

I. Introduction.

In *The Law of Peoples*<sup>2</sup> (hereafter *LoP*), John Rawls places basic human rights centerstage. All peoples must honor human rights, both internally in their own domestic orders, and externally in their relations with other peoples or human populations. Human rights constitute a cornerstone of any acceptable regime of international law and relations. In this respect, Rawls's position is orthodox; it affirms the central elements of the post-World War II consensus in human rights discourse and practice.

In other respects, however, Rawls's treatment of human rights is heterodox. Rawls does not justify human rights through direct appeal to the equal moral status of individual human persons, a teleological understanding of a universal human nature, or an explicit and well-developed account of fundamental human interests or capacities.<sup>3</sup> He characterizes Article 1 of the *Universal Declaration of Human Rights* of 1948 (hereafter *UDHR*), which makes just such direct appeals, as an expression of "liberal aspirations" rather than the articulation of a premise from which universal human rights might be publicly justified within the international context.<sup>4</sup>

Further, he characterizes human rights in the first instance as norms governing international relations, the relations between peoples.<sup>5</sup> They are primarily addressed to, impose duties on, and answer to the interests of peoples and their governments. To be sure, they benefit, and are undoubtedly meant by Rawls to benefit, individual human persons. But Rawls does not emphasize this. An oft-cited passage is illustrative: Rawls seems to suggest that human rights violations invite international remedial action primarily because of the threat they pose to

peaceful international relations between peoples, and not, one is left to surmise, because of the harm done to the basic interests or dignity of the individual persons whose rights are violated.<sup>6</sup>

Finally, Rawls is explicitly minimalist in his listing of basic human rights. While he affirms basic human rights to subsistence, physical security, personal property, formal equality under the law, freedom from slavery or forced occupation, and sufficient liberty to sustain meaningful freedom of religious practice and thought, he does not affirm basic human rights to democracy, nondiscrimination, or the full range of liberal democratic freedoms (of assembly and association, or expression, for example).<sup>7</sup> To be sure, as we shall see, his list of basic human rights is less minimalist than many critics have allowed. Nevertheless, he clearly rejects the view that all or nearly all of the rights contained within the *UDHR* are basic human rights, or human rights proper, as he puts it.<sup>8</sup>

With respect to the content, nature and function, and justification of human rights, then, Rawls's position appears to be heterodox to some significant degree. This, of course, generated both surprise and disappointment in many quarters, not least among those who saw in what they took to be the reigning orthodoxy of human rights discourse and practice a natural extension of the sort of moral vision Rawls delivered in *A Theory of Justice*. My aim in this essay is to explicate sympathetically what I take to be Rawls's position on human rights and, by so doing, to demonstrate that Rawls's position is more plausible, less heterodox, more coherent, less *ad hoc*, and finally better justified than many critics have recognized.

## II. Basic Human Rights: Rawls's List.

Rawls identifies eight principles which taken together constitute the law of peoples. Principle number six states “[p]eoples are to honor human rights.” Discussions of Rawls’s position on human rights typically begin with his list of basic human rights in Section 8.2.2.a.. The list there strikes most readers as excessively minimalist. Of course, Rawls begins his list with the words “[a]mong the human rights are...” and thus does not intend it to be exhaustive. Indeed, immediately after introducing his eight principles, including the just mentioned principle number six, he characterizes the principles as incomplete and in need of supplement, interpretation and explanation. That his Section 8.2.2.a. list is not exhaustive is confirmed in Section 10. There he affirms as human rights, in the full and most fundamental sense of the term, the rights specified in Articles 3-18 of the *UDHR*.<sup>9</sup> These include the central elements of due process and the rule of law (Articles 6-12 and 17), the right to refuse nonconsensual marriage (Article 16), a right against cruel, inhuman or degrading punishment and against torture (Article 5), the right to seek asylum (Article 14), the right to a national identity (Article 15), and the right to freedom of movement (Article 13). Rawls also affirms those rights entailed, on any plausible understanding, by the rights set out in Articles 3-18. Rawls mentions all the rights specified in the conventions on genocide and on apartheid. But there are no doubt many others. For example, the Article 11 right to be presumed innocent until proven guilty in a public trial with all guarantees necessary for a meaningful defense must surely entail a right against coerced self-incrimination. Absent such a right, the Article 11 right would be of little benefit to those holding it. Thus, it would be unreasonable to suppose that Rawls does not regard the right against coerced self-incrimination to be also a basic human right, even though it does not explicitly appear in Articles 3-18 of the *UDHR*.<sup>10</sup> Undoubtedly, careful reflection on Articles 3-

18 would generate further examples of additional human rights necessarily entailed by the rights specified in those Articles. Rawls's list of human rights is, then, rather more robust than many readers have been willing to acknowledge.

Still, there is no getting around the fact that Rawls does not include among his basic human rights a general right to nondiscrimination. Indeed, he excludes the Article 23 right to nondiscrimination in employment and the Article 21 right to universal and equal suffrage.<sup>11</sup> But, again, his position is not quite what his critics have sometimes claimed. The human rights he does explicitly affirm set important limits to the range of discrimination his position allows. And he makes it clear that all peoples must respect the rights of minority populations.<sup>12</sup> Further, while he does not think that basic human rights prohibit gender discrimination in political, economic or social life, he does insist that women have a basic human right, *inter alia*, to have their interests represented in consultative political processes, to express dissent and so on.<sup>13</sup>

There is also no getting around the fact that Rawls does not include on his list of basic human rights many of the economic and social rights affirmed by the *UDHR*. He appears purposefully to exclude Articles 24, 25, 26 and 27. He explicitly identifies Article 22 as excluded.<sup>14</sup> In Section 8.2.2.a., the only economic rights Rawls lists are the right to subsistence and to personal property. If this were all he said, of course, his would be a pretty thin conception of social and economic rights. But this is not all he says.

