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Race, Rights, and Justice

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RACE, RIGHTS, AND JUSTICE

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For Lorraine

Preface

This volume is intended to serve as a companion to my previous book on two central and related areas of analytical philosophy of law.[1] Together these two books cover a wide range of issues in mainstream philosophy of law. Generally, they cover many central topics on legal interpretation, justice, rights, responsibility, and punishment. More specifically, *Responsibility and Punishment* covers the problems of individual responsibility and punishment, Immanuel Kant's view of the nature and justification of crime and punishment, the development of a Kantian theory of punishment that evades traditional concerns with retributivist theories of the justification of punishment, an articulation and defense of a new offender-centered analysis of forgiveness and apology, the problems of collective responsibility, punishment and compensation, including reparations to indigenous Americans.

Race, Rights, and Justice is comprised of three parts: Interpreting Constitutional Law, Justice, and Rights. The chapters on constitutional interpretation include treatments of both Antonin Scalia's theory of textual originalism and Robert Bork's theory of original intent (Chapter 1), along with Benjamin Cardozo's theory of constitutional interpretation (published in 1921), one that philosophers of law seem not to have noticed serves as a precursor to that of Ronald Dworkin's (Chapter 2). Infused in this discussion is a moderate version of the perspective of critical race theory, a standpoint that is largely ignored by philosophers of law in the analytical tradition. Furthermore, I find that the basics of critical race theory are not inconsistent with what I take to be a plausible theory of constitutional interpretation (Cardozo's). More specifically, that the framers and ratifiers of the United States Constitution were racists (especially in regard to American Indians and blacks) makes problematic an appeal to their original intent in order to interpret it. Another significant feature of my treatment of this topic is that the major elements

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[1] J. Angelo Corlett, *Responsibility and Punishment*, 3rd Edition (Dordrecht: Springer, 2006), Library of Ethics and Applied Philosophy, Volume 9.

of Dworkin's theory are found in Cardozo's. Indeed, it is a challenge to find out what major part of Dworkin's theory cannot be traced back to Cardozo's theory.

The problems facing legal interpretation pertain to the foundations of international law and global justice insofar as any system of legal rules requires interpretation. Although my treatment of legal interpretation focuses, as does the bulk of the analytical philosophy of law tradition, on U.S. law, what is true of problems in interpreting the U.S. Constitution is also true of difficulties posed to the interpretation of international law, though currently issues of how to construe original intent are not as pressing in international law as they are in U.S. law for obvious reasons. But some of the basic issues in the interpretation of the U.S. Constitution still pose themselves for the interpretation of international law: ought law to have a foundationalist, coherentist, or some other structure? Should established law serve as absolute or *prima facie* precedent for legal decision-making by judges? Is it justifiable, on moral grounds, for judges to make legal decisions based on majority viewpoint? And should judges, in attempting to make best sense of the body of law, inject their decisions with their own religious or political moralities, especially in hard cases? Although this last question poses difficulties in domestic cases of judicial decision-making, it poses particular problems in the sphere of international law wherein justices from different cultural backgrounds are faced with the task of interpreting and applying international law to hard cases.

Until recently, analytical philosophy of law itself has paid precious little attention to problems of international law, much in the same way that political philosophers have until recently paid little attention to matters of global justice. In investigating these matters in Chapter 3, I list several desiderata of a plausible theory of international law, embarking on a description of Kant's view of international law, and then H. L. A. Hart's.

In Chapter 4, I articulate and assess John Rawls' Law of Peoples in terms of what it omits regarding compensatory justice. I then consider and reject certain aspects of cosmopolitan liberalism in its critique of Rawls. I conclude that Rawls' theory of international justice is more plausible than cosmopolitan liberalism, and better serves as a moral foundation of an international legal system.

Since the chapters on constitutional interpretation, international law, and global justice make heavy explicit and implicit use of the concept of rights, it is vital that I devote a couple of chapters to rights with the Feinbergian assumption that, though rights are not the be all and end all of a just society, a state or federation of states cannot be just without them. The nature and value of rights is explored with some depth in Chapters 5 and 6—the

former addressing individual rights and the latter analyzing group or collective moral rights. The focus of these chapters, like the rest of the book, is on moral rights that ought to ground legal ones. That is to say, when we say that so and so has a moral right, what we often mean is that the law ought also to respect that right inasmuch as the law can do so, all things considered. These chapters provide substance to the contents of their predecessors, a depth that is not reflected in other accounts of international law or justice. Yet without such substance, critical thinkers are left to wonder just what these rights are that are "human" and ought to be respected by everyone. Knowing the nature and value of rights, human or otherwise, enables us to avoid making hasty and ungenerous claims about what others believe about them. An example of such disingenuous misunderstanding is exposed in Chapter 5 where I demonstrate how Allen Buchanan misconstrues Karl Marx on rights and in turn misconstrues what differentiates liberal political theories from Marxist ones. Indeed, this error could have been avoided if Buchanan thought more carefully about the nature and value of rights, and if he took the time to read Marx, the target of his critique, with due care and generosity. Chapter 6 addresses confusions about whether or not some collectives of certain kinds (such as ethnic groups) can and do have rights. Most philosophers, even today, have gravely mistaken what the real issues are here, and thereby have taken problematic positions on the matter unnecessarily.

Finally, I include a chapter on international law and the Colombian crisis. I use Michael Walzer's conception of humanitarian intervention and Rawls' notion of the duty of assistance and apply them to the Colombian case, and with new results for both the U.S.-declared drug problem, and for the civil war in Colombia, and for U.S. involvement in Colombia. While morally dirty hands abound, it is clear that the U.S. has some of the most soiled hands in this scenario, violating Walzer's and Rawls' respective principles of intervention and assistance. This chapter takes theory into practice of our world of injustice, and locates perpetrators of severe injustice who are in no way justified in assisting or intervening.

Cumulatively, my writing of this book has been over a period of a decade. It contains chapters that reflect a mainstream training in philosophy of law, but with the added feature of taking race and racism quite seriously throughout my analyses. This is particularly true when it comes to indigenous rights. While there are a few analytical philosophers of law who address problems of racism, I do so from an indigenous perspective, and, more broadly, from the perspective of the racial underclasses. I do so with the goal and intention of not capitulating to what many political liberals endorse, namely, a kind of not really taking seriously the rights of racial underclasses. My approach is not typical in mainstream analytical philosophy of law, as such racial

perspectives are left to legal scholars in the critical race theory camp who themselves are not mainstream analytic philosophers and who characteristically eschew mainstream thought about justice and rights as these concepts are construed within mainstream analytical philosophy of law.

Those whose philosophical and legal theoretic work on the issues addressed herein that have most influenced me include Feinberg and Rawls, though at bottom my indigenism frequently bids me to go beyond some of their points of argument and analysis as even these astute minds failed to address and take seriously enough the rights of indigenous and otherwise racial underclasses. I am forever grateful to Feinberg and Rawls for what they have given to both philosophy and legal theory.

There are numerous people and organizations I wish to thank for their assistance in making this book possible. Appreciation extends to Oxford University Press for the use of "Dworkin's *Empire* Strikes Back!" *Statute Law Review* (2000), pp. 43–56, which is reprinted (with revisions) as part of Chapter 2. I would like to thank the Canadian Philosophical Association for the use of "Marx and Rights," *Dialogue* (1994), pp. 377–389, which is reprinted (with revisions) as part of Chapter 5. I am grateful to the *Canadian Journal of Law & Jurisprudence* for the use of "The Problem of Collective Moral Rights," 7 (1994), pp. 237–259, reprinted as the bulk of Chapter 6.

It would be remiss of me to neglect to thank my former mentor Joel Feinberg for his incisive comments on drafts of Chapters 2, 5, and 6. And I am grateful to Marisa Diaz-Waian, Michael Jenkins, Eduardo Salazar, and Fernando Serrano for their proofreading skills and indexing. I am also grateful to two anonymous referees for Springer's Law and Philosophy Series for incisive comments on the penultimate draft of this book, and to Neil Olivier, Publishing Editor, for his encouragement and expertise. I also thank Deivanai Loganathan for her excellent production assistance.

San Diego, California J. Angelo Corlett

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Introduction

Philosophers often say that the point of their efforts is to make the unclear clearer. But they may make the clear unclear: they may cause plain truths to disappear into difficult cases, sensible concepts to dissolve into complex definitions, and so on. To some extent, philosophers do do this. Still more, they may seem to do it, and even to seem to do it can be a political disservice.—Bernard Williams[1]

This book is on the moral foundations of law ranging from Ronald Dworkin's theory of law as integrity, to Immanuel Kant's and John Rawls' respective theories of global justice, to the concept of rights (both individual and collective), to the dire circumstances of civil war, illicit drugs, and humanitarian intervention in Colombia and some of the problems that these circumstances imply for international law. It provides integrated philosophical discussions of the legal concepts of the nature of justice and rights in both domestic and global contexts.

By "global justice," I not only mean notions of global human need and how that important and complex cluster of challenges ought to be met, but also how societies ought to behave toward one another and how they ought not to in order to not violate certain rights to sovereignty and related rights that states and individuals have. Global justice, then, is that area of philosophy of law (and of political philosophy, more generally) that examines questions concerning the rights and responsibilities states and individuals have toward each other and to themselves, including the protection of individual rights. Moreover, it is clear that each chapter's main topic deserves attention that a book would bring to it. My goal, however, is not to provide a comprehensive philosophical treatment of each such topic. Rather, it is to weave these chapters together into an integrated whole of topics in the mainstream of philosophy of law.

