

### **Three Human Rights Agendas.**

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#### *Introduction.*

In this essay I offer an attractive but under-appreciated alternative approach to theorizing human rights.<sup>1</sup> It is offered as a sort of constructive interpretation meant to fit and justify that which is best in our international order and practice.<sup>2</sup> Specifically, I want to argue that there are at least three distinct kinds of human rights, and thus three distinct, if interrelated and overlapping, human rights agendas. First, there are those human rights identified and justified by reference to the natural duties owed by all persons to all other persons apart from and prior to any historically given institutional relations or social practices. These are the human rights the institutional and systemic violation of which so “shocks the conscience” that they give to potential criminal liability within the international order for the violation of *erga omnes* obligations.<sup>3</sup>

Second, there are those human rights identified and justified by reference to the conditions necessary and sufficient for the natural duty to justice morally to bind the members of a polity to one another and to their polity. The natural duty to justice has only formal content apart from some institutional or social context given by history. But given an appropriate context, it is capable of underwriting political and legal obligations of *prima facie* moral force. It is this aspect of the natural duty to justice that explains how and why we find ourselves standing in morally significant special relationships with compatriots that do not reach to noncompatriots, or, to put it the other way around, how and why we often find noncompatriots already embedded in their own morally significant systems of political and legal obligation and authority of which we are not a part. Human rights of this second sort are necessary and sufficient to any polity’s claim to recognitional legitimacy and a right to nonintervention within the international order.

Third, there are those human rights identified solely by reference to the contingent and voluntary positive undertakings, through treaty, custom and so on, of polities recognized as legitimate within the international order. These rights mark the (perhaps ever expanding) boundary of moral consensus between distinct polities the members of which share a collective right to political self-determination.

There is for each of these three kinds of human rights a corresponding human rights agenda. The kinds and agendas overlap to some degree. The human right to be institutionally secure against genocide, for example, appears under all three headings. But there are differences. For example, there are a number of rights, familiar as constitutional rights in liberal democracies, that may qualify as human rights only to the extent that they can be brought under the third heading. And while human rights under both the first and second heading have the

character of *jus cogens*, it is the violation of those under the first heading that most plausibly supports international criminal liability. Clarity with respect to these three kinds of human rights and the human rights agendas they underwrite is essential to understanding and evaluating key human rights documents, for example, the *Universal Declaration of Human Rights*, as well as recent developments within international law and international relations, for example, talk from the Bush Administration to the effect that liberalization and democratization are legitimate aims of U.S. foreign policy.

What follows comes in just two parts. First, I set out a general methodological framework for thinking about human rights. The framework is not orthodox within philosophical discussions of human rights. Second, with that framework in place, I then work through in more substantive detail each of the three kinds of human rights set out above, paying special attention to those of the second kind. I conclude with a few brief remarks regarding the merits of the approach taken here.

### *Thinking About Human Rights.*

As persons or moral agents, human beings have certain natural duties. These are pre-institutional in that they apply apart from and prior to any institutions or social practices persons might find themselves subject to or participating in. These duties need not be derived from an ideal moral theory. They simply specify noncontroversial and essential features, given merely in the form of a list if need be, of what it is to be a person or responsible moral agent and thus eligible for inclusion in any normatively charged institutional order or social practice. Thus, everyone has a natural duty not to be cruel or gratuitously to inflict unnecessary injury or suffering on innocents. And everyone has a natural duty to aid others with pressing basic needs or in great peril, so long as aid can be given without undue risk or loss to oneself. There are other natural duties too, but the list is not long. We can say that we have natural duties not to act in ways that would “shock the conscience” of any person sufficiently morally competent to be eligible for membership and participation in a normative institutional order and social world. In saying this we can remain neutral with respect to any deeper theoretical unity regarding these natural duties. The point is just that there are clearly some things known by any person with a conscience to be required or forbidden.

Corresponding to these natural duties, everyone has what we may call a natural right not to be treated by others in ways that violate their natural duties. Thus, I have a natural right not to be tortured by you for fun and you have a natural right to my aid should I find you in great peril and be able to aid you at little or no risk to myself. These rights we can call human rights, for they are rights each person has against all others. They are universally binding and they establish a mandatory moral minimum. While they are identified from the cosmopolitan or universalist point of view of moral agency or personhood, they are not so much justified from that point of view as constitutive of or necessarily ingredient in it. And while they originally belong to the normative domain of interpersonal morality, they neither presuppose nor derive their normative force from any ideal moral theory. Nor do they belong exclusively to the domain of interpersonal morality; they function as necessary moral constraints on social institutions and

practices as well.

The natural duties include a natural duty to act justly, to do one's part to sustain and perfect the institutional orders and social practices to (or in) which one finds oneself subject (or participating) as a person. This natural duty to justice is not a duty to create just social institutions and practices as if from scratch, for all possible persons, and as guided by some blueprint delivered by an ideal moral theory derived from considerations of reason and human nature alone. Accordingly, its content as a pre-institutional natural duty is essentially formal. What it requires of any of us will be a function of the institutional orders and social practices we find ourselves born or otherwise cast into. It is, of course, not a duty slavishly to submit to those institutions and practices. Indeed, it may sometimes require conduct, even civil disobedience, aimed purposefully at substantial reform. But when it does, it will do so in the name of principles of justice constructed out of our critical moral reflection on those institutions and practices as they are given to us by history, rather than in the name of principles ingredient in an ideal moral theory arrived at through a philosophical meditation on the demands of reason and the facts of human nature alone.