He also says that all peoples have a duty of assistance to insure that the basic needs of all persons are met and that these basic needs must be understood in terms of the economic and institutional resources necessary for them to make meaningful use of the rights, liberties and opportunities of their (liberal or decent) society, whatever they may be.<sup>15</sup> Now, admittedly,

assigning all peoples this duty of assistance is not quite the same thing as saying that all persons have a basic human right to have their basic needs met in this sense of needs indexed to the basic structure of their society. But when Rawls focuses directly on the basic human rights possessed by individual persons, he interprets the right to subsistence as a right to a “minimum economic security” including “general all-purpose economic means” sufficient to make “sensible and rational use” of the liberties afforded within one’s own domestic political order.<sup>16</sup> Moreover, he maintains that the moral status of a people depends on its organizing itself as a mutually advantageous system of cooperation (even if not liberal and democratic). This justifies not just a right against slavery or servitude, but also a right against systemic exploitation, for systemic exploitation is simply the institutionalized but avoidable failure of mutual advantage. A more charitable reading, then, would have Rawls committed to a basic human right to a substantial economic and social minimum relative to the decent or liberal democratic domestic order to which one belongs, a minimum (in all cases except perhaps the atypical case of an isolated and primitive indigenous people) beyond what typically comes to mind when one thinks of mere subsistence.

While minimalist when assessed against the *UDHR* or other familiar benchmarks, Rawls’s list of basic human rights is not nearly as minimalist as many critics suggest. To be sure, important liberal democratic rights are left out. Rawls recognizes no basic human rights to democratic government or universal suffrage, the robust freedom of assembly or expression typically secured in liberal democracies, nondiscrimination in political, economic and social life, free and universal public education, social security or other welfare programs familiar from contemporary liberal democracies, and so on. These are significant omissions. But here several

points must be kept in mind if we are to be clear about how significant a departure these omissions mark from the orthodox understanding of contemporary human rights discourse and practice.

First, the human rights Rawls identifies as basic represent the moral core of each of the six categories of rights listed in the *UDHR* and two *Covenants*. These categories are: 1) rights governing the physical security and psychological integrity persons, 2) rights governing basic individual freedoms, 3) rights governing political participation, 4) due process rights insuring nonarbitrary state action, 5) equality rights, and 6) social and economic rights.<sup>17</sup> While the *UDHR* and two *Covenants* include within several of these categories rights Rawls does not recognize as basic, Rawls does identify as basic the most fundamental rights within each category. These basic human rights bind and may be enforced against all peoples and populations, on Rawls's view, regardless of their consent or voluntary undertaking, something that is not true generally of the rights on the *UDHR* and two *Covenants*.<sup>18</sup>

Second, strictly speaking, the *UDHR* is not a legally binding document and all the parties signatory knew that when they signed. The Preamble to the *UDHR* explicitly states that its purpose is to set an aspirational standard to be used in measuring the progress or development of bodies politic to be secured internationally through teaching and education. This, of course, is just how Rawls understands the *UDHR*, even if he also thinks some of its provisions set out genuine or proper basic human rights specifying threshold conditions of recognitional legitimacy within the international order eligible for legitimate coercive enforcement regardless of consent.<sup>19</sup>

Third, while the two *Covenants* implementing the *UDHR* are legally binding on party

signatories, many state parties signed stating explicit reservations to particular provisions, often those dealing with precisely the rights Rawls excludes from his list. The practice of signing treaties with reservations is legally recognized and accepted within international law.<sup>20</sup> To get a sense, then, of what is taken for granted in contemporary human rights discourse and practice, it is not enough simply to read the two *Covenants*, or any particular list of human rights documents (including the *Convention on the Elimination of All Forms of Discrimination Against Women* [CEDAW], etc.). The international public political culture of which human rights discourse and practice is a part is vastly more complicated and less unified than any such reading would suggest.

Fourth, much of contemporary human rights discourse and practice is concerned with human rights either binding on particular states because they have already consented to them as such or urged on states as obligations they ought to take on by giving their consent. But Rawls's concern in *LoP* is not primarily with what we might call the politics of human rights or human rights as made part of positive international law through treaty, custom and so on, but rather with those human rights binding on states regardless of and prior to any consent they may or may not give, human rights that must be secured for there to be anything like a morally acceptable international politics of human rights.

If we keep these points in mind the gap between Rawls's somewhat minimalist list of basic human rights and the list one arrives at through a quick review of contemporary human rights documents or the webpages of NGOs devoted to human rights advocacy is less startling. Rawls's critics typically do not notice these explanatory bases for the gap. But this is not surprising. Those who have aligned themselves with the international human rights movement

as advocates (and I count myself among them) have few strategic or political incentives to distinguish sharply between human rights binding regardless of consent and those binding only with or because of consent. Nevertheless, for philosophical purposes, or at least Rawls's philosophical purposes, the distinction must be made.

Three final points. First, Rawls's view is consistent with the unity of basic human rights. There can be no basic *right* to subsistence without a basic right to express dissent and, in a developed state occupying a large territory, a basic right to freedom of movement. Basic human rights mark the set of mutually interdependent conditions that must be met for persons to acquire legal and political obligations of at least *prima facie* moral force by virtue of their membership in a body politic. Or so I shall argue below. Second, Rawls allows that experience and research may justify including on the list of basic human rights some democratic political participation rights or gender nondiscrimination rights if it turns out that they are empirically necessary to one or more of those rights already identified as basic.<sup>21</sup> Presently it appears that while they substantially contribute to the ability of states to secure for their members some of the rights, most notably subsistence, Rawls identifies as basic, they may not be empirically necessary. Cuba, for example, secures basic subsistence rights (though it may violate other basic human rights) without democratic political participation rights. The empirical case for making democratic political participation rights or general nondiscrimination rights basic (and thus internationally enforceable) is not yet complete. Third, Rawls's account of basic human rights is fully consistent with a political commitment to realizing an international order within which a much wider range of human rights are binding on all states through positive international law by virtue of their consent and ultimately customary practice. One may affirm Rawls's account and

also continue to think it important that liberal democratic and other well-ordered peoples as well as NGOs and individuals of good will work toward the universal voluntary affirmation by all states of the two *Covenants*, *CEDAW*, and other significant human rights documents without reservation and with meaningful enforcement.