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[1] Bernard Williams, *In the Beginning Was the Deed* (Princeton: Princeton University Press, 2005), p. 64.

J.A. Corlett, *Race, Rights, and Justice*, Law and Philosophy Library 88, DOI 10.1007/978-1-4020-9652-5_1, © Springer Science+Business Media B.V. 2009

This book does not, moreover, propose to offer grand and complete new theories of the topics under investigation. As W. E. B. DuBois states, "... one can never tell everything about anything. Human communication must always involve some selection and emphasis."[2] In relying on important works on constitutional interpretation, rights, justice, and humanitarian intervention, my arguments and analyses are meant to advance significantly and multifariously these crucial philosophical discussions. In so doing, I challenge some of the prevailing wisdom pertaining to these areas of investigation. Thus the task herein is to assist in the refinement of what I take to be largely plausible existing theories of these problems. Insofar as my general approach makes the moral prior to the political, my views follow those of Rawls and can be subsumed under a structuralist version of political moralism. Insofar as they make the moral prior to the legal, my views can generally be placed under the category of legal moralism. Throughout, however, I infuse into mainstream analytical philosophy of law points of argument recognizing fully the rights of indigenous peoples and other racial underclasses (such as blacks). This influences my assessment of certain theories of legal interpretation, as well as my assessments of Rawlsian and cosmopolitan liberal accounts of global justice and how I assess the cluster of problems that is the quandary of humanitarian intervention into Colombia.

As noted in the Preface, this book has three parts: Interpreting Constitutional Law, Justice, and Rights. Certain chapters in this book have been largely revised in order to integrate into them plausible aspects of some of the perspectives of nonmainstream philosophies of law, such as critical race theories. Thus issues of racism play an essential role in my approach to philosophy of law. Moreover, the chapters herein have been written to take account of what a number of legal scholars (some historical, and others contemporary) have argued on constitutional interpretation, justice, and rights. And the result is a book on philosophy of law that is quite inclusive in its approach to address some of the fundamental problems of philosophy of law. In light of DuBois' words cited above, I beg forgiveness from the reader that I do not herein take into account factors of how legal problems are engendered or sexualized. I do, however, demonstrate significant sensitivity, though perhaps insufficient for some, to the problem of socioeconomic class and how it effects some of the problems I address.

What is law? And when it is codified in the form of a constitution, such as in the case of the Constitution of the United States of America, how ought it to be interpreted by judges? These are the key questions that make up the

[2] W. E. B. DuBois, *An ABC of Color* (New York: International Publishers, 1963), pp. 50–51.

first two chapters of this book. Chapters 1 and 2 explore various kinds of theories of legal interpretation, and assess their plausibility. They explicate and critically assess various theories of U.S. constitutional interpretation—including textual originalism and original intent—and argue in favor of one that is most consistent with Dworkin's theory of law as integrity, a theory that seems to be consistent in the main with that of Benjamin Cardozo's views on legal interpretation.[3] Furthermore, I defend Dworkin's version of Cardozo's theory against the respective objections raised by J. L. Mackie and Andrew Altman. I then reason toward a modified version of Dworkin's theory: "constitutional coherentism." On this view, no legal rule is in principle beyond the reach of being revised, overturned, or rejected for the sake of the betterment of the legal system, *ceteris paribus*. One reason for this is that, contrary to an essentially conservative position about the law, I assume that the law is to serve its citizens rather than vice versa, and this implies that citizens have a cluster of rights pertaining to the changing of the law, subject to their being good reasons to do so. A view that would deny this assumption would seem to imply that the citizens of a country are not only bound to the law, but are its servants. The reason why I reject such a view is that, among other things, it would appear to undermine individual autonomy and the sovereignty of a people. Finally, throughout my discussion, I assume a general kind of objectivist realism concerning morality and the law.[4]

Chapters 1 and 2 set the stage for difficulties that arise for any attempt to establish a system of international law in order to create and sustain a reasonably just society of peoples. Regardless of which rules are adopted by whichever participatory states, such laws will require interpretation. Thus the basic points made in Chapters 1 and 2 apply globally as well as domestically. In Chapters 3 and 4, subsequent to a description of Kant's views on international law, and following a statement of H. L. A. Hart's perspective on the same,[5] Rawls' theory of international justice as it is articulated and defended

[3] Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921).

[4] For important discussions of objectivity in morality and the law, see Ronald Dworkin, "Objectivity and Truth: You'd Better Believe It," *Philosophy and Public Affairs*, 25 (1996), pp. 87–139; Kent Greenawalt, *Law and Objectivity* (Oxford: Oxford University Press, 1992); Michael Moore, *Objectivity in Ethics and Law* (Burlington: Ashgate, 2004), Part Two; Gerald Postema, "Objectivity Fit For Law," in Brian Leiter, Editor, *Objectivity in Law and Morals* (Cambridge: Cambridge University Press, 2001), pp. 99–143. For an overview of the subject of truth in legal contexts, see Dennis Patterson, *Law and Truth* (Oxford: Oxford University Press, 1996).

[5] H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), Chapter 10.

in *The Law of Peoples*[6] and cosmopolitan liberalism are examined. Assumed throughout my discussion is that considerations of international justice ought to inform international law. Some of the most important objections to each theory are noted, and no attempt is made for a comprehensive assessment of either. But a new challenge to each position is set forth and defended, one which places a high priority on compensatory justice between peoples or states. This challenge holds that no theory of international justice is complete unless and until it can adequately handle cases of compensatory justice, including reparations to peoples who are severely and wrongfully harmed by other peoples—even well-ordered ones. Thus it appears that both theories of domestic and global justice share a common malady: in their focus on matters of distributive justice, they seem to have ignored the importance of compensatory justice and the foundational role it plays in a generally just society (global or otherwise), or one attempting to be just. This criticism is especially poignant in light of Rawls' desire to formulate principles of international justice that can be used to construct a *realistic* utopia.

Of course, rights are fundamental to any viable system of law. So it is important to come to a plausible understanding of them, both legally and morally, insofar as it is believed that the foundation of legal rights and rules ought to be ethical. By this, it is meant that moral rights are not "nonsense upon stilts" as Jeremy Bentham believed them to be,[7] but rather grounded in what the balance of human reason informs us about conflicting claims or interests, all things considered. Legal rights ought to be grounded in "true" morality, though not everything that is morally wrong ought to be legally prohibited for practical reasons. The origin of rights, whether noninstitutional (moral) rights or institutional (legal) ones, is human reason. Not all moral rights can be institutionalized because not every moral ideal can in practical terms be workable within a legal system. But this hardly means that legal rights have no moral grounding.[8] Legal rights worth respecting have some degree of moral justification, at least those that have moral import. In any case, I assume that the grounding of moral and legal rights in human reason is such that rights can and do exist, regardless of whether or not they need to be exercised. This implies that it is problematic to think that rights are contingent on wrongs in the sense that wrongs are the sources of rights.[9] Such

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[6] John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999).

[7] Jeremy Bentham, "Anarchical Fallacies," in John Bowring, Editor, *The Works of Jeremy Bentham* (Edinburgh: Edinburgh University Press, 1843), Volume 2, pp. 491f.

[8] Joel Feinberg, *Freedom and Fulfillment* (Princeton: Princeton University Press, 1992), Chapters 8–10.

[9] Alan Dershowitz, *Rights From Wrongs* (New York: Basic Books, 2004).

a view begs the question concerning the nature of wrongs, and thus does us little or no good in determining the sources of rights. Wrongs, whatever they are, may serve as an indication that rights are to be discovered by human reason in search of protections from them. But there is no logical correlation between wrongs and rights, or vice versa.

In Chapter 5, I argue that it is incorrect to think, as most philosophers do, that what separates political liberalism from Marxism is that the former believes in rights while the latter does not. Indeed, the well-known but poorly understood words of Karl Marx on rights do *not*, as most believe, condemn rights *per se*. Rather, they condemn the ways in which rights talk can confuse issues rather than infuse working-class folk with empowerment toward freedom to sell their labor power. Indeed, a generous interpretation of Marx implies rather strongly that he did not condemn all rights, but rather condemned rights of bourgeois culture. This implies that there are some rights that Marx does not condemn, such as the right to sell one's own labor power freely, without coercion, and the right to self-determination, of which it is an instance. Indeed, the right to freedom of expression, thought by most in the Western world to gain its initial expression in the writings of John Stuart Mill,[10] was in fact articulated in rather clear terms by none other than Marx himself.[11] With this duly revisionistic understanding of the history of philosophy where Marx is concerned, we then have a duty to revise our misconceptions about what genuinely divides political liberalism from Marxism. It is not my contention that such a conceptual division is much like the emperor's new clothes. I argue that it is not the case that political liberals such as Rawls respect rights while Marx does not; rather, I contend that political liberalism respects a certain cluster of rights (and not others), while Marxism respects another cluster of rights (and not others), whereas there are some rights that both liberals and Marxists respect, perhaps even with equal strength of commitment. Along the way, the nature and value of rights is clarified along the lines analyzed by Joel Feinberg.[12] The relevance of this portion of the book is that it is helpful to understand what truly distinguishes liberal societies from nonliberal ones (in part in terms of the kinds of rights each respects). For in attempting to construct a viable system of international law, such rights must be considered to be important candidates for inclusion in a legal system

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[10] John Stuart Mill, *On Liberty* (London: Longman's, Green, and Co., 1865).

