, genocide, and other violations of human rights. Their

government falls short of its duty to help them acquit their moral responsibilities when it accedes to definitions of sovereignty that prevent it from intervening to prevent such crimes or to ameliorate their disastrous effects. Together these duties call for a more complex regime governing collective intervention in the affairs of individual states that that system provides.

Governments fail their citizens' legitimate expectations in a third and less obvious way when they accept an international system that makes impossible or discourages the international cooperation that is often—and increasingly—essential to prevent economic, commercial, medical, or environmental disaster. People are subject to the constant risk of what philosophers call “prisoners’ dilemmas”: circumstances in which it is rational for them one by one to do something—drop litter in the park—that ends in loss for them all—a park destroyed. These situations pose difficult challenges of coordination. Governments can and do respond to such challenges, when these can be solved locally, by adopting and enforcing laws, by making littering a crime, for instance. But some problems—overfishing of the seas, for example, and pollution of the atmosphere with carbon—cannot be met by governments each acting only for its own territory. People in the separate states need the protection that only a coordinated policy backed by all or nearly all governments can provide. But an unmitigated Westphalian system simply repeats the dilemma at the international level. If no state can be forced to cooperate, they will all have a reason not to participate.

The legitimacy of coercive government requires, fourth, that people play some genuine, even if minimal and indirect, role in their own government. Political theorists disagree about what kind of participation is essential in different forms of government, but it is generally understood (even if this is far from universally provided) that some form of widespread suffrage in the election of officials is both necessary and sufficient within a distinct political community. In a world of strong and increasing economic interdependencies, however, people’s lives may be more affected by what happens in and among other countries than by what their own community decides. Dignity seems to require that people everywhere be permitted to participate in some way—even if only in some minimal way—in the enactment and administration of at least those policies that threaten the greatest impact on them. An unmitigated Westphalian system makes that impossible.

These are all ways in which the unchecked state sovereignty system impairs or threatens the legitimacy of the individual states that make up the system. But since each of those states derives its moral title to govern a particular territory from the arrangements that make up that international system, it therefore has the further, independent reason, different from those I just listed, for concern that the system on which its legitimacy depends in that more fundamental way is not itself illegitimate.

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Coercive government (I include not just traditional “sovereign” states but also any institution or organization claiming coercive authority) has a standing duty to improve its own legitimacy. Each traditional state therefore has a duty to pursue available means to mitigate the failures and risks of the sovereign-state system. That duty of mitigation provides the most general structural principle and interpretive background of international law. But as it stands, it is not sufficiently determinative. In many circumstances, a number of very different regimes of international law would each serve to improve the legitimacy of the international system, were it enacted and enforced, and states may reasonably disagree about which would be best. That obvious fact explains a further fundamental structural principle. This is the principle of *salience*: If a significant number of states, encompassing a significant population, has developed an agreed code of practice, either by treaty or by other form of coordination, then other states have at least a *prima facie* duty to subscribe to that practice as well, with the important proviso that this duty holds only if a more general practice to that effect, expanded in that way, would improve the legitimacy of the subscribing state and the international order as a whole. If some humane set of principles limiting the justified occasions of war and means of waging war gains wide acceptance, for instance, then the officials of other pertinent nations have a duty to embrace and follow that set of principles. The Universal Declaration of Human Rights so declares in the final “whereas” of its preamble: “a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge.”<sup>14</sup> The salience principle has an obvious snowballing effect. As more nations recognize a

14. See <http://www.un.org/en/documents/udhr/index.shtml>.

duty to accept and follow widely accepted principles, those principles, thus even more widely accepted, have greater moral gravitational force.

In the seventeenth century, salience was provided by two traditions. The first was the political force of Christianity. The Westphalian system was European and Europe was Christian. Church teaching, so far as it was pertinent, could be treated as the spine of developing international law—of the rules of *jus ad bellum* and *in bello*, for example. The second was the idea, inherited from imperial Rome but now put to different uses, of a *ius gentium* of legal principles common to nations across the Westphalian system. Early international law reflected both influences. It incorporated the natural law tradition developed through Aquinas, and it recognized principles widely shared by domestic legal systems, a recognition fossilized now in paragraph (c) of Section 38 (1) of the International Court Statute I quoted.