### III. Basic Human Rights: Their Nature and Function.

If the previous section is correct, then Rawls's view of the content of basic human rights is less heterodox, less *ad hoc*, and more plausible than it at first appears. But what about his account of the nature and function of basic human rights?

On Rawls's view basic human rights are universal rights. They bind all states regardless of consent. They mark conditions to be met by any body politic to be recognized as legitimate within the international order and thus entitled to self-determination and nonintervention. States that honor human rights and that also remain nonaggressive secure for themselves within the international order a right against coercive or forceful intervention, whether in the hard form of military intervention or the softer forms of diplomatic or economic sanction.<sup>22</sup>

Basic human rights are best understood, then, in terms of their practical function within the international order.<sup>23</sup> They are not timeless, prepolitical, natural rights belonging to the moral fabric of the universe or flowing directly from some universal human nature. This they could not be. They presuppose a world of distinct peoples, individual bodies politic, confronting practical issues of foreign policy in international relations and prepared to address and resolve those issues as moral issues. This world with its practical problems is a contingent, historical and political achievement. Human rights are universal; their moral force reaches even to long-

isolated, territorially remote, indigenous peoples.<sup>24</sup> But they are not universal in the way that traditional natural rights are.

Instead, their universality is a function of their genesis within the practical reason of liberal democratic peoples as they undertake as corporate moral agents to answer their most their most pressing or basic question of foreign policy. That question is this: What other states, if any, are we, as liberal democratic peoples, morally obligated to recognize as possessed of the same right to self-determination and nonintervention we claim for ourselves on the international or global stage? The universality of basic human rights derives from the fact that liberal democratic peoples are morally obligated to recognize as possessed of an international right to self-determination and nonintervention all and only nonaggressive states the basic structure of which secures for all members the basic human rights Rawls identifies.

Basic human rights, then, are rights possessed by individuals against the particular bodies politic to which they belong. They are enjoyed, when they are enjoyed, as civil or constitutional rights. International enforcement efforts aim always at realizing domestic political orders faithful to basic human rights and thus entitled to recognitional legitimacy (and with it self-determination and nonintervention) within the international order. Basic human rights presuppose, then, not a single, unified and centralized system of global political authority, but rather an international cooperative federation or federations of distinct, autonomous and, from an international perspective, legitimate systems of domestic political authority.

Within a morally acceptable international order, basic human rights constitute a fundamental foreign policy imperative for all member states.<sup>25</sup> One reason for this is that states that violate basic human rights, so-called “outlaw states,” pose a fundamental threat to peace and

stability within the international order. The authority they claim over their members merits no moral recognition from liberal democratic (or other decent) peoples; it is not genuine political authority. Outlaw states are systems of domination, or terror, or exploitation, or brute force. They are not morally significant systems of legal and political obligation and authority. Liberal democratic (or other decent) peoples cannot rely on them, then, at least not as a moral matter, to keep their populations from aggressive, violent or criminal activities. And since outlaw states do not honor basic human rights, their populations, or significant portions thereof, are unlikely to be sufficiently satisfied with their domestic condition to refrain from aggressive, violent or criminal activities. So, states that violate basic human rights, outlaw states, pose a real threat to international peace and security, even when they are nonaggressive toward their neighbors. Accordingly, liberal democratic (and other decent) peoples have good reason to insure that basic human rights are universally honored.

By emphasizing the foregoing Rawls may appear to suggest that the fundamental moral status or needs or interests of individual human beings provides no compelling reason to make human rights a foreign policy imperative. But this is not quite right. Rawls clearly thinks that the suffering of individual persons in burdened societies is fundamental to the justification of the duty of assistance, a duty which effectively makes basic human rights a foreign policy imperative for all states.<sup>26</sup> And he clearly thinks that bodies politic exist for and ought to serve the good of their individual members as moral agents; why else would the law of peoples require all bodies politic to be organized as genuine and mutually advantageous systems of cooperation? Of course, Rawls allows that to be genuine and mutually advantageous a system of general social cooperation between persons need not assume those persons to be free and equal individuals

without any antecedent group-based memberships or obligations or claims. But he nowhere allows that bodies politic need not answer to the needs and interests of their members as persons.

While Rawls does not emphasize it, his human rights doctrine answers to, or is at least appears intended to answer to, the fundamental moral status and basic needs of all human persons as moral agents and social beings. One might say that it answers to a fundamental interest shared by all human persons in recognition and membership as a person or moral agent (though not necessarily a free and equal citizen) in a well-ordered and decent (though not necessarily liberal and democratic) body politic or people entitled to self-determination and nonintervention. The law of peoples aims at and authorizes the international use of force to secure a world within which this basic human interest is universally met as a matter of right.<sup>27</sup> Once this world is secure, however, force no longer has any legitimate role to play within the international order, except as a defense against aggression.

I wish to highlight just one final feature of Rawls's treatment of the nature and function of human rights. While basic human rights must be universally secured, it does not follow that they must be enjoyed everywhere as individual or citizenship rights in the familiar "rights as trumps" sense common to liberal jurisprudence. The international legal order need not commit to the universality of liberal jurisprudential categories and commitments in this sense.

Rawls affirms, and thinks liberal democratic peoples must recognize, the possibility of nonliberal, nondemocratic but nevertheless decent and well-ordered peoples entitled to recognitional legitimacy within a peaceful and morally acceptable international order.<sup>28</sup> Such peoples may organize themselves around various group memberships and affirm a "common good" rather than a liberal conception of justice.<sup>29</sup> Accordingly, they may not find congenial a

liberal jurisprudence of rights belonging to individuals simply as individuals or citizens and functioning as “trumps” over competing claims tied to the common good. How, then, can they honor basic human rights? How ought the emergent international legal order interact with these domestic “common good” legal systems within which the liberal ideal of individual or citizenship rights as trumps is not at home?