[11] J. Angelo Corlett and Robert Francescotti, "Foundations of a Theory of Hate Speech," *Wayne Law Review*, 48 (2002), p. 1097.

[12] Joel Feinberg, *Social Philosophy* (Englewood Cliffs: Prentice-Hall, 1973); Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press, 1980).

that would morally obligate peoples to it. Moreover, unless there is a proper understanding of what indeed distinguishes liberal societies from nonliberal ones, it will be difficult to accurately interpret whatever legal rules are meant to protect the rights of states and individuals under international law, and global justice will be impossible.

But what is a *collective* moral right? Under what conditions might it accrue? To what sorts of collectives might it accrue, and why? Chapter 6 explores the nature of collective moral rights. It then provides a philosophical analysis of the conditions under which collective rights accrue. A version of Moral Rights Collectivism is defended against Moral Rights Individualism; the latter denies the very possibility of collective moral rights. This analysis has implications for a legal system seeking to become reasonably just and well ordered. Collective rights must not be written off as harmful or nonsense, as many would have us believe. Both individual and collective rights are important to the functioning of a well-ordered legal system. The question then becomes one of which individuals and collectives ought to have rights and under what conditions, not whether or not any collectives ought to have rights.

Having discussed justice and rights in a global context, it is important to explore some of the deeper ramifications of some such rights in a contemporary nonideal setting. Chapter 7 takes up what seems to be an intractable problem in U.S. and some other societies, namely, the matter of illicit drugs. Taking a uniquely indigenous perspective, this chapter uses critically Michael Walzer's and Rawls' notions of humanitarian intervention[13] and the duty of assistance,[14] respectively, in order to argue that recent and current U.S. policies in support of the Colombian government are unwarranted. A wholly new analysis of the conditions of humanitarian intervention is articulated and applied to the drug problem between the U.S. and Colombia, one having implications for international law.

Why another book on justice and rights? One reason is that this book is written within the mainstream analytical tradition of philosophy of law. Yet it explores the above mentioned problems with an eye toward the indomitable difficulties of racism and class, which are rarely, if ever, taken into account in Anglo-American analytical philosophy of law. Although critical race theorists, most of them legal scholars rather than philosophers, analyze legal problems from the perspective of race and class, they do not do so within the analytical philosophical methodological paradigm. I analyze legal

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[13] Michael Walzer, *Just and Unjust Wars*, 3rd Edition (New York: Basic Books, Inc., 2000).

[14] Rawls, *The Law of Peoples*.

conceptions philosophically and from within the mainstream methodological paradigm of analytical jurisprudence, taking my lead from Joel Feinberg. No call for paradigmatic revolution is made herein. Rather, what is called for is more precise and even deeper (though admittedly not comprehensive) analysis of matters of constitutional interpretation, justice, and rights.

However, it would be a mistake to infer from the fact that this book's propositions are argued and analyzed from within the mainstream analytical tradition of philosophy of law that its conclusions are predictable or always mainstream. On the contrary, the chapter on constitutional interpretation not only places for the first time Dworkin's theory of law as integrity in part of its broader legal theoretical context, demonstrating that it is not in any obvious way significantly novel, but it also (subsequent to defending Dworkin's view from some leading criticisms) sets forth and defends a new version of the theory of legal interpretation known as constitutional constructionism. It is a theory that is neither originalist nor intentionalist, but completely constructionalist. Unlike Dworkin's view that judges must remain faithful to established law, "constitutional coherentism" does not hold such a view. For the adage that "the law must serve the people" is taken most seriously by constitutional coherentism. In demythologizing the U.S. Constitution, constitutional coherentism seeks to place law totally in the hands of reasonable people who take democracy and law seriously.

Moreover, this book's originality is not found in its analysis of the nature and value of rights. The analysis of rights adopted by *Justice and Rights* is adapted from Feinberg's famous and well-received analysis of rights, except that instead of grounding the nature of rights in valid claims, I do so in either valid claims *or* interests, as the case may be. Additionally, I argue that the nature of rights, whether legal or moral, is such that they can be possessed by certain decision-making collectives as well as individual agents. I take this to be a logical extension of Feinberg's position on rights that makes his notion of the nature and possession of rights[15] coherent with his conception of responsibility[16] of both individuals and collectives of certain sorts. Perhaps even more groundbreaking is my refutation of the popular view that what distinguishes political liberalism from Marxism is that the former respects rights, while the latter does not. Despite several detailed arguments, textual and otherwise, to the contrary, I relieve this position from its current and undeserved place in respectable academia. What is now needed is a much more nuanced and deeper analysis of political realities that would properly

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[15] Feinberg, *Rights, Justice, and the Bounds of Liberty*; Feinberg, *Freedom and Fulfillment*.
[16] Joel Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970).

classify these eminent political philosophies that have influenced global politics so powerfully and for several generations.

Finally, as a manner by which to apply some of the principles of international law set forth by Rawls in *The Law of Peoples*, a novel approach to the problems that have plagued Colombians for decades is articulated. But the perspective given is not one of a U.S. supporter, or even one of a supporter of either the Colombian government or the rebel forces seeking to replace it. Rather, it is a specifically indigenous perspective, one that sees the intractable quagmires of the region in their deeper complexity, but nonetheless reminds readers that the true possessors of territorial rights in the scenario are the indigenous U'was. Whatever serves as a genuine solution to the problems engulfing Colombia at this time must account for this fact, among other things. Justice in Colombia can find no other route except through this truth. Perhaps it is at this juncture that this book joins well to its companion volume on responsibility and punishment insofar as each argues in favor of justice for indigenous peoples.[17]

In the end, it is hoped that my arguments and analyses will have enabled us philosophers of law to move forward a step or two in our thinking about the problems I address. And I certainly pray that Brand Blanshard's words apply to the writing of this philosophical treatise: "If he is not right, at least he deserves to be; he puts all his cards on the table; he keeps nothing back; he fights, thinks, and writes fairly, even to the point of writing clearly enough to be found out."[18] These insightful words certainly apply to Feinberg. But I offer this book in the hope that they also apply, at least in some meaningful measure, to what I have written herein. In light of Bernard Williams' words that begin this Introduction, I shall "emphasize reality at the expense of philosophical abstraction" in order to avoid making "sensible concepts to dissolve into complex definitions."[19]

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[17] J. Angelo Corlett, *Responsibility and Punishment,* 3rd Edition (Dordrecht: Kluwer Academic Publishers and Springer, 2006), Library of Ethics and Applied Philosophy, Volume 9.

[18] Brand Blanshard, *On Philosophical Style* (Manchester: Manchester University Press, 1954), p. 24.

[19] Williams, *In the Beginning Was the Deed*, p. 64.

Part I
Interpreting Constitutional Rights

Chapter 1
Interpreting the U.S. Constitution

> *What morality requires of a person, in morally difficult circumstances, is not something to be mechanically determined by an examination of the person's office or role-centered duties. An individual must on rare occasions have the courage to rise above all that and obey the dictates of conscience. One's conscience may be wholly convincing, considered only on its own terms. But its conflict with duty will nevertheless make the decision morally complex and difficult—Joel Feinberg.*[1]

> *Constitutional law is part law, part politics, and part history, a history comprising legal precedents and the causes and effects of past political controversies. The pursuit of American constitutional history, for a person who is curious and has the time to pursue it, leads back to the initial debates in the Congress of the United States regarding the meaning of the constitutional text, and beyond, to the proceedings in the Constitutional Convention and to the investigation of the widespread controversies that arose during the campaign to secure ratification. The trail of this history goes back still further: to the Continental Congress under the Articles of Confederation and the attitudes and policies that animated the debates of that body—Joseph M. Lynch.*[2]

Over the years, the Supreme Court of the United States of America has gained tremendous power. One need only consider that despite the fact that the right of a pregnant[3] woman to an abortion is nowhere found in the U.S.

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[1] Joel Feinberg, *Problems at the Roots of Law* (Oxford: Oxford University Press, 2003), p. 16.

[2] Joseph M. Lynch, *Negotiating the Constitution* (Ithaca: Cornell University Press, 1999), p. ix.

[3] I attribute the right to an abortion to *pregnant* women because it seems a bit odd to say that nonpregnant women have such a right, if indeed anyone has the right at all. If there is a right to an abortion, it would seem to accrue not to women who are not pregnant, or those who can never (for whatever reasons) become pregnant, but only to those who are,

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Constitution, the Court, for better or for worse, "discovered" such a right. While some would seek to curtail the Court's power to create or construct such law to protect a "new" right not found explicitly in the Constitution, others would seek to support the Justices' power in constructing law where the Constitution is silent and where vital issues are at stake. It would appear, then, that the debate is in large part between a descriptive construal of judges as historians of the meaning of the Constitution's text and a normative account of the judge as moralist where the Constitution's text has gaps and does not straightforwardly address a case at hand. But as some have argued, this is a bifurcated argument, as what judges both do and ought to do on the bench is to implement both constitutional textual content and meaning, on the one hand, and extra-legal principles on the other. Judges not only ought to interpret the given text of the Constitution, but sometimes need to go beyond the given text and construct new law wherein situations not addressed by the given text are silent.