The world that emerged from World War II was very different. There was no longer a dominant religious tradition across the world, and widespread secularism in Europe and North America would have negated the influence of any such tradition anyway. War and economics had made different nations with different legal cultures and traditions, including the Soviet Union and China, crucial to world order. Reliance on shared legal principle was no longer possible. The retreat from colonialism that left many new or newly independent nations behind made such reliance even less useful. Some new focus of salience was needed and was quickly provided in San Francisco.

The charter and institutions of the United Nations are best understood not as arrangements binding only through contract or on signatories but as an order all nations now have a moral obligation to treat as law. The obligation is created not by consent but by the moral force of salience as a route to a satisfactory international order. Indeed—more generally—multilateral agreements setting out conceptions of such an order, like the Charter, the Geneva Conventions, the genocide agreements, and the Treaty of Rome establishing the International Criminal Court, are made international law for all, not just their initial signatories, through that principle. It is therefore important to distinguish the force of such multinational treaties, and the appropriate interpretive strategies for them, from that of agreements creating international organizations, like the European Union and the WTO, that are designed from the start for only a club of signatory nations and members later expressly

admitted, with institutional procedures that cannot sensibly be used outside that club.

In that way the salience principle explains the contemporary as well as the ancient role of *ius gentium* in international law. It also helps to explain the domestic use of that idea. It explains, for example, why the constitutional courts of separate nations are (and should be) drawn to notice and to attempt to achieve some integrity with the constitutional principles of other nations.<sup>15</sup> The debate among Supreme Court justices in the United States about whether that court should cite foreign legal materials looks silly when the practice is defended by its proponents as simply providing helpful suggestions, as a law review article might, that judges are free to accept or disregard. Who could sensibly object to that? The practice becomes more consequential when the responsibility of individual nations to seek a *ius gentium* is noticed. International order is strengthened as the “general principles of law recognized by civilized nations” grow more uniform. Interaction between the international and the domestic laws of human rights is particularly important for that reason.

The principle of salience provides a better account of the sources of international law set out in Article 38 of the International Court Statute than the consent theory can offer. We noticed earlier that the consent theory made a good part of Article 38 circular and unhelpful. The salience principle provides much better support for the sources that are named in that Article, though with the important proviso I mentioned added. It supports them individually: it explains the demands of customary international law, for instance. The more general principle I called the principle of mitigation, from which the salience principle flows, itself explains the idea of a *ius cogens*.

Salience explains the great popularity of Article 38—the consensus among scholars that it correctly states the grounds of international law—in a further way as well. The article not only sets out the implications of the principle of salience but is itself a beneficiary of the principle. Its provisions are self-confirming: it contributes to international order to continue to treat those provisions as sources of international law.

15. See Jeremy Waldron, “Foreign Law and the Modern *Ius Gentium*,” *Harvard Law Review* 119 (2005): 129–47; and Waldron, “Partly Laws Common to All Mankind”: *Foreign Laws in American Courts* (New Haven, Conn.: Yale University Press, 2012), chaps. 2–3.

Snowballing works at that level as well. According to the positivist account that makes consent fundamental, these sources flow—imperfectly—from the very idea of law as based in consent. On the account I describe, they flow instead from the moral demands, on which the legitimacy of an international system depends. These are taken to be more fundamental than consent and not contingent on consent.