The question here is what is meant by “securing basic human rights.” Rawls is not altogether clear about this. He indicates that benevolent absolutisms honor basic human rights.<sup>30</sup> But he cannot mean by this that they honor basic human rights *as rights*, since the subjects in such a regime lack the political participation rights necessary to be able to insist on the content of their basic human rights *as a matter of right* or of their rights. They enjoy that content only through the good will of their benevolent ruler, not through their reciprocal commitment with their ruler to public rules backed by reasons. But such a reciprocal commitment is essential if they are to enjoy the content of their basic human rights as a matter of right or their rights. Indeed, it is this absence of reciprocity between the ruler(s) and the ruled that, on Rawls’s view, renders benevolent absolutisms less than well-ordered and thus ineligible for recognition and full membership in a morally acceptable international order of peoples or corporate moral agents.

What distinguishes a decent people from a benevolent absolutism is that in the former but not the latter there are things citizens or subjects can do, publicly, legally and institutionally recognized things, to insist on the content of their basic human rights. They can criticize or dissent from violations or failures to deliver that content. They can demand a public justification. And so on. Governed by public rules backed by reasons and faithful to the content of basic human rights, all within the rule of law, the citizens or subjects of a decent people stand

in a relationship of at least minimal reciprocity with their ruler(s). They are constituted and recognized as moral and political agents, even if not the free and equal citizens of a liberal democracy. Thus constituted, there are things they can do, actions they can perform, to insist on the content of their basic human rights within the constitutional and legal framework of their decent domestic order with its common good conception of justice.<sup>31</sup> Of course, the official jurisprudential discourse within such a decent domestic order may not look much like the jurisprudential rights-talk of a liberal democracy. Citizens or subjects may not think of themselves as insisting as individual citizens on their “rights as trumps” over any conception of the common good. But what they are able to do and to insist on is sufficient to insure that the content of their basic human rights is secured within their domestic order as a matter of public reasons and right.<sup>32</sup> This possibility of a decent domestic jurisprudence not organized around the idea of individual rights as trumps the international legal order, Rawls’s view suggests, must accommodate. It need not accommodate the jurisprudential doctrines, if any, at home within benevolent absolutisms. There one finds only passive, even if happy or content, subjects; one finds no political agents, no reciprocity between the ruler(s) and the ruled.

#### IV. Basic Human Rights: A Rawlsian Justification.

Suppose we accept Rawls’s account of the content, nature and function of basic human rights. What justification does Rawls offer for this account? Here critics maintain that Rawls offers no plausible justification and that any justification he might offer will lead eventually to a more robustly liberal and democratic list of basic human rights and a less internationalist conception of their nature and function. This is, I think, not true. While Rawls does not himself

develop any extended justification for his conception of basic human rights, he suggests a sound Rawlsian justification.

The law of peoples sets out the basic moral principles to govern an international order morally acceptable to liberal democratic peoples. Because liberal democratic peoples share a fundamental practical commitment to reciprocity between moral agents, whether corporate or natural persons, the law of peoples must be publicly justifiable to all those subject to it.

Reciprocity is, for Rawls and Rawlsian liberals, a root moral norm. It requires of moral agents that they restrict themselves in their other-regarding conduct to acting in accord with principles those others also could reasonably affirm from their own moral point of view without being manipulated or lied to and so on.<sup>33</sup> It requires a social world structured by public norms backed or potentially backed by shared reasons and not force alone. Rawls's original position arguments, both domestic and international, are meant to identify and bring into focus those substantive principles of political morality consistent with reciprocity between existing moral agents. Principles properly identified will or could stand as a focal point of an overlapping consensus among diverse moral agents.

Rawls aims to show that basic human rights stand or could stand as one focal point of an overlapping consensus within the public political culture of international relations. But he does not aim to show this by conducting an empirical search for such a focal point of consensus. That would make his conception of basic human rights "political in the wrong way," to recall the phrase from *Political Liberalism*.<sup>34</sup> Rather, he aims to show this by inquiring first into what liberal democratic peoples from an appropriate moral point of view would reasonably affirm between themselves regarding basic human rights, and then inquiring second into whether,

should any exist, other apparently decent peoples – Islamic, Confucianist, perhaps some form of nondemocratic and nonliberal socialist, and so on – could also reasonably affirm those same commitments from their own moral points of view without manipulation, coercion and so on. Accordingly Rawls invokes two international original position arguments, one within which agents represent only liberal democratic peoples, and the other within which they represent only decent peoples; each leads in its own way to the same law of peoples and the same public international conception of basic human rights.<sup>35</sup>

Readers of *LoP* tend to assume that Rawls's desire to avoid parochialism or charges of Western imperialism best explains the minimalism of his human rights doctrine. Of course Rawls desires to avoid such charges.<sup>36</sup> But this desire is not what leads him to his somewhat minimalist conception of human rights. Rather, it is his commitment to reciprocity, first as between liberal democratic peoples, and then, and only then, as between liberal democratic peoples and other decent peoples. Rawls gives every impression that his conception of basic human rights is the conception that would be morally appropriate (at the level of first principles enforceable against peoples regardless of consent or voluntary undertaking) even in a world of only liberal democratic peoples. His human rights minimalism, then, is not a function of concessions to or accommodations of nonliberal, nondemocratic decent peoples. To be sure, he undertakes to show that his conception of basic human rights will satisfy the demands of reciprocity even in a world of liberal democratic and other decent peoples. But the overlapping consensus between liberal democratic and other decent peoples is over a conception of basic human rights already determined, on Rawls's account, by liberal democratic peoples, consistent with their own commitment to reciprocity and from their own moral points of view. Thus Rawls

deflects charges of parochialism or Western imperialism while insuring that liberal democratic peoples are faithful to their distinctive moral points of view and honor their commitments to reciprocity. Basic human rights belong to a liberal law of peoples, not a law of liberal peoples.