In a constitutional democracy such as one that many believe is found in the U.S., the question of the nature of law (usually couched in terms of the famous and ongoing debate between natural law theorists who argue that the law and morality are essentially connected, and legal positivists who argue that they are not) is related to the question of U.S. Supreme Court judges' interpretation of the informational content of the U.S. Constitution. For all but the most trivial of legal statements are interpretive and involve value-laden (and often moral) reasoning.[4] As some legal commentators put it,

> Law is not simply a system of ideas but a series of consequences that human beings inscribe on the lives of other human beings through the medium of those ideas. However dispassionately one may seek to analyze the ideas, it is foolish to suppose that one's appraisal of the consequences will be dictated *exclusively* by that analysis. The analysis will help to expose the availability of choices and to elaborate some of the connections between ideas and consequences. But which consequences—and therefore which choices—one regards as tolerable or intoler-

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at some given time, pregnant. It is the latter women, then, who possess the right to an abortion at the time(s) they are pregnant. This is true unless, of course, it makes sense to argue that a woman has a right to an abortion should she become pregnant, and that it is when she becomes pregnant that she is in a position, should she indeed have the right, to claim it.

[4] Anthony G. Amsterdam and Jerome Bruner, *Minding the Law* (Cambridge: Harvard University Press, 2000), p. 7. However, "when there is a truth of the matter, ... the decision is not a matter of choice or discretion" [George Fletcher, *Basic Concepts of Legal Thought* (Oxford: Oxford University Press, 1996), p. 55]. But not inconsistent with this claim is one made by Alf Ross: "It is ... erroneous to believe that a text can be so clear that it cannot give rise to doubt as to its interpretation" [Alf Ross, *On Law and Justice* (Berkeley: University of California Press, 1959), p. 135].

able will necessarily depend in part upon one's values, faiths, and beliefs about the way in which human beings should be treated.[5]

While few believe that such judges neither do nor should interpret the Constitution, there is widespread disagreement as to precisely both what does and what ought to go on vis-à-vis these judges and their interpreting the supreme law[6] of the U.S., or what Bruce Ackerman refers to as its "sacred texts,"[7] but what William Lloyd Garrison[8] not only denounced in many of his speeches, but sometimes burned, calling the U.S. Constitution "a covenant with death and an agreement with hell."[9] For Garrison, "Of all injustice, that is the greatest which goes under the name of law."[10] One helpful way to frame the question of constitutional interpretation is this: precisely what ought interpretation to entail, merely interpreting the given text, or that and constructing rights and duties based on the content of the text when the text is silent or unclear concerning a vital issue at hand?

Which mode of constitutional interpretation is most plausible, both in terms of how the judges do interpret and how they ought to interpret the U.S. Constitution? As Justice Antonin Scalia remarks, "the hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation,"[11] leading Scalia to bemoan that "We American judges have no intelligible theory of what we do most,"[12] and "So utterly unformed is the American law of statutory interpretation that not only is its methodology unclear, but even its very *objective* is."[13]

Although it is important to understand the history of constitutional interpretation,[14] it is even more crucial to figure out what is the most reasonable

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[5] Amsterdam and Bruner, *Minding the Law*, p. 6.

[6] See Article VI, Section 2 of the U.S. Constitution for the famous supremacy clause.

[7] Bruce Ackerman, *We the People* (Cambridge: Harvard University Press, 1998), p. 10.

[8] For an account of William Lloyd Garrison, see Russel B. Nye, *William Lloyd Garrison and the Humanitarian Reformers* (Boston: Little, Brown and Company, 1955).

[9] Quoted in William O. Douglas, *An Almanac of Liberty* (New York: Doubleday and Company, Inc., 1954), p. 242.

[10] Quoted in Douglas, *An Almanac of Liberty*, p. 242.

[11] Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," in Amy Gutmann, Editor, *A Matter of Interpretation* (Princeton: Princeton University Press, 1997), p. 14.

[12] Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," p. 14.

[13] Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," p. 16.

[14] For an account of the early history of debates concerning how the U.S. Constitution ought to be interpreted, see Lynch, *Negotiating the Constitution*. For histories of legal

way to interpret the text as sometimes history reveals that a certain set of practices is, all things considered, wrongheaded and ought to be rejected. As Richard H. Fallon, Jr., argues, "Few if any constitutional theories are purely normative. Most if not all claim to 'fit' or explain what they take to be the most fundamental features of the constitutional order. But few constitutional theories are purely descriptive either. Most also include prescriptions for reform."[15] And this is a good thing, given Derrick Bell's caution that "Constitutional protections, and the judicial interpretations built on them, have real importance but, all too often, work out in practice in unanticipated, and destructive, ways."[16] While Bell argues rather pessimistically (not without plausible grounding, however) that reform measures through the U.S. legal system are bound for disappointment as the history of legal reform demonstrates, I shall adopt a cautiously optimistic attitude toward such problems and insist that it is all the more urgent that an ongoing struggle is undergone in order to discover the most plausible way to interpret the Constitution, all things considered. For the alternative courses of action come with tremendous risks for all involved, some of which are potentially deadly.[17]

In what follows in both this and the following chapters, I assume the possibility of settled law, but that legal indeterminacy (typically held by many legal realists such as John Chipman Gray[18] and critical legal studies scholars) is implausible insofar as its skepticism about legal determinacy is greater than moderate. I concur with Ronald Dworkin that there is usually an objectively right answer to legal cases and rights conflicts in courts, all relevant things considered.[19] Metaethically speaking, I assume a realist stance on the possibility of moral truth and knowledge that ought to, among other things,

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theory and of philosophy of law more generally, see W. Friedmann, *Legal Theory* (London: Stevens & Sons, Limited, 1949), and Carl Joachim Friedrich, *The Philosophy of Law in Historical Perspective* (Chicago: The University of Chicago Press, 1963).

[15] Richard H. Fallon, Jr., *Implementing the Constitution* (Cambridge: Harvard University Press, 2001), p. 24.

[16] Derrick Bell, *And We Are Not Saved* (New York: Basic Books, Inc., 1987), p. 10.

[17] J. Angelo Corlett, *Terrorism: A Philosophical Analysis* (Dordrecht: Kluwer Academic Publishers, 2003), Philosophical Studies Series, Volume 101; Ted Honderich, *After the Terror* (Edinburgh: University of Edinburgh Press, 2002); Michael Walzer, *Just and Unjust Wars*, 3rd Edition (New York: Basic Books, Inc., 2000); Burleigh Wilkins, *Terrorism and Collective Responsibility* (London: Rutledge, 1992).

[18] John Chipman Gray, *The Nature and Sources of Law* (Gloucester: Peter Smith, 1972).

[19] Ronald Dworkin, "Objectivity and Truth: You'd Better Believe It," *Philosophy & Public Affairs*, 25 (1996), pp. 87–139.

inform the content and function of law.[20] What follows in this and the subsequent chapters are discussions of theories of constitutional interpretation that share my fundamental assumptions along these lines.

Textual Originalism and Original Intent

One theory of constitutional interpretation is "naïve originalism," dubbed "the dictionary school" by Learned Hand.[21] It holds that what is most important is that judges "get it right" in terms of what the framers and ratifiers of the sacred political text had in mind. On this view, the U.S. Constitution is a document the contents of which is to serve for judges as a kind of legal "bible" of sorts that its citizens are to obey. Naïve originalism is not unlike Christian fundamentalism in how the latter construes the contents of "the bible" as both authoritative and inerrant. The naïve originalist similarly holds that the Constitution is the sole guide to U.S. legal affairs insofar as the outlining of basic rights is concerned, and it is never to be changed or supplemented for any reason. It denies what those such as Fallon refer to as the "unwritten constitution" of precedents, adjudicative norms, etc., which form a legitimate backdrop against which judges may decide cases.[22] A textualist version of naïve originalism is found in Scalia when he states that "My view that the objective indication of the words, rather than the intent of the legislature, is what constitute the law leads me . . . to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning."[23] Scalia continues: "I object to the use of legislative history on principle, since I reject intent of the legislator as the proper criterion of the law."[24] For Scalia, then, it is not the original intent of the framers and ratifiers of the Constitution that a judge ought to be after in interpreting the law, but rather the original *meaning* of the text of the Constitution itself:

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[20] For a critique of "veriphobic" perspectives on such matters, see Alvin Goldman, *Knowledge in a Social World* (Oxford: Oxford University Press, 1999); *Pathways to Knowledge* (Oxford: Oxford University Press, 2002).

[21] Learned Hand, *The Spirit of Liberty* (New York: Alfred A. Knopf, 1952), p. 107. Of this view, Hand writes: "No matter what the result is, he must read the words in their usual meaning and stop where they stop. No judges have ever carried on literally in that spirit, and they would not long be tolerated if they did."

[22] Fallon, *Implementing the Constitution*, Chapter 7.

[23] Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," pp. 29–30.

[24] Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," p. 31.