The natural duty to justice does not morally bind all persons to one another in any sort of pre-institutional way. It is unlike the other natural duties in this respect. Its demands arise, when they do, only within the context of, and are shaped by, the determinate institutional orders or social practices constitutive of our historical situation. The content of its demands may vary. But they always express what is required for one to do one's part with others to sustain and improve or perfect the particular institutional order or social practice into which one finds oneself with them cast by history. The reform-minded civil disobedient acts on her natural duty to justice by calling her compatriots to what she understands to be the intolerable gap between what their shared institutional order or social practice should and could be and what it in fact is.

For our purposes here, there are at least two relevant institutional orders or social practices constitutive of our historical situation. The first is the body politic, institutionally embodied as a state. Each of us is born into, and most of us live out our lives within the same, one. The second is the international order. We each find ourselves cast into the international order, though typically in a manner mediated by our membership in a particular body politic. Fulfilling our natural duty to justice is a matter of doing our part to sustain and improve these institutions and practices constitutive of our historical situation. This is never a matter of merely slavishly submitting to their demands or acquiescing to the status quo. But it is also never a matter of soldiering forward under the flag of an institutional blueprint delivered by an ideal and pre-institutional moral theory worked up from considerations of reason and human nature alone. It is rather a matter of acting on our best moral understanding or interpretation of these institutions and practices.

Determining what our natural duty to justice demands of us within the context of any institutional order or social practice is a matter of arriving at an interpretive judgment regarding its point and purpose and then reasoning to determinate principles that would justify those persons participating in or subject to it in sustaining or continuing it along a particular trajectory.

There is no one correct way to reason to such principles for every institutional order or social practice. Nevertheless, we should reason in the first instance under the assumption of favorable conditions for the continuation of the institution or practice. These conditions include the possibility of more or less full compliance with the demands, whatever they turn out to be, the institution or practice would make were it realized consistent with our best moral understanding or interpretation of it. These are the assumptions necessary to work out the demands of justice within a social institution or practice as a matter of ideal theory. Here the demands of justice mark the conditions necessary and sufficient, under favorable conditions and assuming the possibility of full compliance, to an institution or practice being justified to those persons participating in or subject to it. They express what the institution or practice would look like if it was fully aligned with the right. Without a sense that, and of how, our existing institutions or practices might be fully aligned with the right, even if only through rather substantial reform, we have no reasonable basis for hope as we live out our lives within them.

Once we have reasoned our way to principles of justice within ideal theory, we can then relax the assumptions essential to ideal theory and ask what justice demands within an institution or practice when the conditions for its continuation are unfavorable (perhaps the barbarians are at the gates) or when compliance with the demands of justice are at best partial (perhaps too many yield too easily to temptation). Our answer will express the demands of justice as a matter of nonideal theory. These must cohere with those of ideal theory, but they may be very different. For example, within the context of the international order, justice may prohibit all war as a matter of ideal theory. But, it may, as a matter of nonideal theory, permit some wars, perhaps those undertaken in legitimate self-defense or ventured in the name of human rights and as part of a humanitarian intervention, or it may permit within a war the intentional targeting of civilians in rare cases of “supreme emergency.”

Nonideal theory does not concern the demands of justice as we endeavor under real world and thus nonideal conditions to realize some moral blueprint delivered to us by an ideal and pre-institutional moral theory grounded in considerations of reason and human nature alone. Rather, it concerns the demands of justice as we endeavor under less than optimal conditions to sustain and improve our existing institutions and practices in light of our reasonable hope for what they could be under more favorable conditions.

Consider the context of a body politic. For the most part, we each find ourselves simply born into one or another polity. Possessed of a natural duty to justice, we wonder what it requires of us. The first thing we must do is identify its point and purpose. This we cannot do merely through description. Our concern is practical and our stance necessarily interpretive. We want to know what the point and purpose of our polity’s basic social structure is on the best interpretation or reflective and evaluative understanding of it. Our judgment must take account of the descriptive facts, but it cannot be given by them. We may find that there is no point and purpose to the basic social structure of our polity, at least none that could underwrite our continued participation in it. But this is a conclusion of last resort, arrived at only if we find no alternative sufficient to vindicate its continued existence and our continued participation in it, even if as a reformer.

Different persons will find themselves in different bodies politic. And they may arrive at different judgments regarding the point and purpose of their polity's basic social structure. But no matter the polity, any adequate account must begin by taking the polity's point and purpose to be the mutually advantageous production and distribution of goods through a well-ordered, rule-governed system of social cooperation. No other sort of account could vindicate the continued existence of a polity as a shared undertaking to all its members or participants as persons possessed of a natural duty to justice. If the descriptive facts make it impossible for members or participants reasonably to interpret the point and purpose of their polity in this way, if their basic social structure is thoroughly, undeniably and irretrievably aimed at some other point or purpose, then they have no natural duty to do their part to sustain and perfect it. Their natural duty to justice remains essentially formal in its content, impotent to underwrite any morally significant political and legal obligations running between them, or any legitimate political or legal authority binding them, as fellow members of or participants in a particular polity.

Suppose, though, that the polity into which we find ourselves cast is in fact reasonably interpreted as a well-ordered, rule-governed system of social cooperation for the mutually advantageous production and distribution of goods by and to its members.<sup>4</sup> Suppose that there is a public conception of justice, that it is generally honored, that the most basic needs or interests of all members as persons are secured, and that all members are shown at least that minimal level of respect due all persons in political life – they are listened to, their good is taken into consideration, and so forth.