At first blush this seems counterintuitive. It seems natural to suppose that agents representing only liberal democratic peoples in an international original position would simply agree to recognize as basic human rights the full range of liberal democratic rights. After all, they know that they represent only liberal democratic peoples with a fundamental interest in realizing liberal democratic justice.

Of course, they also know that none of the peoples they represent are perfectly just and that many of the peoples they represent will reasonably disagree over what liberal democratic justice requires and the extent to which any of them approximates those requirements. Further, they also know that all the peoples they represent have a fundamental interest in their own political autonomy and thus in realizing liberal democratic justice on their own terms in their own way. Given all this, such agents will find themselves unable to agree to any particular scheme of liberal democratic rights as setting out the basic human rights binding on, and in principle enforceable against, all regardless of consent. Any such agreement would unacceptably encroach on the political self-determination of the peoples represented and invite the resolution of reasonable international disagreements through force cut free of shared or potentially shared reasons.

So, it is not reasonable to suppose that liberal democratic peoples would or should agree to a list of basic human rights that includes the full range of some particular well-defined and complete list of liberal democratic rights. But what about a more modestly or generically liberal

and democratic list of basic human rights? Surely, it seems, agents representing only liberal democratic peoples could agree to a conception of basic human rights binding on all regardless of consent that is at least modestly or generically liberal and democratic. Wouldn't they agree, for example, to some general right to democratic political processes, or to universal suffrage, or to nondiscrimination in employment or eligibility to run for office?

One consequence of any such agreement would be that states not yet fulfilling the specified basic human rights, those without universal suffrage or with gender or religious restrictions on eligibility for public office, would be denied equal standing within the international order as a moral order. They would not have a right to self-determination and nonintervention, or in any case, not the same right as those states with universal suffrage, nondiscrimination and so on. At the turn of the last century, then, England and the United States would have had no right against coercive or forceful intervention, diplomatic, economic, perhaps even military, by other states keen to see that women get the right to vote. At the turn of the century before the last, they would have had no right against coercive or forceful intervention aimed at abolishing certain Church privileges. (Depending on what one thinks ingredient in a conception of basic human rights that is modestly and generically liberal and democratic, the United States today might have no right against forceful intervention, say diplomatic and economic, to secure domestic campaign finance reform and other essentials to anything like fair value for basic political liberties.)

There is something odd about this. Liberal democratic peoples today, at least in the paradigm cases, regard their own domestic orders as their own achievements and thus as one of their greatest source of pride as peoples. (As an American I look forward to the day when we as

a people domestically secure fair value for basic political liberties; it will be a proud day for Americans.) It is precisely because they were each free to liberalize and democratize in their own way on their own time through their own domestic struggles that this is so. But once even generically liberal and democratic rights are included among the basic human rights internationally binding and enforceable regardless of consent or voluntary undertaking, liberalization and democratization become things that may legitimately be forced on states. How can liberal democratic peoples ground their *amour propre* in their own liberal democratic domestic orders taken as their own achievements and at the same time affirm principles of international morality that permit the use of force to compel the liberalization and democratization of other nonaggressive states, even states organized as genuine systems of cooperation, committed to the common good of their members as moral agents, and faithful to measure of reciprocity secured between ruler(s) and the ruled? Given their own self-understanding, and with it the historical bases of their own *amour propre*, it would be unreasonable of liberal democratic peoples to authorize principles of international morality that permit the use of international force solely to secure the liberalization and democratization of such an otherwise apparently decent body politic.

But what, then, would agents representing only liberal democratic peoples agree to with respect to basic human rights? If not the rights essential to any generically liberal and democratic domestic order, then what? I propose putting the question another way: What could all liberal democratic peoples agree to as minimally sufficient to justify their own claimed right to self-determination and nonintervention? Whatever this is, presumably the agents representing them in an international original position would agree to include it among the first principles of

international morality binding on all regardless of consent.

Rawls does not answer this question directly. But some suggestive references suggest the following view.<sup>37</sup> In a well-ordered polity organized as a genuine system of cooperation for the common good of all members constituted and sustained as moral and political agents, the legal and political obligations imposed by that polity on its members have *bona fide*, even if only *prima facie*, moral force. The members of such a polity are bound to one another and to their body politic, with its normative system of political and legal authority, in a morally significant way. It is theirs in the sense that it belongs to the exercise of their moral and political agency to determine its structure and content in light of their own best judgments and other moral commitments. Nonparticipants or nonmembers ought to respect the moral and political agency of those implicated within this morally significant normative system of political authority. They ought to refuse forceful intervention. That members might be morally justified in civil disobedience is not by itself a sufficient reason for outsiders to forcefully intervene. Outsiders may of course undertake to influence the judgments of those implicated within such a system of political authority through reasoned argument, example and so on. But respect for the moral agency of individual persons underwrites both the right to collective self-determination on the part of those implicated in such a system of political authority and the duty to refuse forceful intervention on the part of those not so implicated.

But how could anything less than a liberal and democratic domestic order confer on legal and political obligations *bona fide*, even if only *prima facie* and thus defeasible, moral force? How could a normative system of political authority be morally significant for its members or participants if it was not liberal and democratic? How could respect for the moral and political

agency of individual persons underwrite a right to collective self-determination for nondemocratic and nonliberal, even if decent and well-ordered, regimes?