If the two jurisprudential accounts end in roughly the same view of the actual sources of international law, does it make any difference which we choose? Have I only marched you up the hill and then marched you down again? No, because, as I said, the major yield of any theory about the grounds of international law is an interpretive strategy for international law. The consent account, I said, yields no helpful strategy. But the legitimacy account does. We should interpret the documents and practices picked out by the principle of salience so as to advance the imputed purpose of mitigating the flaws and dangers of the Westphalian system. The correct interpretation of an international document, like the UN Charter, is the interpretation that makes the best sense of the text, given the underlying aim of international law, which is taken to be the creation of an international order that protects political communities from external aggression, protects citizens of those communities from domestic barbarism, facilitates coordination when this is essential, and provides some measure of participation by people in their own governance across the world. These goals must be interpreted together: they must be understood in such a way as to make them compatible.

## VI

I have now twice mentioned one example of an important interpretive question. It has been very widely assumed by distinguished international lawyers, including the late Tom Franck, that no humanitarian military intervention is legal under international law unless it has been approved by the Security Council. But the Security Council is often crippled by the power of each permanent member to veto even otherwise unanimous decisions. That power allows what should be an essentially legal decision—does a violation of human rights justify intervention?—to be distorted by considerations of political and economic advantage. A permanent member might, for example, seek favorable economic treatment in Africa by promising its veto in aid of dictatorial regimes.

On occasion, however, states or groups or international organizations have intervened in force without Security Council authorization. The Iraq invasion is a minatory example. The United States did claim that it had Security Council permission—as did the United Kingdom, in spite of its Attorney General's initial opinion to the contrary. But that claim was spurious. The invasion is almost unanimously condemned as illegal in the wider international community. But the intervention by NATO forces in Kosovo is, on the contrary, widely even if not unanimously approved. No one claimed Security Council authorization for that intervention. Tom Franck declared it illegal because it lacked that authorization. But he also declared the intervention morally necessary: he called it a morally mandatory act of international civil disobedience.<sup>16</sup> That is a dangerous description, particularly from an eminent international lawyer. International law is fragile, still nascent and in critical condition. The proposition that a sense of moral duty can justify violations of international law threatens to strangle the child.

I mentioned another possibility: that the popular interpretation of Article 2 (4) of the United Nations Charter, on which Franck relied, is mistaken. Perhaps we should understand its prohibition to be limited to the use of military force aimed at territorial change or political dominion. We might argue to that conclusion in several ways. We might understand the "Purposes of the United Nations" cited in Article 2 (4) to be those that flow from the moral responsibility nations had to create that institution: the responsibility to protect people from the dangers of the insulated sovereignty of the Westphalian system. External aggression is one of those dangers, but internal terrorism is another, and we can sensibly attribute protection from both dangers as among the United Nations' purposes. That understanding is strengthened by the General Assembly's early (1950) Uniting for Peace Resolution (often called the Acheson plan). The General Assembly:

Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or

16. Thomas M. Franck, "Lessons of Kosovo," *American Journal of International Law* 93 (1999): 857–60.

act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.<sup>17</sup>

It is further strengthened by the international community's generally favorable reception to the Responsibility to Protect declaration of the International Commission on Intervention and State Sovereignty (ICISS) in 2001. The Commission's report stated:

We have made abundantly clear our view that the Security Council should be the first port of call on any matter relating to military intervention for human protection purposes. But the question remains whether it should be the last. In view of the Council's past inability or unwillingness to fulfill the role expected of it, if the Security Council expressly rejects a proposal for intervention where humanitarian or human rights issues are significantly at stake, or the Council fails to deal with such a proposal within a reasonable time, it is difficult to argue that alternative means of discharging the responsibility to protect can be entirely discounted.<sup>18</sup>

A "World Summit" of more than 170 nations in 2005 endorsed the spirit of the ICISS report in this language:

[W]e are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>19</sup>

This language did not recognize intervention that is not authorized by the Security Council, but it nevertheless bears on the interpretation of

17. See [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/377\(V\)](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/377(V)).

18. See <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

19. See <http://www.who.int/hiv/universalaccess2010/worldsummit.pdf>.

Article 2 (4) because it clearly supposes that a nation's sovereignty, or "territorial integrity," does not protect it from legitimate intervention in its domestic affairs.