Within this context, our natural duty to justice is alive and in play. We have a natural duty to do our part to support and improve or perfect our polity. Our political and legal obligations are not merely political and legal; they have some *prima facie* moral force. And the authority asserted by our defacto political rulers and legal officials is more than just authority asserted. It has a *prima facie* legitimacy. Why is this? Anyone subject to defacto political and legal authority within a well-ordered, rule governed, mutually advantageous system of social cooperation has reason to acknowledge that authority as publicly authoritative, for no one will be in a better position by themselves to settle conventions, solve coordination problems, establish a secure and public basis for entitlements, adjudicate conflicting claims, and so on, through public assertions of their own private judgments or views as authoritative.<sup>5</sup> A well-ordered polity need not be just; its public conception of justice may be incorrect or deficient. But insofar as it delivers rule-governed, mutually advantageous social cooperation, a well-ordered polity cannot be too unjust. Its realization marks a sort of threshold, leaving those subject to it with the joint task of rendering it more perfectly just over time.

Suppose we find ourselves in a well-ordered polity constituted as a mutually advantageous system of social cooperation, and so forth. Our defacto political rulers and legal officials have *prima facie* legitimate authority and we have political and legal obligations of *prima facie* moral force. To think otherwise would be to fail to fulfill our natural duty to justice. But that same duty binds us to the improvement and perfection of our polity, to rendering it more just over time. And to do our part not simply to support but to improve or perfect the institutional order of our polity, we need to arrive at a determinate sense of what justice demands

within it. But this we cannot know without a more fine-grained understanding of the particular goods to be produced and distributed, as well as the nature and relations between those engaged in their production, distribution and consumption. Here interpretive judgments may diverge. They may diverge between members of the same polity if there is more than one reasonable interpretation of their polity's basic social structure. And they may diverge between members of different polities if they face different institutional orders or histories or understand their structural relations within their polity in different ways.

Consider first the case of disagreement between polities. The members of polity A may judge the goods to be produced and distributed to include substantive ideals of religious or moral virtue. And they may understand themselves as participants in their polity to be always already situated within particular normatively structured groups – tribes or religious sects. That is, they may understand their relationship to their polity as mediated by other, already given, normatively charged group memberships. The members of polity B, on the other hand, may judge the goods to be produced and distributed to include only generic primary goods understood as something like all purpose means to a very wide range of final ends. And they may understand themselves as participants in their polity to stand as free equals in an unmediated relationship to their basic social structure. Normatively charged group memberships may be irrelevant to them when it comes to determining first principles of justice for their polity.

Interpretive judgments here – regarding the goods to be produced and distributed and the nature of the participants within the rule-governed system of cooperation – are subject to reasonable disagreement. But not all interpretive disagreements are reasonable. Within the context of the United States, for example, any interpretation of the institutional order and history that posited the salvation of souls or the cultivation of religious virtue as among the goods to be produced and distributed, or that characterized participants as persons always already situated within normatively ordered religious or ethnic groups, would be (at least presumptively) unreasonable. The institutional order and history of the United States, not to mention the political self-understandings of U.S. citizens, just doesn't support these interpretive judgments. There may be more than one reasonable interpretive judgment, of course. (For example, libertarians and liberals may be reasonably divided in this way.) But the foregoing is not among the reasonable possibilities. Things might be different, however, if the institutional order and history being interpreted were that of Oman or Yemen. An unreasonable interpretation of the basic social structure of the United States may be reasonable when ventured by an Omani or Yemeni as an interpretation of the basic social structure of his or her polity.

Of course, some interpretations will be unreasonable in any context. And any interpretive judgment may be in error. It does not follow from the fact that an interpretive judgment is reasonable that it is best, all things considered. Identifying the best interpretation of a social institution or practice is always a (fallible) matter of comparing competing reasonable interpretations along more than one evaluative dimension and rendering one's own individual judgment, all things considered.

Further, arriving at an interpretive judgment as to the point, purpose and key features of a basic social structure is just a first step toward arriving at a sense of what justice demands within

that structure. And moving from the former to the latter constitutes a second opportunity for interpretive disagreement to arise. Just as U.S. citizens in rough agreement about the point, purpose and key features of their basic social structure may nevertheless reasonably disagree over what it would mean to render that structure fully just, so to with Omani or Yemeni citizens when it comes to articulating the demands of justice for their bodies politic.

There are, here, three things to emphasize. The first is that the way members of any polity are to reason about what justice demands of them will depend on how they understand the point, purpose and other key features of their polity as a mutually advantageous rule-governed system of social cooperation. What goods is it concerned to produce and distribute and how do they understand themselves to be situated as participants within it? Rawls's familiar "original position" argument constitutes a reasonable, on my view the most reasonable, way to reason about what justice demands of those who find themselves cast into polities broadly liberal and democratic in their institutional order and history and political self-understandings. It organizes and expresses a very widely (though even in liberal democracies not universally) shared and attractive interpretation of a liberal democratic polity as a system of social cooperation and does so in a way that underwrites a reasoned path to determinate principles of justice. These principles, say Rawls's two principles or some close cousins, derive their normative force and reach not from some relationship to an ideal moral theory worked up from considerations of reason and/or human nature alone and prior to and independent of any institutional context given by history. Rather, they derive it from their belonging to the best constructive moral interpretation of the institutional order and history of, and self-understandings common in, liberal democratic polities. In this way they may deliver content and give direction to the natural duty to justice for those who find themselves cast into such polities. They fill out what it means to do one's part with others to sustain and perfect the institutional order or social practice one finds oneself cast into with them. Of course, they do so as *a* theory of justice, not *the* theory of justice. Within a liberal democratic polity, members or participants keen to honor their natural duty to justice may reasonably divide over conceptions of justice and thus what that duty requires of them.