H.L.A. Hart sets out the conditions necessary and sufficient to genuine legal obligations. Famously, these are two. First, legal rules valid within the system must be generally obeyed. Second, officials must accept and honor in their official conduct the criteria of legal validity.<sup>38</sup> Hart goes on to note that there can be no genuine legal obligations in the absence of formal or natural justice (since treating like cases alike is essential to rule-following and rule-following, at least by officials, is essential to genuine legal obligations).<sup>39</sup> With respect to substantive justice, Hart argued that to be viable for any length of time a legal system must extend a minimum natural law content to some significant portion of the population.<sup>40</sup> But this content he thought necessary to a viable and enduring legal system only because of contingent facts about human beings (and thus admitting its necessity was no affront to the positivist thesis that there is no necessary *conceptual* connection between law and morality). More importantly for present purposes, Hart did not think this content had to be distributed equally or even minimally to all for genuine legal obligations to exist. For Hart, the legal system in the antebellum South in the United States generated genuine legal obligations. Officials accepted and honored in their official conduct a rule governing criteria of legal validity, citizens largely obeyed the law, and a minimum natural law content was extended to enough of the population to sustain the legal system over time. It does not follow, of course, that the legal obligations of citizens in the antebellum South had any moral force as such. But they were genuine legal obligations on Hart's account. Citizens and officials were members of or participants in a normative system of legal authority.

Hart's analysis of legal obligations thus fails to explain why legal obligations have even *prima facie* moral force for citizens or subjects. His view requires only that legal officials secure general obedience to the law and hold themselves accountable to certain internalized rules governing legal validity and the like. Hart does emphasize that officials must regard their own official conduct as guided by rules and thus reasons. But from a liberal democratic point of view this is not enough to deliver unto legal obligations even *prima facie* moral force since it requires no reciprocity at all between officials and citizens or subjects. At its core, then, Hart's view is, to invoke language used by Rawls, only a theory of how officials can satisfy themselves that they are acting properly.<sup>41</sup> It admits the possibility of genuine legal obligations with no more authority, from the moral point of view of citizens or subjects, than commands backed by force.<sup>42</sup> To identify the conditions that must be met if legal obligations are to have for all members of a polity at least *prima facie* moral force, we must move beyond Hart's theory of law.

Rawls cautiously refrains from taking a stand on Hart's theory of law or legal obligation as such.<sup>43</sup> Whether the antebellum South had a genuine legal system capable of imposing genuine legal obligations, Rawls explicitly refrains from saying. But Rawls does follow Philip Soper in maintaining that Hart's conditions minimally necessary and sufficient to genuine legal obligations fail to invest those obligations with even *prima facie* moral force. But what, then, would be minimally necessary and sufficient to insure that the normative force presumably carried by genuine legal obligations was always at least *prima facie* moral force, to insure that citizens' or subjects' legal obligations were just part of a larger and morally significant normative system of political authority?

This is the fundamental question. Liberal democratic peoples have no good reason to

confer on any polity a right to collective self-determination and nonintervention just because its members are bound by genuine legal obligations in Hart's sense. Those living in the antebellum South were likely bound by such obligations, but as slave-holding polities Southern states had no moral right to nonintervention.<sup>44</sup> Liberal democratic peoples have a good reason to confer a right to self-determination and nonintervention only on those polities within which the genuine legal obligations of members carry *prima facie* moral force derived from the morally significant normative system of political authority that is their context and home.

No system of political authority could underwrite a *prima facie* moral obligation to obey the law without being purposefully aimed at the good or advantage of all members as moral agents and enforced by officials prepared publicly to defend the law in such terms. Officials may enforce a common good or liberal conception of justice. But they must enforce (some form of) one or the other and defend their official conduct with reasons addressed to citizens or subjects as moral and political agents. And citizens or subjects must be able publicly to demand and have a right publicly to receive and evaluate reasons for official state action. Only if these conditions are met in some substantial and meaningful way may citizens or subjects and officials realize sufficient reciprocity to confer moral significance upon the normative system of political authority (that marks them as citizens or subjects and officials) and thus upon their legal obligations within that system.

What would it mean for these conditions to be met in a substantial and meaningful way? Several things.<sup>45</sup> First, all citizens or subjects must have a right to evaluate, dissent from and receive a public justification for official state actions. Because this right is without worth apart from more general rights to freedom of thought and conscience, to some minimally decent

standard of living (above bare subsistence), and to physical and psychological security, citizens or subjects must also have these rights. Roughly, we might say, what Hart called the minimum natural law content of any viable legal system for human beings must be extended to all those subject to domestic political authority and the law. If it is not, outsiders will have no reason to think that the legal obligations of insiders are also *prima facie* moral obligations and thus no reason to think that their respect for insiders as moral agents underwrites a right to collective self-determination for insiders or a duty on outsiders to refuse forceful intervention in their domestic political order.

For outsiders to have a reason to think that the legal obligations of all insiders carry *prima facie* moral force, they must also have reason to think that the political-legal system administered by officials and enforced on citizens or subjects is a system of mutually advantageous cooperation for all. In addition to securing those rights already mentioned, this will require securing also those rights necessary to immunity from systemic exploitation and to insuring for all some nontrivial zone within which they may pursue their own good by their own lights as moral agents. There must be a right to personal property, a right to refuse marriage, a right to some substantial religious liberty, a right to asylum, rights against Apartheid and genocide, and so on. Of course, the political-legal system must also secure natural or formal justice. And it must do so within the context just set out.

At this point we have arrived, more or less, at Rawls's list of basic human rights. While I cannot carry out the full analysis here, my hunch is that if we continue to inquire, from a liberal democratic point of view, into the conditions that a polity must satisfy for its members to have a right to collective self-determination and nonintervention, we will find ourselves talking about

bodies politic organized as viable constitutional republics. If I am right about this, then agents representing only liberal democratic peoples in an international original position will agree to a principle of basic human rights that makes binding on all bodies politic regardless of treaty or voluntary undertaking only those rights essential to a well-ordered constitutional republican form of government. These will include the rights set out in or entailed by Articles 3-18 of the *UDHR*, along perhaps with others, but not those set out in Articles 1-2 or 19-30. They will form a proper subset of liberal democratic rights, but will not include general rights to democratic political processes or nondiscrimination. They are, accordingly, consistent with the priority liberal democratic peoples assign their own liberalization and democratization in their own *amour propre*.