In this way, we can build a salience case for an interpretation of the UN Charter that would permit humanitarian intervention even if the Security Council failed to authorize that intervention because one or more of the permanent members exercised a veto. But recall the proviso embedded in the salience principle. We must now ask: would an interpretation of the Charter that would permit intervention unauthorized by the Council actually improve the legitimacy of coercive government in the world? There is a powerful argument that it would not: Iraq. Any doctrine that would allow powerful nations to justify aggressive war as a protection of basic human rights boils with the danger of abuse. (The humanitarian justification was not offered by American or British officials in advance in the Iraq invasion, but it has been suggested by former officials of both in retrospect, and could be expected to be offered much more often if established in international law.) This counterargument is powerful because it warns that permission to invade without Security Council authorization would prove massively divisive rather than a principle around which further consensus and salience might develop.

However, a safer though more ambitious interpretation of Article 2 (4) might yet be sustained. We might argue, not that the Article permits unauthorized humanitarian military action as it stands, but that it would permit General Assembly action that would have that effect subject to appropriate safeguards. Imagine that the General Assembly has adopted a resolution with the following substance: member states are forbidden, acting unilaterally or in groups or regional organizations, to threaten or use military force without the authorization of the Security Council, unless a majority of the Security Council has voted to authorize the intervention and the International Court, pursuant to its authority to issue advisory opinions upon the request of the General Assembly, declares that the actions of the regime against which force is proposed constitute crimes against humanity.<sup>20</sup>

20. I do not use a more general description, such as "violations of human rights," because I believe that only certain violations of human rights justify military or even serious economic intervention or sanction. See Dworkin, *Justice for Hedgehogs*, chap. 15.

This would be fresh legislation, of course, rather than an interpretation of the Charter as it stands. But would this General Assembly resolution be *ultra vires* the Charter or otherwise invalid? The argument that it would be valid legislation has two parts. The general argument I offered for a permissive interpretation of Article 2 (4) would support the resolution, and the counterargument I described, about the danger of unilateral action, would be removed by the resolution itself. Crimes against humanity have been sufficiently well defined in other documents and in international practice to provide a satisfactorily clear standard for the International Court to apply in its advisory opinions. In an influential discussion, Antonio Cassese summarizes the position under general international law as follows. Crimes against humanity are

[i] particularly odious offences in that they constitute a serious attack on human dignity or a grave humiliation or a degradation of one or more human beings; (ii) they are not isolated or sporadic events, but are part either of a government policy (although the perpetrators need not identify themselves with this policy) or of a wide practice of atrocities tolerated or condoned by a government or a de facto authority. However, murder, extermination, torture, rape, political, racial, or religious persecution and other inhumane acts reach the threshold of crimes against humanity only if they are part of a widespread or systematic practice. Isolated inhumane acts of this nature may constitute grave infringements of human rights or, depending on the circumstances, war crimes, but may fall short of meriting the stigma attached to the category of crimes under discussion.<sup>21</sup>

So, on the moralized approach to international law that I am now defending, the resolution I imagine would not be *ultra vires* and action taken pursuant to that resolution would not be illegal under international law. Any sensible resolution would be much more elaborate, of course. It might revise the procedures of the International Court so as to expedite the advisory decisions required, for example. Or—a more radical idea—it might bypass the International Court altogether and

21. Antonio Cassese, "Crimes against Humanity," in *The Rome Statute of the International Criminal Court: A Commentary*, ed. Antonio Cassese, Paola Gatta, and John R.W.D. Jones (Oxford: Oxford University Press, 2001), 1:353–77, at p. 360.

create a special international court for this ad hoc purpose. I shall not try to explore the appropriate character of any such court now. But any of these possibilities would establish a remarkable and important improvement in international law.