The second thing we need to keep in view is that it is not unreasonable for those who find themselves cast into a very different sort of polity, with a very different institutional order and history, or marked by very different self-understandings among participants, to understand the point, purpose and other key features of their polity (as a system of social cooperation) very differently. They may see it as concerned to produce and distribute a somewhat different range of goods, or they may understand their relationships to one another and to their basic social structure in a somewhat different way. For example, there may be no unmediated relations between individuals and the polity, not even in principle or theory. Rawls's "original position" argument (or any variant of it) may not constitute for them by their lights the most reasonable way to reason to a determinate conception of justice so as to give content and direction to their natural duty to justice. They may reason not unreasonably in a different way. And by so doing, they may arrive at (some range of) ideal theory conceptions of justice very different from that arrived at by the members of a liberal democratic polity. Those living in liberal democratic polities and affirming liberal democratic conceptions of justice must recognize this fact. A

“common good conception of justice”<sup>6</sup> is not necessarily unreasonable when ventured by those who find themselves within a system of social cooperation neither broadly liberal nor democratic as a matter of institutional order and history or of participants’ self-understandings. Even within a polity organized by and aimed at a nonliberal and nondemocratic conception of justice, persons may, by virtue of their natural duty to justice, be bound to one another (perhaps as fellow reformers) by political and legal obligations with *prima facie* moral force and the authority of defacto political rulers and legal officials may be *prima facie* legitimate vis a vis those subject to it.

The third thing to note is that in practical philosophy, at least practical political philosophy, justification is always to the other. We are principally concerned to solve practical problems as they arise within shared institutions and practices (we almost never face the practical problem of constructing institutions and practices *ab initio*) by reference to principles and norms other participants could reasonably affirm, or could not reasonably reject, without manipulation, deception and so on and given generally available information. Everyone knows that might does not make right. What is sometimes forgotten is that might backed only by a truth claim others cannot reasonably affirm or in fact reasonably reject does not make right either, even if the truth claim happens in fact to be true. This is of first importance within international relations.

Suppose there is or could be a polity the members of which, as persons possessed of a natural duty to justice, not unreasonably arrive at some nonliberal, nondemocratic conception of justice which they work to realize within their polity as a system of social cooperation. These persons would find themselves morally bound to one another, even if as fellow reformers, within a nonliberal, nondemocratic polity. Their political and legal obligations would have *prima facie* moral force as special obligations binding them one to another and to their polity and their defacto political rulers and legal officials would have *prima facie* legitimate authority over them. Suppose this polity is prepared to interact reasonably with liberal democratic peoples within the international order. It is not aggressive and thus poses no threat to the justice of other states and it is prepared to subordinate the pursuit of its national interest within international relations to fair terms of interaction or cooperation with others. Liberal democratic peoples must be prepared to justify their conduct in that order, then, by reference to principles and norms such a nonliberal and/or nondemocratic people could reasonably affirm or not reasonably reject.

Thinking about the conditions minimally necessary and sufficient to bind persons to one another and to their body politic through their natural duties to justice, to subject them to political or legal obligations of at least *prima facie* moral force *qua* political or legal obligations, and to render the authority asserted by their defacto political rulers and legal officials at least *prima facie* legitimate, constitutes a second way of thinking about human rights, one clearly distinct from thinking of human rights as the correlates of those natural duties that bind all persons to all other persons prior to and independent of any institutional context. All human persons have a natural duty to justice and may thus come under appropriate conditions to be morally bound to others within a particular historically given institutional order or social practice, a body politic, as a shared undertaking. Specifying the conditions necessary and

sufficient to such a morally charged political and legal relationship is one way of setting legitimacy criteria for polities within the international order and of bounding and grounding the collective right to political self-determination. This second way of thinking about human rights differs from the first in that the latter makes no reference to the natural duty to justice or the institutional or social preconditions of its ability to bind persons to one another or direct their conduct in a shared undertaking.

Suppose now an international order the participants in which are polities legitimate in the foregoing sense. Their members are morally bound to one another and to political and legal authority as constituted in their polity through their natural duty to justice. They are therefore situated *vis a vis* nonmembers in an asymmetric moral relationship. The principles of justice appropriate to this international order will, as in the domestic case, depend on our interpretive understanding of its point and purpose. Whatever the principles turn out to be, it seems likely that they will, first, extend to the members of each such polity, taken as a collective, a collective right to political self-determination, and, second, allow these polities to introduce additional norms or principles to the international order through treaty, reflective acquiescence to customary practice, or other mechanisms consistent with the collective right of their members to political self-determination. Here we find a third way of thinking about human rights, as positive international norms made binding within the international order simply by virtue of their being voluntarily undertaken by polities properly recognized as legitimate.

We find ourselves driven, then, just by the methodological commitments introduced and developed in this section, to the thesis that there are three distinct ways in which we can think about human rights, and, as seems likely, three distinct, if sometimes overlapping, human rights agendas. There are those human rights associated with the natural duties all persons owe to all other persons apart from and prior to any institutional or social context. There are those human rights marking the conditions necessary and sufficient for the members of any polity, through their natural duty to justice, to be bound to one another and to their polity in a morally significant way, for their political and legal obligations *qua* political and legal obligations as well as the authority asserted by their defacto political rulers and legal officials to acquire *prima facie* moral force such that their moral relationship to fellow insiders is different from that to outsiders, and their polity merits recognition as their legitimate and shared undertaking within the international order, one over which they have collective right of political self-determination. And there are those human rights given by the positive political undertakings of such polities within the international order, whether through treaty-making or through reflective acquiescence to customary practice as normatively binding.

### *Three Human Rights Agendas.*

It is time, now, to fill in behind or in front of the foregoing and rather extended methodological remarks. I want to start, perhaps counter-intuitively, with what I identified above as the second kind of human rights, namely those marking the conditions necessary and sufficient for the members of a polity, through their natural duty to justice, to be bound to one another and to their polity in a morally significant way such that within the international order

those not part of their polity will confront them as individual persons already embedded in a specific and morally significant system of political and legal obligation and authority which it is in the first instance at least theirs to sustain and improve or perfect. That's a mouthful and it needs to be unpacked.