"What I look for in the Constitution is precisely what I look for in the statute: the original meaning of the text, not what the original draftsmen intended."[25] But as Hand points out, "even if the law had a language of its own, it could not provide for all situations which might come up."[26]

A more nuanced version of originalism admits both that problems can and do arise from time to time that are beyond the reasonable predictive minds of the framers and ratifiers, and that further amendments to the Constitution are needed. However, such amendments are never to contradict the original contents of the Constitution itself. Nor should they run afoul of the intent of the framers and ratifiers. I shall refer to this as "moderate originalism."

Robert Bork's Theory of Original Intent

Robert Bork is a proponent of originalism, though out of fairness to his view I shall construe him as one of the moderate stripe when he writes: "What does it mean to say that a judge is bound by law? It means that he is bound by the only thing that can be called law, the principles of the text, whether Constitution or statute, as generally understood at the enactment."[27] It is Bork's inclusion of "the principles of the text" that influences me to categorize him as a moderate originalist and not a naïve one (as many have done). For it seems that Bork is allowing judges to exceed the literal text of the law to invoke principles, as they may, in interpreting the law so that the law may be applied to this or that case. On the other hand, Bork states that "The abandonment of original understanding in modern times means the transportation into the Constitution of the principles of a liberal culture that

[25] Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," p. 38. For a critique of Scalia's distinction between variant forms of originalism, see Ronald Dworkin, "Comment," in Amy Gutmann, Editor, *A Matter of Interpretation* (Princeton: Princeton University Press, 1997), 115f.

[26] Hand, *The Spirit of Liberty*, p. 105.

[27] Robert Bork, *The Tempting of America* (New York: The Free Press, 1990), p. 5. See David Lyons, "Constitutional Interpretation and Original Meaning," *Social Philosophy & Policy,* 4 (1987), pp. 75–101, for a criticism of Bork's early views on this topic. My assessment of Bork's position is based solely on his considered judgments in his book, which contains his more recent views. Also see Samuel Freeman, "Original Meaning, Democratic Interpretation, and the Constitution," *Philosophy and Public Affairs*, 21 (1992), pp. 1–42, where a broad distinction is drawn between "non-interpretivism" and "interpretivism" in constitutional interpretation studies.

cannot achieve those results democratically."[28] And it is just such a statement that seems to suggest that Bork's theory of the nature of law does not approve of a judge's use of principles in applying the law. Perhaps the best way to understand Bork's position is to see him as implying that there is a distinction between constitutional principles, on the one hand, and extra-constitutional principles, on the other. The former are ones that are derived quite directly from a common-sense reading of the Constitution, whereas the latter are those that do not find themselves embedded directly in the Constitution, but are rather found in religious, ethical, political, or other such sources. For Bork, it is the former, but never the latter, that are legitimate sources for the judge's applying the law. It is this kind of construal of Bork's theory of law that makes internally coherent (though implausible) his claim that "The role of a judge committed to the philosophy of original understanding is . . . to find the meaning of a text . . . and to apply that text to a particular situation, which may be difficult if its meaning is unclear."[29] "Where the law stops, the legislator may move on to create more; but where the law stops, the judge must stop."[30]

Closely related to constitutional originalism is naïve constitutional intentionalism. According to this view, judges are to interpret the U.S. Constitution remaining faithful to the intent of the framers and ratifiers. One problem with this view is that the early history of the Constitution demonstrates that that various framers and ratifiers often had conflicting intentions regarding the meanings of the contents of the words of the document. So, like originalism, intentionalism lends itself to a moderate version of the theory: moderate intentionalism. According to this view, judges are to interpret the Constitution consistent with some or another intent of the framers and ratifiers, according to extra-constitutional documents such as books, pamphlets, or letters, published or not, by the said framers and ratifiers. I take Bork to exemplify this approach.[31] According to him,

> . . . what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean . . . All that counts is how the words used in the Constitution would have been understood at the time. The original understanding is thus manifested in the words used and in secondary materials, such as debates at the conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like.

[28] Bork, *The Tempting of America*, p. 9.

[29] Bork, *The Tempting of America*, p. 149.

[30] Bork, *The Tempting of America*, p. 151.

[31] This approach is dubbed "hypertextualist" in Ackerman, *We the People*, p. 72.

> If the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended. If the Constitution is law, then presumably, like all other law, the meaning the lawmakers intended is as binding upon judges as it is upon legislators and executives.[32]

Of course, it is natural for originalism and intentionalism to blend into a single theory of constitutional interpretation, which is what we have in Bork's case. In such a case, it is argued that it is not only the words as they are written, but the intent behind them that is to guide judges in applying the law of the land. It is this view that we refer to as the doctrine of "original intent." Legal positivism seems consistent with this position, as according to it, judges are construed as those who simply apply the law as it is, and not as it ought to be, and that what makes for valid law are rules enacted by a legitimate legal system.[33] The content of the law as it ought to be is to be determined by legislators according to the rules of a legislative system of law. As Ackerman describes this hypertextualist–positivistic view: if there are no formal amendments, then there can be no legitimate legal change.[34] Judges are to apply law, not interpret it in the "construction" sense of "interpret." In fact, Bork argues, it is the theory of original understanding (including intentionalism), i.e., original intent, that best secures the U.S. doctrine of separation of governmental powers.[35]

Now it is interesting that Bork, being both an originalist and an intentionalist, seeks to ground his theory of the nature of law in a neutrality principle: "The philosophy of original understanding is capable of supplying neutrality . . . in deriving, defining, and applying principle."[36] Thus there is on his view no room for politics in the law, at least for judges seeking to interpret and apply the law properly. Indeed, according to Bork, "In the absence of law, a judge is a functionary without a function."[37]

So far Bork's theory of original intent appears to be internally coherent. But he goes on to argue that

> As new cases present new patterns, the principle will often be restated and redefined. There is nothing wrong with that; it is, in fact, highly desirable. But

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[32] Bork, *The Tempting of America*, pp. 144–145.

[33] For an account of legal positivism, see William E. Conklin, *The Invisible Origins of Legal Positivism* (Dordrecht: Kluwer Academic Publishers, 2001), Law and Philosophy Library, Volume 52.

[34] Ackerman, *We the People*, p. 260.

[35] Bork, *The Tempting of America*, p. 153.

[36] Bork, *The Tempting of America*, p. 146.

[37] Bork, *The Tempting of America*, p. 147.

> the judge must be clarifying his own reasoning and verbal formulations and not trimming to arrive at results desired on grounds extraneous to the Constitution.[38]

But here is where Bork's theory of law appears to flounder. In the restatement and reformulation of "constitutional" principles, it is quite unclear what the boundary lines are between those that are truly constitutional and those that are not. Lacking such a distinction, it is question-begging for Bork to assert that one principle is constitutional and hence acceptable for judicial use over another. The theory of original intent, then, owes much more of an explanation than Bork provides concerning what counts as appropriate principles for judicial use. For all Bork says, nothing by way of clear explanation is given that would prevent a liberal judge from claiming that her principles are constitutionally rooted or consistent in some more indirect fashion, and nothing would prohibit a conservative judge from claiming that her principles are likewise constitutional. Hence Bork's theory does not really separate without *ad hoc* pronouncements proper versus improper principles to be used by judges. Moreover, it cannot seem to rightly distinguish good from bad decisions predicated on such principles in judicial decision-making. This renders dubious Bork's claim that "The structure of government the Founders of this nation intended most certainly did not give courts a political role."[39] For "founders"' intentions aside, lacking a viable manner by which to distinguish constitutional principles for judicial use from unconstitutional ones might well imply that original intent, even if it is in some ways a desirable doctrine, is fundamentally impossible to implement. After all, even if the founders wanted a politically neutral court and law on which to ground its decisions, that desire seems practically impossible because judges, being human, are influenced by their various extra-legal beliefs and can only do what is possible in this world, and ought implies can. And a politicized judiciary and legal system may be the reality, whether Bork likes it or not. For whatever legal penumbra exist in the law may represent a contingent fact with which originalists and intentionalists must cope. And it does little good for Bork to insist in light of such realities that pervade hard cases that "Even if evidence of what the founders thought about the judicial role were unavailable, we would have to adopt the rule that judges must stick to the original meaning of the Constitution's words"[40] if there is no viable way to discern constitutional principles from unconstitutional ones for use by judges in hard cases. Nor will it do for him to state that "Constitutional philosophies

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[38] Bork, *The Tempting of America*, p. 151.

[39] Bork, *The Tempting of America*, p. 154.

[40] Bork, *The Tempting of America*, p. 154.

always have political results. They should never have political intentions."[41] For we would plausibly determine and assess a judge's intentions by the results of her decisions, as a matter of practical reality. And all of this seems to hold true whether we attempt to discern the framers' and ratifiers' specific or abstract intentions.[42]

But even if Bork could rescue his theory from the aforementioned problem, Hand writes the following of such a position:

> The judge must therefore find out the will of the government from words which are chosen from common speech and which had better not attempt to provide for every possible contingency. How does he in fact proceed? Although at times he says and believes that he is not doing so, what he really does is to take the language before him, whether it be from a statute or from the decision of a former judge, and try to find out what the government, or his predecessor, would have done, if the case before him had been before them. He calls this finding the intent of the statute or of the doctrine. This is often not really true. The men who used the language did not have any intent at all about the case that has come up; it had not occurred to their minds. Strictly speaking, it is impossible to know what they would have said about it, if it had. All they have done is to write down certain words which they mean to apply generally to situations of that kind. To apply these literally may either pervert what was plainly their general meaning, or leave undisposed of what there is every reason to suppose they meant to provide for . . .
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> Thus, on the one hand, he cannot go beyond what has been said, because he is bound to enforce existing commands and only those; on the other, he cannot suppose that what has been said should clearly frustrate or leave unexecuted its own purpose.[43]

Hand's words serve as a precaution to those, like Bork, who would hold too insistently to the original intent standpoint on constitutional interpretation.