Within well-ordered constitutional republics the conditions of moral and political agency are sufficiently secured and there is sufficient reciprocity between rulers and the ruled for legal obligations to take on *prima facie* moral force. This is true even for nonliberal and nondemocratic constitutional republics, of which there have been many throughout history and are many today. And it is out of respect for the moral and political agency of those persons already subject to such *prima facie* moral obligations, that liberal democratic peoples acknowledge their right to collective self-determination and nonintervention. Indeed, this is the basis for their own claim to collective self-determination and nonintervention as liberal democratic peoples. While the United States was at the turn of the last century not yet liberal and democratic since it denied women the right to vote, to hold many jobs and so on, it was or was plausibly then regarded as a constitutional republic. And so, counter-intuitive as it may have at first seemed, agents representing only liberal democratic peoples in an international

original position will agree to regard as basic human rights only those essential to a constitutional republican form of government. Where these rights are secured and there is no threat of external aggression, a people is entitled to self-determination and nonintervention. Where these rights are not secured, respect for the moral and political agency of individual persons requires that they be secured. Outlaw states and burdened societies must be transformed.

Peaceful, well-ordered constitutional republics faithful to the basic human rights set out here are self-contained, independent, and morally significant systems of political and legal obligation and authority. They are, as corporate moral agents, entitled to self-determination and nonintervention, not because corporate moral agents have rights in and of themselves independent of their individual members, but rather because as well-ordered systems of cooperation they constitute and sustain their individual members as moral and political agents (even if not as free and equal liberal democratic citizens) with legal and political obligations of *bona fide prima facie* moral force.

Of course, agents representing liberal democratic peoples will want to reserve for the parties they represent the right to engage in a diplomatic international politics of persuasion and moral criticism aimed at encouraging all peoples to more fully perfect themselves as liberal democracies, either through their own internal self-development, or through voluntary and shared political undertakings through treaty, federation, and the like. But persuasion, moral criticism, treaty-making and voluntary federation – all of which belong to a morally acceptable politics of human rights guided by liberal democratic aspirations – are quite different from force, coercion, or sanction.

The foregoing argument for basic human rights depends in no way on invoking the second international original position within which agents represent only decent peoples. There is no compromise with or accommodation of decent peoples. There is no rejection of the moral priority of individual persons or of liberal democratic self-understandings. There is only the inquiry by liberal democratic peoples into the moral basis of their own claims to self-determination and nonintervention within the international order. To be sure, Rawls conjectures that the agents representing only decent peoples in a second international original position would affirm more or less the same law of peoples and the same doctrine of human rights. Certainly they would affirm all the main features. Thus, any really existing decent peoples (if there are any) could affirm the same law of peoples liberal democratic peoples affirm from the moral point of view of their own self-understanding. This is important. It insures that liberal democratic peoples honor their own moral commitment to reciprocity and it locates the law of peoples within an existing or reasonably possible overlapping consensus within international public reason.

Rawls's conception of basic human rights does not depend on a particular religious doctrine or philosophical understanding of the moral nature of persons (though it most certainly assumes that all human beings capable of being rational, responsible, and reasonable are moral persons). It draws instead on an account of political authority and legal obligations, an account latent within the self-understanding of liberal democratic peoples and yielding a list of basic human rights presumably acceptable to other decent peoples seeking recognitional respect and a right to self-determination and nonintervention as corporate moral agents in the international order. In this way, Rawls offers a human rights doctrine that addresses the practical foreign

policy issues faced by liberal democratic peoples while also satisfying their commitment to reciprocity and thus the demand for a human rights doctrine public justifiable within an international public reason.

## V. Conclusion.

Basic human rights bind all states regardless of their consent. With respect to basic human rights, what is politically on the table is only how best to secure their universal realization, whether through unilateral or coordinated and cooperative international efforts. This is one aspect of a morally legitimate politics of human rights. Liberal democratic peoples, of course, will rightly seek a world within which all states honor more than basic human rights and increasingly approximate liberal democratic ideals within their domestic orders. Toward this end, they and those individuals and associations belonging to or affiliated with them may undertake various international political initiatives aimed at bringing not yet liberal or democratic states voluntarily to take on the liberal democratic ideal (by ratifying treaties such as CEDAW, for example).<sup>46</sup> This is another aspect of a morally legitimate politics of human rights. Coercion, whether military or not, has no place here. And liberal democratic peoples may rightly federate (as in the European Union) and impose on themselves as human rights a rather robustly liberal and democratic regime of rights. This is another aspect of a morally legitimate politics of human rights; again, coercion has no place here.

If we conjoin Rawls's doctrine of basic human rights with the foregoing account of the politics of human rights, we see that Rawls has set out a powerful vision of how free peoples, following their own historical paths and faithful to the limits of a liberal conception of international right, might arrive at a world within which (at least generically) liberal democratic

rights are universally recognized and enforced as human (though not basic human) rights.

Rawls's position on human rights is less heterodox, more plausible, less *ad hoc*, more coherent, better justified, *and more liberal* than has been generally acknowledged.

#### Endnotes

1. I want to thank Alyssa Bernstein, Allen Buchanan, Rex Martin, Jim Nickel, Walter Riker, and Kok-Chor Tan for conversations about or comments on earlier drafts of this paper.
2. John Rawls, *The Law of Peoples*, Harvard University Press, 1999. Hereafter cited as *LoP*.
3. *LoP*, pg. 68.
4. *LoP*, pg. 80.
5. See, e.g., *LoP*, pgs. 27, 78-81.
6. *LoP*, pg. 81. Rawls's remark reflects United Nations practice insofar as under the United Nations Charter only the Security Council can authorize coercive intervention, including economic sanctions, and then only in the interests of peace and security.
7. *LoP*, pg. 65.
8. *LoP*, pg. 80.
9. *LoP*, pg. 80.
10. The right to be free of coerced self-incrimination is included, along with other rights essential to the right to be presumed innocent, in Article 14 of the 1966 *International Covenant on Civil and Political Rights*.
11. Article 23 is explicitly excluded at *LoP*, pg. 80. Article 21 is clearly excluded by implication since decent peoples need not have representative democratic forms of government making use of universal equal suffrage.
12. See, e.g., *LoP*, pg. 38.
13. *LoP*, pgs. 75, 78.
14. *LoP*, pg. 80.
15. See, *LoP*, pg. 38, note 47.