We can start with an account of the conditions necessary and sufficient to legal obligations simply *qua* legal obligations. Legal obligations understood in this way are normative but their normative force need not register as moral. H.L.A. Hart ventured perhaps the best known and most plausible account of the conditions necessary and sufficient to legal obligations simply *qua* legal obligations.

Hart sets out two basic conditions, each of which is itself complex. First, legal rules valid within the institutional political-legal order must be generally obeyed. Second, officials within that order must accept and honor in their official conduct shared criteria of legal validity, their official conduct must itself qualify as an instance of rule-following.<sup>7</sup> Hart goes on to note that there can be no legal obligations in the absence of formal or natural justice, since treating like cases alike is essential to rule-following behavior, and rule-following behavior, at least by officials, is essential to legal obligation.<sup>8</sup> With respect to matters of substantive justice, he argues that while a viable legal system must extend a “minimum natural law content” to a large enough portion of the subject population to secure their acquiescence to and thus the viability of the legal order – some portion of the population must enjoy legal rights to bodily integrity, to freedom of movement, to truth-telling and promise-keeping, and so on – it need not extend any such content to the entire subject population.<sup>9</sup> Hart's reasoning here is psychological and empirical, not moral. His claim is not that the “minimum natural law content” must be extended to some segment of the population so as to give them at least legal obligations with *prima facie* moral force. It is rather that it must be so extended since no legal system can long depend on police officers posted on every corner to secure that measure of compliance necessary to its enduring over time. Some measure of compliance must be voluntary or not coerced, and extending the “minimum natural law content” to some portion of the population is the empirical, psychological condition of securing it. For Hart, then, the legal system of a slave-holding polity might prove viable (indeed, some evidently have) and generate genuine legal obligations. Treating like cases alike under the law Hart regarded as fully consistent with a law that distinguishes between cases on morally suspect grounds, as surely any law affirming slavery must. Formal or natural justice carried no necessary substantive moral content.

Whether we accept Hart's analysis of the conditions necessary and sufficient to legal obligations *qua* legal obligations, we surely cannot accept it as an account of legal obligations that have *prima facie* moral force *qua* legal obligations. There are several reasons for this. Consider a slave-holding society. Surely the natural duty to justice possessed by the slaves will underwrite no moral duty to do their part to sustain and perfect the institutional order. Slaves cannot be bound to others and their polity through legal or political obligations or assertions of political or legal authority in any morally significant way. They necessarily confront the legal and political order they find themselves in as a hostile force to be resisted or escaped, not as a system of social cooperation addressed to them as persons and therefore to be sustained and

improved.

Or, consider a polity within which the subjects all or nearly all comply with the law out of a deeply entrenched and unreflective disposition to submit to an absolutist ruler. Again, their natural duty to justice will not underwrite a moral duty to do their part to sustain and improve the legal and political institutional order they find themselves cast into. The natural duty to justice is alive only within political and legal contexts organized, or reasonably interpreted, as systems of cooperation between persons. An absolutist polity the members of which unreflectively and instinctively submit to their ruler is at best a system of coordination addressed to members not as persons or responsible moral agents but merely as children to be directed.

So, while the conditions Hart identifies may be taken as necessary and sufficient to legal obligations *qua* legal obligations, they cannot be taken as sufficient to legal (or political) obligations possessed of *prima facie* moral force *qua* legal (or political) obligations. They fail to mark the institutional conditions necessary for the natural duty to justice to bind all those within a polity, as persons or responsible moral agents, to one another and to their polity in a manner and to a degree sufficient to command moral respect from outsiders. Their satisfaction is not sufficient to render the authority asserted by defacto political rulers and legal officials *prima facie* legitimate vis a vis those subject to it. What more is required?

Plainly, what Hart called the “minimum natural law content” must be extended to all those subject to the law within the jurisdiction. Those purposefully left institutionally and systemically vulnerable to attacks on their bodily integrity, to regular deception, and so on have no natural duty to do their part to support and improve that order. Their position is not even that of the reformer engaged in civil disobedience. The civilly disobedient reformer acts on her natural duty to justice, doing her part to sustain and improve her deeply flawed institutional order in light of what she thinks justice within that order demands. Her civil disobedience, including her willingness to accept her legal punishment, is a moral call to her compatriots issued in the name of their common bonds arising out of the natural duty to justice. For those bonds to arise, she must find herself within an institutional order reasonably interpreted as at least a well-ordered system of social cooperation. Those institutionally and systemically denied the minimum natural law content, slaves and so on, stand in a very different position. Since the institutional order they confront neither includes nor recognizes them as persons and is in no way concerned to advance their good, they have no reason to support and, with their compatriots, work to improve and perfect it, rendering it more perfectly just. Their stance is necessarily and more fundamentally adversarial. Within any polity, then, what Hart called the “minimum natural law content” must be extended to all if political and legal obligations and authority are to have any moral force as political and legal obligations and authority. At the least this means basic subsistence and security rights must be legally affirmed and socially secured for all.

This should hardly surprise. No well-ordered polity could qualify or be interpreted as a system of social cooperation for mutual advantage if it did not extend this content to all within it. No one needs a polity to be left institutionally and systemically vulnerable to attacks on their bodily integrity, to starvation, to persistent deception, and so on.

But this is just one aspect of what it means for a well-ordered polity to qualify or be reasonably interpretable as a system of social cooperation. Beyond subsistence and security, a well-ordered polity must produce and distribute goods that reflect a some conception of the “common good” or “mutual advantage” widely shared by members.