Of course, another of the main objections to the doctrine of original intent is that it places too heavy an emphasis on the role of the people in the making and interpretation of law. Even if it were true that judges ought to abide by Bork's theory of law, why should the law follow the dictates of majority rule as Bork presses throughout *The Tempting of America* where he accuses "liberals" of being "antidemocratic" in pressing a philosophy of law that encourages judicial interpretation based on political principles?[44] First, Dworkin points out that ". . . we must distinguish the question of what the

[41] Bork, *The Tempting of America*, p. 177.

[42] For a discussion of this distinction in constitutional interpretation, see David O. Brink, "Legal Interpretation, Objectivity, and Morality," in Brian Leiter, Editor, *Objectivity in Law and Morals* (Cambridge: Cambridge University Press, 2001), pp. 27–28.

[43] Hand, *The Spirit of Liberty*, pp. 106–107.

[44] Bork, *The Tempting of America*, p. 178.

Constitution means from the question of which institution has final authority to decide what it means."[45] Second, this "majoritarianism premise," as Dworkin calls it,[46] holds that judicial review offends democracy in the ways that it impacts and influences law by way of compromising it, giving a few federal and U.S. Supreme Court judges profoundly more power than others to make decisions about how society ought to live. But as Dworkin argues, ". . . it is far from evident that judicial review is in any way an undemocratic institution:"

> . . . judicial review does not offend any symbolic or agency goals. It does not impair equality of vote, because it is a form of districting and does not, in itself, reflect any contempt for or disregard of any group within the community. Nor does judicial review damage the agency goals of democracy. On the contrary, it guards those goals, by giving special protection to freedom of speech and to the other liberties that nourish moral agency in politics. It does more: it provides a forum of politics in which citizens may participate, argumentatively, if they wish, and therefore in a manner more directly connected to their moral lives than voting almost never is. In this forum, moreover, the leverage of the minorities who have the most negligible leverage in ordinary politics is vastly improved.[47]
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> . . . Constitutionalism is an improvement in democracy so long as, but only so long as, its jurisdiction is limited to choice-insensitive issues of principle.[48]

Additionally, judicial review invites, in a rather democratic manner, the legislature to respond to the Court's interpretation of a law by either affirming the said interpretation, or by denying it, or by affirming the interpretation in one respect and denying it in another. It also serves to update the law in light of circumstances that would require it to face up to, and to avoid legislative "deep freeze."[49]

Moreover, as Joel Feinberg points out in regards to the Borkian charge of judicial activism,

> Critics of "judicial activism" often say that this construal of the situation suffers the fatal flaw of permitting the judge to apply *her own* values or appeal to *her own* moral convictions, as if it would be better if she appealed to someone else's moral principles that she might not personally share. Of course the principles she uses must be "her own"—that is, principles in which she genuinely believes. Otherwise, her opinion in the case would lack conviction, and she would lack sincerity

[45] Ronald Dworkin, "Comment," in Amy Gutmann, Editor, *A Matter of Interpretation* (Princeton: Princeton University Press, 1997), p. 124.

[46] Ronald Dworkin, *Freedom's Law* (Cambridge: Harvard University Press, 1996).

[47] Ronald Dworkin, "What is Equality" Part 4: Political Equality," in Thomas Christiano, Editor, *Philosophy & Democracy* (Oxford: Oxford University Press, 2003), p. 135.

[48] Dworkin, "What is Equality? Part 4: Political Equality," p. 136.

[49] Guido Calabresi, *A Common Law for the Age of Statutes* (Princeton: Princeton University Press, 1982), p. 32.

> and integrity. Those principles, however, are relevant and proper not because they are hers. Rather, they are hers because she thinks they are cogent for quite independent reasons, because the reasoning that leads her to them is sound, and because the principle of natural justice that she invokes is correct. There can be no certainty about that, of course, but practical certainty is hard to come by in those complex legal decisions that confront no gap, involve no purely moral reasoning, and require no leap across the chasm to natural justice.[50]

If Feinberg is right, then this would seem to imply that part of Bork's complaint about activism in the Court boils down to a simple one that Bork disapproves of judges who would decide cases in vastly different ways than he would decide them. Furthermore, a careful study of the U.S. Supreme Court reveals that it has not consistently upheld First Amendment rights to freedom of expression from 1870 to 1920.[51] And there is little or no question that the Court's justices in such cases tended to reflect what the public believed about that "right"[52] in cases of national crisis. While Bork might respond that such instances of judicial decision-making simply show how badly out of line the judges were compared to the original framers' views on freedom of expression, the point nevertheless remains that judges ought not to decide cases based on majority intent.[53] Social stability is important, but equally, if not more, important is the law's doing the right thing by way of people's rights. And original intent can capture this insight only if it is assumed at the outset that the U.S. Constitution already contains both in words and implied principles everything that judges need to decide cases brought before them—even in hard cases! But this is as unlikely as the ability of sacred and ancient religious texts to furnish the information necessary and sufficient to handle all of life's contemporary problems.

But if Bork's intentionalist originalism places too much emphasis on the Court's deciding cases according to majority rule of the populace of citizens

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[50] Feinberg, *Problems at the Roots of Law*, pp. 7–8.

[51] David M. Rabban, *Free Speech in Its Forgotten Years* (Cambridge: Cambridge University Press, 1999). For a philosophical analysis of the right to freedom of expression in U.S. law, see Joel Feinberg, *Freedom and Fulfillment* (Princeton: Princeton University Press, 1992), Chapter 5; Kent Greenawalt, *Speech, Crime, & the Uses of Language* (Oxford: Oxford University Press, 1989).

[52] I use "'right'" instead of "right" in that, if Joel Feinberg is correct about the nature of claim-rights such as freedom of expression, its possession as a valid claim does not depend on public approval or majority rule opinions. That the Court sought to curtail the right in question on several occasions shows that it was, in its eyes, no right at all because it was subject to the whims of the populace as the Court construed popular assent.

[53] This is different than judges deciding cases based in part on the implications of their decisions for the public welfare. What the public thinks is good for it and others may at times not be what is truly in its own interest, or in the interest of individuals in it.

and in light of the content of the U.S. Constitution, it also distorts such an emphasis. For as Akhil Reed Amar argues, the assembly and petition clauses of the First Amendment protect not only "the ability of self-elected clusters of individuals to meet together; it is also an express reservation of the *collective* right of We the People to assemble in a future convention and exercise our sovereign right to alter or abolish our government."[54] If this is true, then what legitimate limits can be placed on a judiciary's attempt to uphold such a right in the face of a more conservative constitutional principle or majority opinion? Bork cannot argue here with consistency that the judge's role is not to uphold the Constitution. Yet the Declaration of Independence, surely qualifying as a primary source of guiding principles for the interpretation of the Constitution, specifies a right (and a duty!) of "We the People" to be able to alter or even abolish the government under certain circumstances of tyranny. Would it not seem that it is a judge's duty, both morally and legally, to uphold any right of the people to alter and abolish the government under such conditions? And might this not imply, at least in some instances, a corresponding right of the people to alter or abolish the very Constitution upon which that government is predicated?

Here it would appear that Bork and his supporters are caught in a quandary: either they must concur that judges in some cases may uphold the constitutional right to alter or abolish the government and perhaps even the Constitution itself, or they must argue effectively that judges have no such duty and that it is some other branch of government that is to ensure that peoples' right. But if not the highest court in the land, then what or who, and *why*? The objection to Bork's view here is not that the Court ought to make new law according to its own whims, but that it has the constitutional right and duty to uphold the First Amendment in its entirety, as well as the right and *duty* of "We the People" to alter or abolish the government and its very Constitution as stated in the Declaration of Independence. This implies that the original intent of the founders is such that it makes the Constitution itself malleable, not some inerrant, authoritative, quasi-religious text. Its sacredness is in its truths and aims for a just social order. But in fact, there is nothing sacred about it in the sense that any of its contents is beyond critical scrutiny or revision. I shall return to this point later in Chapter 2 when I set forth the conceptual foundations of my own theory of law.