16. See, *LoP*, pg. 65, note 1.
17. James Nickel and I make use of these six categories in our “Relativism, Self-Determination and Human Rights,” in *Democracy in a Global World: Human Rights and Political Participation in the 21st Century*, Deen Chatterjee, ed., Rowman and Littlefield, forthcoming 2005.
18. Rights specified in the two *Covenants* binding on state parties by virtue of their consent or voluntary undertaking may over time be so integrated into the general background landscape of international relations that they come within international law to have general force as a matter of customary practice. For discussion, see Henry Steiner and Philip Alston, *International Human Rights in Context*, 2<sup>nd</sup> Ed., Oxford University Press, 2000, pgs. 69-72.
19. For a useful discussion of the idea of recognitional legitimacy, see Allen Buchanan, “Recognitional Legitimacy and the State System,” *Philosophy and Public Affairs*, v. 28, n. 1, 1999, pgs. 46-78.
20. For a summary of the legality of reservations within international human rights law, see Louis Henkin, et al., *Human Rights*, Foundation Press, 1999, pgs. 307-311. A related practice (insofar as it presupposes a commitment to the self-determination of well-ordered bodies politic or peoples) recognized in international human rights law is the judicially applied “margin of appreciation” doctrine according to which human rights tribunals (such as the European Court) afford state parties a significant degree of latitude or discretion in meeting their voluntarily assumed human rights obligations. For discussion and defense of the “margin of appreciation” doctrine, see Burleigh Wilkins, “International Human Rights and National Discretion,” *The Journal of Ethics*, v. 6, 2002, pgs. 373-382.
21. For Rawls’s discussion of these matters, see *LoP*, pgs. 109-111, including the notes therein.
22. See, e.g., *LoP*, pg. 80.
23. This point is powerfully advanced by Charles Beitz in his “Human Rights and the Law of Peoples,” in *The Ethics of Assistance*, Deen Chatterjee, ed., Cambridge University Press, 2004. Beitz contrasts this “practical” view of human rights with more “orthodox” views that understand human rights in terms of timeless individual natural rights possessed by persons by virtue of some morally salient fact about them as human persons.
24. Human rights enforcement with respect to remote, primitive indigenous peoples may be more complex than in more familiar cases of modern outlaw states. See, *LoP*, pg. 93, note 6.
25. For a helpful discussion of this aspect of human rights more or less consistent with the Rawlsian approach as I am presenting it, see Erin Kelly, “Human Rights as Foreign Policy Imperatives,” in *The Ethics of Assistance*, Deen Chatterjee, ed., Cambridge University Press, 2004.

26. See *LoP*, pg. 114.
27. See, *LoP*, e.g., pgs. 89, 93, 113.
28. For a defense of Rawls's position on this matter, see my "Rawls on International Justice: A Defense," *Political Theory*, v. 32, n. 3, 2004, pgs. 291-319.
29. See, e.g., *LoP*, pg. 66.
30. See *LoP*, pgs. 4, 63, 92. Rawls's position on benevolent absolutisms is not clearly set out. But it seems to be that because they recognize no right to political participation at all, they are not well-ordered polities entitled to recognition, respect and self-determination within a morally acceptable international order. But because the content of all other basic rights is benevolently delivered to their subjects, there is no right to intervene on the part of outsiders. Presumably, it is up to the subjects of a benevolent absolutism to claim their own political participation rights; their ability to do so cannot be discounted as negligible since they receive the content of all other basic human rights.
31. For a useful discussion of what it means to enjoy basic human rights as rights, see Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, 2<sup>nd</sup> Edition, Princeton University Press, 1996, especially Chapter 3, pgs. 74f.
32. I owe a debt to Rex Martin for illuminating discussion on this point.
33. For discussion of the various ways in which reciprocity might be understood within Rawls's work, see my "Reciprocity and Reasonable Disagreement: From Liberal to Democratic Legitimacy," forthcoming *Philosophical Studies*, 2005.
34. Rawls uses the phrase regularly. See, e.g., John Rawls, *Political Liberalism*, Columbia University Press, 1996, pg. 142.
35. See, *LoP*, pgs. 63, 69-70.
36. See, *LoP*, pg. 68.
37. The suggestive references are to H.L.A. Hart's *The Concept of Law*, 2<sup>nd</sup> Edition, Oxford University Press, 1997, and Philip Soper's *A Theory of Law*, Harvard University Press, 1984. See *LoP*, pg. 66, 67, and 72. See also, *Political Liberalism*, pgs. 109-110, note 15.
38. See, Hart, *The Concept of Law*, pgs. 116-117.
39. *Ibid.*, pgs. 159-160.
40. *Ibid.*, pgs. 193-200.
41. See Rawls, *Political Liberalism*, pgs. 143-144.

42. Hart remained himself troubled by this apparent feature of his view. See Nicola Lacey, *A Life of H.L.A. Hart*, Oxford University Press, 2004, pgs. 228-234.

43. See *LoP*, pg. 66, note 5.

44. Similarly, South Africa had no moral right to nonintervention prior to the abolition of Apartheid.

45. Rawls develops these points, albeit in a cursory way, in *LoP*, pgs. 65-72.

46. Treaty-making is not the only path open to expanding the range of human rights enforceable under international law. Custom (not rooted in mere force) may be integrated into and enforced as international law. There is, therefore, much to be gained simply by drawing not yet liberal and not yet democratic peoples into an international conversation and practice within which liberal democratic peoples play a substantial and visible and perhaps leading role. The power of example ought not be underestimated.