We’ve now added two conditions to those Hart specifies as necessary and sufficient to legal obligations *qua* legal obligations. We’ve added that Hart’s “minimum natural law content” must be extended to all subject to the legal-political order, and that the legal-political order must be aimed at some widely shared conception of their common good or mutual advantage. We can add now a third. The core features of the rule of law must be secured. Laws must be publicly promulgated, duly enacted, issued in clear and understandable language, consistently administered, nonarbitrary and consistent as a set, and so on. A political-legal order in substantial noncompliance with any of these core components of the rule of law will fail to address those subject to it as persons or responsible moral agents engaged with others in a system of cooperation. The rule of law must be secured then if persons are to find themselves, through their natural duty to justice, subject to political and legal obligations and authority of *prima facie* moral force.

A fourth and fifth condition follow as well from the idea that a polity must address itself to subjects as persons or responsible moral agents if they are to find themselves bound to it and one another through their natural duty to justice. There must be some institutional mechanisms for communication between rulers and officials and those subject to their authority. Those subject to political and legal authority must be able to (and must periodically) insist on and contest public justifications for exercises of that authority. They must have some rights to express dissent. And rulers and officials must have institutional duties to justify publicly their official conduct. A polity within which members instinctively and unreflectively submit to any exercise of political and legal authority and within which rulers or officials recognize no obligation to justify themselves publicly is not one within which members can become bound to one another or to their polity through their natural duty to justice. This constitutes a fourth condition.

It is related to a fifth. On Hart’s account of legal obligation and authority, officials must internally accept the criteria of legal validity and thus the laws they enforce. But citizens or subjects need only comply, for whatever reason, whether fear of sanction alone or thoroughly unreflective habitual acquiescence. This may be sufficient to legal obligations and authority as such. But if the natural duty to justice is to give the members of a polity reason to assign *prima facie* moral force to their defacto political and legal obligations and authority, then members must generally comply with the law and other official demands not purely out of fear of sanction or thoroughly unreflective habitual acquiescence. Their compliance must reflect to some degree their own internal reflective acceptance of much of the order to which they are subject.

Let’s review the conditions we’ve set out as necessary and sufficient morally to bind those subject to a political-legal order to one another and to that order through their natural duty to justice. First, officials must internally accept and honor the conditions of legal validity.

Second, most valid laws must be generally obeyed. Third, the political-legal order must secure for all subject to it Hart's "minimum natural law content." Fourth, it must be aimed at the production and distribution of other goods beyond this minimum widely affirmed by members as ingredient in their common good or to their mutual advantage. Fifth, the core elements of the rule of law must be secured. Sixth, those subject to the law must have rights to dissent from and to demand public justifications for laws and official actions under them, and officials must recognize and honor a duty to respond to such dissent and provide such justifications. Finally, most of those subject to political and legal authority must generally comply not simply out of fear of sanction or unreflective habitual obedience, but in some measure because they internally and reflectively accept must of the order to which they are subject.

Any polity that met these conditions would have a strong claim to recognition not just as a rule-governed system of social cooperation for mutual advantage, but as a decent constitutional republic. Its members would, I submit, find themselves morally bound one to another and to their polity by virtue of their natural duty to justice.<sup>10</sup> They may find themselves bound as reformers, even reform-minded civil disobedients, depending on the state of their polity and the conception of justice they affirm. But their particularist political and legal obligations tied to membership or participation in their body politic would have *prima facie* moral force *qua* particularist political and legal obligations. They would stand in a special moral relationship to their compatriots and to their own polity not shared with outsiders. Their polity would be, at least in the first instance, theirs to sustain and improve. Outsiders must acknowledge this moral fact. A failure to acknowledge this fact is tantamount to a failure to recognize others as persons possessed, like oneself, with a natural duty to justice.

As just acknowledged, outsiders have a natural duty to justice too. But it obligates them to support and improve or perfect, first, their own domestic polity, assuming it is at least a decent constitutional republic, and, second, the international order within which all such polities are cast on the global stage. The latter is not a duty directly to improve and perfect the decent well-ordered polities of others as if one were a member. It is a duty to improve and perfect the international order. There is much to do here, much of it aimed at supporting meaningful political self-determination for all decent, well-ordered constitutional republics. Of course, outsiders have other natural duties toward all other persons, direct duties both negative (e.g., not to be cruel) and positive (e.g., to provide aid to those in great need when aid can be provided without great risk or loss).

Those belonging to or participating in different decent constitutional republics, whether liberal democratic or otherwise, will confront one another as persons already embedded in particularistic systems of political and legal obligation and authority of *prima facie* moral force. To respect others as persons possessed of a natural duty to justice is to recognize and respect this moral asymmetry. This recognition and respect is made manifest within the international order through norms of recognitional legitimacy and nonintervention predicated on the fulfillment of just those conditions necessary and sufficient a decent constitutional republic, whether liberal democratic or otherwise.

The members of a constitutional republic satisfying the foregoing conditions enjoy, then, a collective right to political self-determination. This right does not extend to attempts to realize within their domestic order conceptions of justice fundamentally at odds with their institutional order and history as a constitutional republic. It does not grant those living within a constitutional republic the right to transform their polity into an authoritarian despotism. But it does grant them the right to realize within their domestic order a nonliberal or nondemocratic “common good” conception of justice. Of course, some, perhaps many, of their members may correctly think such a conception of justice suboptimal or incorrect. And such a conception of justice would be “unreasonable” if ventured by persons cast into a liberal democratic institutional order and history and keen to give content and direction to their natural duty to justice. But in a decent constitutional republic, the right to political self-determination ranges over any conception of justice not unreasonable if ventured by a member as the target at which her natural duty of justice point her.