## VII

The third of the risks I mentioned, posed by the Westphalian system of full sovereign independence, is the lack of any international legislative body with sufficient jurisdiction to solve the grave coordination problems that every nation now confronts. We are already seized by devastating prisoners' dilemmas: about terrorism, climate change, Internet communication, and economic policy. If we had an entirely different form of international organization—a worldwide federal system, for instance, with a supreme parliament—we could attack those problems through comprehensive global legislation. The unmitigated Westphalian system allows no comparable opportunity. Each nation, I suggested, has a general responsibility to do what it can to improve the legitimacy of its own coercive government, and therefore a responsibility to attempt to improve the organization of states in which it functions as a government. What follows for international law?

Once again, we can make use of the hypothetical international court I imagined. Suppose the General Assembly of the United Nations enacted, by majority vote of the member states, a comprehensive plan to regulate carbon emissions, stipulating quotas for each nation. Would our imagined court be right to enforce those quotas through the international police force? No, not as things stand, for a variety of reasons. No plausible interpretation of the language of the UN Charter or of more than a half-century of practice under the Charter would justify assigning that kind of legislative power to the General Assembly. Stipulating emission quotas cannot be supposed to be among the cardinal purposes of the United Nations, as protecting populations from crimes against humanity can be.

There would be, I think, an even more basic objection. The overall argument I have proposed requires international law doctrine to be interpreted to improve the legitimacy of the international arrangement. It hardly improves legitimacy to allow the General Assembly as now composed—all member states are represented by a single vote even

though some have exponentially greater populations than others—to dictate to the world. A world parliament cannot be manufactured out of the international structures agreed as compromises in San Francisco. But the bases we have identified for international law, which include the principle of salience, do provide procedures for establishing a more legitimate world parliament that I believe could be defended as now authorized.

I will only sketch one example: a four-majorities system of international legislation. Suppose an international conference is convened in which almost all nations, though perhaps not including all the permanent members of the Security Council, agreed to a General Legislative Convention. This Convention authorizes the United Nations General Assembly to adopt legislation addressed to global dangers requiring coordinated international action, and stipulates that such legislation would be enacted if it received votes representing states that hold a majority of the members' total populations, a majority of votes in the General Assembly, a majority of votes in the Security Council, and a majority of votes among the permanent members. Legislation so enacted would automatically be submitted to the International Court of Justice, which would apply principles of subsidiarity, as these have been developed within the European Union, for example, to determine whether such legislation was sensibly regarded as of international dimension or was a matter properly left to national determination.

I suggest this voting formula—four-majorities together with judicial review—only as an example of a new institutional structure that might be created by broadscale treaty making followed by salience. Other formulas can be constructed of equal or perhaps much greater merit: events and salience would pick out the first adequate one. Any such international voting system, coupled with International Court protection against international overreaching, would go some way toward mitigating the fourth impact of the Westphalian system on legitimacy I mentioned. This is often described as a democratic deficit. Of course it would be a stretch to say that a voting scheme like the four-majorities would provide worldwide democracy. Democracy does not mean just majority rule,<sup>22</sup> but it does suppose a political community almost all of whose population participates as equals directly or indirectly in the broad range

22. See Dworkin, *Justice for Hedgehogs*, chap. 18.

of political decisions affecting their lives. Still, some such formula would provide greater indirect participation in their own governance than most of the world's population now enjoys. A multiple-majorities formula is also sufficiently complex to protect a range of cultures and traditions from any deeply offensive authority.

#### VIII

If a genuine and effective world government had developed, in place of the Westphalian system of separate states, then demands of justice that are now local to particular states would be demands on the world as a whole. A coercive political community must respect the dignity of those over whom it exercises dominion by showing equal concern and respect for them all. Justice would therefore require a world government to show that equal concern for everyone alive. It is hard to predict the results of a world government accepting that responsibility. There are different conceptions of what equal concern requires. But though a global requirement of equal concern would certainly not generate equal wealth for everyone in the world, it would almost certainly produce much less inequality than the Westphalian system now generates. I must therefore add that, certainly to the disappointment of some readers, nothing in my argument supposes that the duty of nations to mitigate the risks imposed by an unmitigated Westphalian system includes a duty to form a world government or to assume each for itself the responsibilities for equality that a world government would have. Still, that space must be watched. I have been describing a future, so far imaginary, in which the duty to mitigate abetted by a principle of salience produces international legislation of greater and greater scope. If that future materializes, then at some point the question will be pressing whether there is then sufficient coercive authority in a world institution to engage some international responsibility of equal concern.