Bork's version of original intent ignores the fact that the U.S. Constitution is a living body of supreme law for the U.S. and is always undergoing a kind of reconstruction, however major or minor, and that the Court plays a meaningful and welcomed role in this process so long as it does not ignore the best

[54] Akhil Reed Amar, *The Bill of Rights* (New Haven: Yale University Press, 1998), p. 26.

light of reason in considering all relevant facts of a case and does not simply impose majority rule. Ironically, Bork's argument from the separation of powers can be turned against itself when we become and remain ever mindful of the fact that "Clause by clause, amendment by amendment, the Bill of Rights was refined and strengthened in the crucible of the 1860s. Indeed, the very phrase *bill of rights* as a description of the first ten (or nine, or eight) amendments was forged anew in these years."[55] "... the Reconstruction generation—not their Founding fathers or grandfathers—took a crumbling and somewhat obscure edifice, placed it on new, high ground, and remade it so that it truly would stand as a temple of liberty and justice for all."[56] No thanks to the founders and the theory of constitutional originalism and intentionalism, some courageous judges have forged a new compact with "We the People" in rejecting the Slave Power and Fugitive Slave Laws.[57] No thanks to judicial faithfulness to original intent, the Constitution has been reinterpreted by a few judges who recognized that *Brown v. Board of Education*, for example, was needed to combat the majority apartheid rule in the U.S. under Jim Crow. But thanks to constitutional originalism and intentionalism some judges saw fit to interpret the very same Constitution—the same Constitution, as Bell writes, "while claiming to speak in an unequivocal voice, in fact promises freedom to whites and condemns blacks to slavery"[58]—in ways that would recognize rights to nonwhite men and women that were, according to the intent of the founders, nonexistent. For when left to the executive and legislative branches of government, failure along these and other related lines often ensued, as was plain with the passage by the U.S. Congress of, for example, the Alien and Sedition Acts, the Fugitive Slave laws, Slave Power, the Mann Act, or in more recent years, the Patriot Act.

As Amar observes, "incorporation enabled judges first to invalidate state and local laws—and then, with this doctrinal base thus built up, to begin to keep Congress in check."[59] And further, "... without incorporation, ... the Supreme Court would have had far fewer opportunities to be part of

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[55] Amar, *The Bill of Rights*, p. 284.

[56] Amar, *The Bill of Rights*, p. 288.

[57] The Fugitive Slave clause (1793) of the U.S. Constitution read as follows: "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

[58] Bell, *And We Are Not Saved*, p. 36.

[59] Amar, *The Bill of Rights*, p. 290.

the ongoing American conversation about liberty."[60] The process of incorporation in judicial interpretation of the U.S. Constitution does not require judges to separate certain rights from the text itself or the intent of its authors, but it does not require judges to ignore such considerations either. For it is the judge's task to mine from the quarry of the founder's propaedeutic text those rights that remain unstated for whatever reasons of founders' biases and short-sightedness. In so doing, Ackerman adds, the Court will fulfill its mission of deciding cases of constitutional concern for the purpose of promoting popular sovereignty.[61] Indeed, the history of the Court is one of a "recurring process of reconstruction" in which formalist (hypertextualist, positivist, originalist, and intentionalist) judges articulate and defend opinions against those of a reconstructionist bent—the one group defending what they construe to be the status quo of the original meaning of how we are to live, while the latter uncontented with such a vision and who pursue what they construe to be a higher way of life. This has created a kind of "constitutional dialogue" in which conservative judges and reformist ones seek to decide cases according to their own best lights given the content of the Constitution and wider law. Nor does it support the idea that the Court ought to decide cases wholly in terms of the intent of the framers and ratifiers of the Constitution.

Perhaps an even deeper challenge to the philosophy of original intent is that the U.S. Constitution, when its original intent is revealed, demonstrates an obvious "intent" of the founders to subordinate various peoples by race and class. Ackerman accuses constitutional originalists and intentionalists of wrongly assuming that the founders have provided the last word on constitutional understanding and revision in that there was the gross moral failure of the founders' not supposing that the support of black slaves or American Indian men and women (or even white women) was essential to democratic reform. The Doctrine of Discovery and its imbedded doctrines of European superiority over those of "other races" was an intricate part of the background assumptions of the Constitution, so much so that it seems that a natural manner by which to understand how the same people who chartered the words of the Constitution could at the same time deny equal rights to folk of the other races was to realize that it was the Doctrine of Discovery and its imbedded doctrines that are assumed to be working in their minds and lives all the

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[60] Amar, *The Bill of Rights*, p. 291. In fact, it was the "Nine Old Men" whose opinions and decisions provided judicial resistance that contributed to the democratic outcome of New Deal legislation, as argued in Ackerman, *We the People*, 312f.

[61] Ackerman, *We the People*, p. 344.

while.[62] Moreover, as William O. Douglas observes regarding the Constitutional Convention: "The use of the word 'slaves' was sedulously avoided. It does not appear in the *Constitution*, for, as Luther Martin commented, its use might be 'odious to the ears of Americans'."[63] This politics of exclusion points to a fundamental failure on the part of the founders as icons of what judges ought to think about the Constitution's intended meaning.[64] As Charles R. Lawrence III points out, "Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role."[65] It is a fact that some of the founders were owners of slaves, most of whom were Africans, and it is another fact that most, if not all, of the founders were wealthy landowners whose wealth was obtained by the theft of indigenous lands and murders of their inhabitants. It is a fact that not one representative of the founders came from one of these oppressed groups. As Amar observes, "Congress's small size and elite status gave rise to special concern about whether representatives would have adequate knowledge of their constituent's wants and needs."[66] Furthermore, as Ackerman argues, "surely the prejudicial opinions of white men, many of them slaveholders, cannot be allowed to serve as the fixed points of our community's search for a more perfect Union?"[67] The point here is that it is far from obvious that what we have in the founders is a group that truly represents "We the People" or legal and democratic legitimacy in any interesting sense sufficient to ground a social contract and an obligation to obey the law.[68]

In point of fact, the U.S. Constitution and the founders must be demythologized, toppled from their fragile pedestals and understood for what they really were. The founders represented a group of wealthy and largely racist and sexist slave-owning, land-thieving elite who sought to protect their own interests even at the cost of war. Whatever the Constitution could protect of "We the People" would also serve the founders' interests by creating and maintaining social stability. But is this sufficient to make the U.S. legal sys-

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[62] Ackerman, *We the People*, p. 88.

[63] Douglas, *An Almanac of Liberty*, p. 79.

[64] Ackerman, *We the People*, p. 88.

[65] Charles R. Lawrence III, "The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism," in Robert L. Hayman, Jr., Nancy Levit and Richard Delgado, Editors, *Jurisprudence Classical and Contemporary*, 2nd Edition (St. Paul: West Group, 2002), p. 627.

[66] Amar, *The Bill of Rights*, p. 31.

[67] Ackerman, *We the People*, p. 32.

[68] For a discussion of the problem of legal obligation, see Corlett, *Terrorism: A Philosophical Analysis*, Chapter 1.

tem a genuinely legitimate one? Is it enough to create a morally and legally just state? In light of these considerations, powerful, non-question-begging, and independent arguments must be adduced in order to make the desire to place the Constitution and its original and intended meaning in such a high place within the U.S. legal system. For given that the aims and motives of the founders were perversely unethical from the start, it cannot be maintained with credulity that the intentional contents of that document truly represent the interests of the people whose interests it claims to represent. If it is true that "It is a question of degree whether any body of rules deserves the name of law,"[69] then the degree of democratic legitimacy that accompanies the Constitution is dubious as law that requires assent of the masses, especially the masses of American Indians and blacks who the laws were created, quite honestly, to oppress through genocide, slavery, and Jim Crow. It goes without saying that to the extent that this line of thought is plausible, the viability of constitutional originalism and intentionalism are undermined insofar as they assume the moral legitimacy of the Constitution and the state founded on it.

Earlier in this chapter, it was noted that a plausible theory of legal interpretation is one that explains well how judges ought to decide cases. And to this point of the discussion, the focus has been on this normative question. But it is also the case that a plausible theory of law must remain cognizant of the ways in which judges in fact decide cases. And it is to this descriptive question that I now turn. For surely it is a desideratum of a plausible theory of the nature of law that it reflect well the ways in which judges in fact decide cases, as we would not want a theory that is too far removed from the reality of the bench, as it were. And it is here where Ackerman provides further insight:

> As we already saw, the Republican Court's opinions in the *Legal Tender* and *Slaughterhouse Cases* discharged analogous constitutional functions toward the end of Reconstruction; and even before the Civil War, the opinions of the Taney Court had served to codify the constitutional meaning of Jacksonian Democracy.
>
> Looking beyond the confines of constitutional law, there are countless other cases in which judicial opinions substitute for formal legislative texts. Consider the problem that arises when judges are obliged to coordinate statutory commands and the common law tradition. In this familiar situation, common law courts regularly appeal to common law cases whenever they find a hole in a statutory scheme. Indeed, this use of judicial precedents in the absence of statutes is the single most important feature distinguishing Anglo-American legal systems from those dominant in Europe.[70]

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[69] G. W. Paton, *A Text-Book of Jurisprudence*, 2nd Edition (Oxford: The Clarendon Press, 1951), p. 63.

[70] Ackerman, *We the People*, p. 270.

Given Ackerman's assessment, it would be incredible to think that judges decide cases in the way that Bork argues they should. Bork seems to be in the unenviable position, then, of having to discount as unconstitutional or unlawful those rulings to which Ackerman refers.