Liberal and democratic conceptions of justice will presumably always qualify as “at least not unreasonable” candidate conceptions of justice for those who find themselves living in a constitutional republic and intent on giving content and direction to their natural duty to justice. Thus, there is in every decent constitutional republic a path to liberalization and democratization from within. It is the path marked first by dissenters but then by a growing consensus among members convinced that the best moral understanding or interpretation of their own polity is given by a liberal democratic conception of justice, that liberal democracy best expresses what it is most reasonable to hope and thus to work for in their constitutional republic. The possibility of such dissent is or should be secure in every decent constitutional republic. If the collective right to political self-determination means anything, it must mean that those who find themselves within a decent constitutional republic must be free to find their own way, free of forceful interference by outsiders, whether polities or other outside agents, to liberalization and democratization from within.

Relations between liberal democratic polities and decent constitutional republics should be consistent with a peaceful politics of mutual recognition and respect. This does not preclude robust and public moral debate, even criticism. Just as it is possible for me to criticize the path you have taken in life while still recognizing and respecting you as a full member in good standing within a shared moral community, so too liberal democratic polities, and the many NGOs advancing the cause of liberal democracy, may criticize the path taken by nonliberal or nondemocratic decent constitutional republics. But their aim, as mine when I criticize your path as an individual, must be to persuade without resort to force within a peaceful context of mutual recognition and respect.

The conditions set out above as necessary and sufficient to a decent constitutional republic, a well-ordered and rule-governed system of cooperation for the mutual advantage or common good of all members, may be expressed as human rights norms. They are captured by, roughly, Articles 3-18 of the *Universal Declaration of Human Rights*, the conventions on genocide and apartheid, and all that is entailed by these provisions.<sup>11</sup> Polities in substantial noncompliance with these norms have no claim to recognition as legitimate, or against

intervention, within the international order. Their members stand in no morally special political or legal relationship to another and their polity that outsiders must respect if they are to respect them as persons possessed of a natural duty to justice. These human rights norms, those belonging to what I've called the second kind, may be regarded then as *jus cogens*. While they will be posited through treaty or otherwise within any morally acceptable system of international law, they will be understood to bind prior to and apart from, and to be nonderogable within, positive international law.

Suppose a polity in substantial noncompliance with these human rights norms. We, who are neither members of nor participants in that polity, will confront those who are, not as persons already embedded in a particularist but morally significant system of political and legal obligation and authority, but rather just as persons. If we find them in desperate need or facing grave peril or evil, our positive intervention, even if forceful, will be not just permissible but often required.

Human rights of this second sort, then, are demanding in their content, morally fundamental within the international order, and fully consistent with a commitment to normative individualism. They go well beyond the basic human rights argued for by Henry Shue.<sup>12</sup> Yet they fall well short of the full range of rights outlined in the *UDHR* or associated with liberal democracy. They include only those rights essential to membership within what I have suggested we think of as a decent constitutional republic (subject to the rule of law and so on).

Thus, among the human rights of *this second sort*, those we should think of as *jus cogens*, there is no human right to democracy, though there are human rights to express political dissent, to demand of rulers public justifications for their conduct, and so on, and to do so free of any credible fear of torture, imprisonment or other official reprisals. There is a human right against all forms of discrimination – slavery, Apartheid, the refusal to extend citizenship or legal status to women and so on – inconsistent on any view with the status of all members of the polity as responsible persons participating in a rule-governed system of social cooperation for mutual advantage or the common good. But there is no human right to nondiscrimination across all domains of political or social life. Some forms of religious, ethnic or gender discrimination, while surely unacceptable from a liberal democratic point of view, may survive within decent constitutional republics as justified by a public conception of justice not unreasonable when ventured within the context of particular institutional order and history. On the economic front, there are human rights of this second sort to private personal property and to the material means, including but not limited to subsistence and basic education, necessary to act in meaningful ways on one's political and legal rights and duties within society. But there is no human right to paid vacations, social security, or many other familiar features of welfare states. Nor is there a human right to any particular distributive pattern of wealth and income, so long as the foregoing constraints are secured. On the liberty front, there are human rights to freedom of conscience, including religious affiliation and practice, to political dissent, to the exchange of information, and so on. But there are no human rights of this second sort to the full run of liberty rights typically affirmed in liberal democracies, for example, a right to freedom of speech that includes the right to produce and consume adult pornography or a right to freedom of association that

includes a right to engage with others in missionary proselytizing.

Of course, independent and legitimate polities may and should undertake – and happily often already have undertaken, sometimes as part of a purposeful effort to liberalize and democratize from within – to commit themselves to additional human rights beyond those essential to any decent constitutional republic and properly regarded as *jus cogens*. Some of these additional rights are set out in the *UDHR*, others are set out in various recent human rights documents (*CEDAW*, etc.). (It bears emphasizing that the *UDHR*, *CEDAW* and so forth also set out many rights essential to a decent constitutional republic.) Once taken on board through treaty, reflective acquiescence to customary practice, or some other means of voluntary undertaking, these human rights bind those committed to them within international law like all other human rights. Nevertheless, there are important differences.

First, their normative force and reach within international law is a function of their having been voluntarily assumed by those polities subject to them within a peaceful international politics of persuasion aimed at consensus building. Second, their content is limited only by the possibilities of consensus building and voluntary undertaking between polities engaged in such a politics. Third, they are consistent with the recognized practice within treaty-making of ratifying treaties “with reservations.” Fourth, they are not properly regarded as *jus cogens* and may, subject to the appropriate procedural requirements, be renounced. Fifth, adjudication and enforcement with respect to them is plausibly viewed as exclusively international, a matter of state to state relations within institutions and practices of a familiar sort.

We now have some sense of the second and third of the three kinds of human rights toward which I gestured at the start of this essay and the human rights agendas associated with each. What about the first kind of human rights? These are those associated with the natural duties running between all persons, those pre-institutional duties the violation of which would “shock the conscience” of any person as a responsible moral agent. Among these I count the right to be free of torture or other forms of gratuitous cruelty and the right, when in great need or peril, to aid from those able to deliver it without substantial risk or loss.