#### IX

You may have been surprised by the freewheeling character of my arguments about the true grounds and therefore the contemporary content of international law. But remember that international law is very young: it was effectively reborn in 1945. The arguments of famous judges in the

comparable formative period of the Anglo-American common law—of Baron Bramwell, Edward Coke, and George Jessel, and of some federal judges in the brave days of *Swift v. Tyson* in the United States—might strike contemporary lawyers as equally freewheeling.<sup>23</sup> The constitutional arguments of John Marshall, who transformed a written constitution, and of Aharon Barak, who made a constitution for Israel without a written one to transform, surprised many of their colleagues. If law is understood as a special part of political morality, and if it serves its community well, its doctrines will crystallize over time. Its roots in political morality will grow less prominent—though will be available when needed—in ordinary legal argument. That progress from principle to doctrine will signal its success. But a rigid separation between legal and moral argument in the development of international law would be premature now and would accelerate its practical irrelevance. We must free the subject from the torpor of legal positivism. We need, now, to nourish the roots, not the twigs, of international law.

JOSEPH HEATH

## The Structure of Intergenerational Cooperation

The problem of anthropogenic climate change has generated renewed interest in the issue of intergenerational justice, or more generally, the question of what we owe to future generations. This is primarily because the costs of carbon abatement are upfront, while the most significant benefits (which is to say, the most important costs averted) will begin to be felt only in about a century. Thus the central question we face is how much sacrifice we—all those living now—should be willing to make in order to improve the quality of life of people, many of whom will be born sometime after we are dead.

This question is one that philosophers have found particularly intriguing, not least because the two most important contemporary approaches to normative political theory, namely, utilitarianism and contractualism, appear to produce answers to this question that are preposterous. Since future people vastly outnumber those who are living in the present, and since it is possible to make productive investments now that will generate very long, if not infinite, streams of future rewards, any simplistic application of the utilitarian calculus suggests that we should be investing pretty much everything we produce; we may not even be entitled to meet our own subsistence requirements.<sup>1</sup> This seems overly demanding. Yet if utilitarianism seems too demanding when applied in an intergenerational context, contractualism seems

I would like to thank the Social Sciences and Humanities Research Council of Canada for financial support of this work. My thanks also to audiences at Queens University and Duke University for critical feedback, as well as the referees and editors of *Philosophy & Public Affairs*.

1. This was shown by Tjalling C. Koopmans, "On the Concept of Optimal Economic Growth," *Pontificae Academiae Scientiarum Scripta Varia* 28 (1965): 225–300. The easy solution is to impose a temporal discount rate, but this is a measure that many utilitarians resist.

23. *Swift v. Tyson* 41 U.S. (16 Pet.) 1 (1842).

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*Philosophy & Public Affairs*  
(ISSN 0048-3915) is published quarterly by  
Wiley Subscription Services, Inc., a Wiley  
Company, 111 River St., Hoboken, NJ 07030-5774.  
Periodical Postage Paid at Hoboken, NJ, and  
additional offices.

Postmaster: Send all address changes to  
*Philosophy & Public Affairs*, Journal Customer  
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# Philosophy & Public Affairs

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WINTER 2013

VOLUME 41 NUMBER 1

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RONALD DWORKIN

*A New Philosophy for International  
Law* 2

JOSEPH HEATH

*The Structure of Intergenerational  
Cooperation* 31

AVIHAY DORFMAN AND  
ALON HAREL

*The Case Against Privatization* 67

*A Note from the Editor* 1

*Subscription Information* ii

*Information for Contributors* iii

*Notes on the Contributors* iv