These human rights will be secured, of course, within any decent constitutional republic. They are therefore, like those already set out as essential to any decent constitutional republic, properly regarded as *jus cogens*. But their institutional or systemic violation has a different moral character, because they bind all persons to all other persons prior to and apart from any institutional relations. Their institutional or systemic violation, as in genocide, war crimes, institutionalized torture, and so on, “shocks the conscience” of all humankind and in this sense represents a violation of what might be called an *erga omnes* obligation, an obligation owed by all individuals and polities within the international community to all others and thus to the international community as a whole. An institutional or systemic failure to tolerate and respond to political dissent is a serious human rights abuse and should be seen as sufficient to dispossess a polity of its recognition as legitimate within the international order along with its consequent right to nonintervention. But institutionalized or systemic torture or genocide is more serious still. It represents a direct assault on the most basic values and obligations common to and

running between all persons and thus all polities and the international community. Human rights of this first sort, then, may constitute a proper moral basis, in cases of genocide, war crimes, institutionalized torture and so on, for both a universal duty to intervene or protect as well as a right to impose international criminal liability, whether realized through a practice of universal jurisdiction, or as now seems the chosen and arguably better path, an International Criminal Court.

### *Conclusion.*

The approach to human rights presented here has, I think, several distinct advantages over those more common within the literature. In a principled way it squares a commitment to normative individualism with a conception of human rights of a *jus cogens* character neither as robust as those especially associated with liberal democratic welfare states nor as impoverished as those the violation of which would “shock the conscience” of any morally competent person. It provides an attractive and theoretically grounded conception of the moral framework within which the liberalization and democratization of decent constitutional republics is to be realized, both through dissent from within and through a peaceful and respectful politics of persuasion and example within the international order. It coheres with many recent developments – regarding criteria of legitimacy, the right to intervene and so on – within the domain of international law and practice, including international criminal law. It offers a principled account of human rights cut free of any particular ideal moral theory or cosmopolitan conception of justice worked up from considerations of reason and human nature alone. And last, but not least, it shares the character of a Rawlsian “liberalism of freedom.”

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1. The alternative is Rawlsian, at least on my understanding of Rawls’s *The Law of Peoples*, Harvard U.P., 1999. I have taken some initial steps toward its articulation and defense in “Rawls on International Justice: A Defense,” *Political Theory*, v. 32, n. 3, pgs. 291-319, 2004; “An Internationalist Conception of Human Rights,” *The Philosophical Forum*, v. 36, pgs. 367-397, 2005; “Global Economic Justice: In Defense of Rawls,” *Journal of Ethics*, forthcoming; and “Political Authority and Human Rights,” in *Rawls’s Law of Peoples: A Realistic Utopia?*, Rex Martin and David Reidy, eds., Blackwell, 2006. I do not defend in this paper the Rawlsian pedigree of this alternative approach. My aim is instead to give it a fuller, deeper and more compelling articulation than I have been able to heretofore. Readers interested in whether it is genuinely a Rawlsian view should consult the works mentioned above.

I should note here also that certain central methodological aspects of my thinking in this essay have recently been given voice in two recent and highly instructive papers, the first by Thomas Nagel, “The Problem of Global Justice,” *Philosophy and Public Affairs*, v. 33, n. 2, 2005, pgs. 113-147, and the second by Aaron James, “Constructing Justice for Existing Practice: Rawls and the Status Quo,” *Philosophy and Public Affairs*, v. 33, n. 3, 2005, pgs. 281-316.

2. I use the phrase “constructive interpretation” in the Dworkinian sense. See, Ronald Dworkin, *Law’s Empire*, Harvard University Press, pgs. 52-3.
3. The idea that some obligations within the international legal order are *erga omnes*, while at least thirty five years old, remains controversial and the object of disagreement. For discussion, see, Christian Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge U.P., 2005; Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford U.P., 1997; and Andre de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry*, Kluwer Publishing, 1996. See also, Larry May, *Crimes Against Humanity: A Normative Account*, Cambridge U.P., 2004.
4. Here I draw on Rawls’s idea(l) of well-orderedness. See, John Rawls, *Political Liberalism*, Columbia University Press, 1993, pg. 35.
5. Here I draw from, but do not follow in all particulars, arguments advanced by Joseph Raz, “Authority and Justification,” *Philosophy and Public Affairs*, v. 14.1, pgs. 3-29, 1985; and Jeremy Waldron, “Kant’s Legal Positivism,” *Harvard Law Review*, v. 109.7, pgs. 1535-1566, 1996.
6. The phrase is Rawls’s. See John Rawls, *The Law of Peoples*, Harvard University Press, 1999, pgs. 66-72.
7. See, H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Oxford U.P., 1997), 116-17.
8. Hart, 159-60.
9. Hart, 193-200.
10. Philip Soper arrives at a similar conclusion in his *A Theory of Law*, Harvard U. P., 1980.
11. For example, though not set out explicitly, the right against coerced self-incrimination is surely entailed by Article 11 of the *UDHR*, which affirms the right to be presumed innocent until proved guilty in a public trial.
12. Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy*, 2<sup>nd</sup> ed., Princeton U.P., 1996. It bears remembering, however, that Shue’s thesis is a conditional, namely that *if* there are any human (or in a domestic context, civil or constitutional) rights at all, then the basic rights he identifies must be among them since they are literally ingredient in any and every other right a person might enjoy. Shue’s focus is not on the institutional and social conditions necessary and sufficient for the natural duty of justice to deliver to political and legal obligations *prima facie* moral force *qua* political and legal obligations.