Perhaps another way to put this last criticism of the doctrine of original intent is to charge it with a kind of foundationalism with respect to existing laws. When such laws are challenged as being all there is for a judge to know in order to decide a case well, the answer seems to be a positivistic one: the laws are properly enacted by a duly elected legislature according to the rules of its legal system, and hence are legally binding rules. But even assuming that such rules contained all of the information needed on which judges are to base their decisions, it does not follow that the rules are themselves self-evidently justified—especially in the case of the U.S. Constitution and in light of the moral problems of its origin and development. Legal foundationalism suffers from the difficulty of not being able to provide an unproblematic and non-question-begging grounding for the law. This poses a challenge for any plausible conception of law. In the next chapter, the basics of an antifoundationalist conception of law are articulated and defended, one which hopes to gain a sufficient degree of plausibility in legal contexts where judges function.

Bork's version of the doctrine of original intent faces several obstacles. First, it is always a formidable task to discern such intentions with reasonable accuracy. But when such an enterprise is undertaken, given the nature of the intentions of the original framers and ratifiers, it is hardly a worthy goal to require judges to interpret the informational content of the U.S. Constitution according to them. Such persons were racists, classists, and sexists in ways that their individual lives bore out with untold clarity. Original intent—even in its more moderate incarnations—presupposes that the Constitution is a living document, but not one that is meant to be revised in ways that might undermine the basic values of the framers and ratifiers. Yet if this conservative position is taken seriously, there seems to be no way to address various and sundry contemporary problems that face U.S. society (e.g., abortion, euthanasia, same-sex marriages, etc.) as they are not addressed by the Constitution. To assert, as Bork does, that the legislature and not the Court is to address such concerns does not address at least two matters. The first is that the Court is meant to serve as one of three checks and balances within the federal government of the U.S. The doctrine of original intent seeks to deprive the Court of its rightful place in balancing what is often legislative and executive branches that have gone awry.

Second, original intent presupposes without argument that the only legitimate way to construe the Constitution is according to what intentions are

found in the framers and ratifiers, once again prohibiting the Court of exercising its rightful role as a corrector of legislative, executive, and societal decisions that have deleterious effects. In short, the doctrine of original intent attempts to deprive the judicial branch of government its rightful place in its proper exercise of judicial review. Among other things, judicial review serves the interests of democracy by challenging the rule of a tyrannical majority, as in cases of slavery, the upholding of certain treaties with American Indians that most U.S. citizens and their representative officials wanted to violate, and Jim Crow legislation at the state levels, each instance of which was supported by morally bad majoritarian rule. For these reasons, then, original intent must be rejected in favor of a less conservative perspective that would not seek to hinder the Court from exercising its rightful place in the federal balances of power that, when functioning reasonably well, will assist in the building of a country possessing a legitimacy that would in turn demand obedience to its laws.

In arguing for the Court's discretion as a check on the balance of executive and legislative powers in a constitutional democracy, I do not argue that the judicial branch ought to be beyond "check" itself. Indeed, to the extent that the Court goes awry in its decisions or in the exercise of its authority,[71] the legislature ought to consider enacting laws that would disambiguate and correct poor judicial reasoning about and interpretation of the law. It is, however, beyond the purview of this book to provide a political theory that would adequately address the balance of powers in a reasonably just society.

If there is one lesson to be gleaned from a study of constitutional originalism and intentionalism, it is that judges ought not to decide cases according to their own whims or on the basis of social biases. As examples, there is the enforcement of the Sedition Act of 1798 where judges often sent to prison those who spoke out in criticism of the government. And in numerous cases, newspaper publishers were imprisoned for criticizing the judges who made such decisions. Then there was *Plessy v. Ferguson*, which supported Jim Crow. However, while these and some other examples illustrate that judges ought not to decide cases out of personal or political bias, they do little to support either originalism or intentionalism. Did original intent help in such cases? If so, that would be an argument against original intent as a necessary condition of constitutional interpretation by judges in that the decisions in such cases were morally abhorrent. If it did not play a role in deciding such cases, then perhaps we ought to ask precisely how original intent could have averted such disasters in U.S. legal history. But if what is

[71] Vincent Bugliosi, *The Betrayal of America* (New York: Thunder's Mouth Press, 2001); Alan M. Dershowitz, *Supreme Injustice* (Oxford: Oxford University Press, 2001).

desired is a comprehensive statement of modern law, we must move beyond the founders' (albeit morally dubious) intent and consider construction as a basic precedent in the evolution of law into its higher form.[72] And it is there where a judge often faces a dilemma between duty and conscience.[73]

It is noteworthy that as far back as the end of the 18th century the notion of judges simply declaring the law was denounced.[74] This criticism of the then status quo in jurisprudence began to give way to a more complicated and nuanced understanding of how judges should and do decide cases. And it is to that perspective I now turn.

[72] Ackerman, *We the People*, p. 17.

[73] Feinberg, *Problems at the Roots of Law*, Chapter 1.

[74] Dennis Lloyd, *The Idea of Law* (Harmondsworth: Penguin Books, 1976), p. 260.

Chapter 2
Constitutional Constructionism

In the field of constitutional law, judges do not feel bound by rulings of their predecessors. . . . And so it is that decisions on the construction of the Constitution *have been constantly re-examined. . . . In general, each generation has taken unto itself the construction of the* Constitution *that best fits its needs—William O. Douglas.*[1]

The previous chapter assessed Robert Bork's version of the doctrine of original intent. In contradistinction to constitutional originalism and intentionalism lies constitutional constructionism. According to this theory, judges are to decide cases involving the Constitution by way of the content of the body of law itself, in conjunction with policies and extra-legal considerations.[2] As Felix Frankfurter writes, "Every [legal] decision is a function of some juristic philosophy."[3] And judges are at least in some cases to engage in interpretation of the law as a creative or discovery process, and that the understanding of the meaning of the law may even change as a result of this process.[4] However, this approach admits that "Not everything that courts do is consistent with the ideal of interpretation. Not everything that elaborates constitutional

[1] William O. Douglas, *An Almanac of Liberty* (New York: Doubleday and Company, Inc., 1954), p. 48.

[2] I shall not consider an alternative construal of constitutional constructionism according to which the primary task of the judge is to interpret law in such a way as to reconstruct laws in light of their original intent. This understanding of (strict) constitutional constructionism is found in Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," in Amy Gutmann, Editor, *A Matter of Interpretation* (Princeton: Princeton University Press, 1997), p. 23.

[3] Harold J. Berman, William R. Greiner and Samir N. Saliba, *The Nature and Functions of Law*, 6th Edition (New York: Foundation Press, 2004), p. 35.

[4] Charles H. Lawrence, III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism," in Hayman, et al., *Jurisprudence Classical and Contemporary* (St. Paul: West Group, 2002), p. 628.

J.A. Corlett, *Race, Rights, and Justice*, Law and Philosophy Library 88, DOI 10.1007/978-1-4020-9652-5_3,
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meaning is interpretation."[5] For the understanding of the Constitution is also worked out in politics quite external to the courtroom, but that influence it nonetheless. In fact, it would be naïve to assume anything less regarding the politicization of the law. As Keith Whittington reminds us:

> Constructions constantly add a denser web of values, institutions, procedures, and rights to the general framework established by the constitutional text and made clear by interpretation. Constitutional understandings are shaped through the interplay of the nation's multiple political institutions and the ambiguities of the fundamental text.[6]
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> Although some efforts at construing constitutional meaning can be readily explained through reference to the jurisprudential model of constitutional interpretation, significant aspects of our historical development are not driven primarily by their fidelity to known textual meaning and are not bound by the strictures of a jurisprudential approach.[7]

Nonetheless, with this caution in mind, I shall focus attention on judicial interpretation of constitutional law. This general approach to legal interpretation has been part of legal debates in the U.S. and Europe for generations. For instance, there is the "jurisprudence of interests" school of thought, which predates by decades Ronald Dworkin's writings on the topic:

> The Jurisprudence of Interests proceeds from two insights. The first is that under the Constitution the judge is bound to abide by the law. The judge has to adjust interests, to decide conflicts of interests in the same way as the legislator. The dispute of the parties brings him face to face with a conflict of interests. But the evaluation of interests which the legislator has achieved has precedence over the individual evaluation by the judge, and is binding on the judge. The second truth is that our laws are inadequate, incomplete, and sometimes contradictory when confronted with the wealth and variety of actual problems which keep arising in daily life. A modern legislator is conscious of this inadequacy, and therefore expects the judge, not to obey the law literally, but to follow it in accordance with the interests involved; not merely to subsume facts under legal commands, but also to frame new ones where the law is silent, and to correct deficient rules. In other words, the judge must not only apply a particular command, but he must also protect the totality of interests which the legislator has deemed worthy of protection.
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> . . . Whenever the facts of a particular case were not foreseen by the statute, the judge must first envisage the conflict of interests which underlies the dispute. Then he must examine whether or not the same conflict of interests underlies other factual situations which have been expressly regulated by legislation. If the answer is in the affirmative, he must transfer the value decision contained in the

[5] Keith Whittington, *Constitutional Construction* (Cambridge: Harvard University Press, 1999), p. 2.

[6] Whittington, *Constitutional Construction*, p. 208.

[7] Whittington, *Constitutional Construction*, p. 207.

> statute to the facts of his case, that is to say, he must decide identical conflicts of interests in the same way ... But he may sometimes find himself in a position where he has to decide a conflict of interests according to his own evaluation. This happens, first, in those frequent cases where the statute refers the judge to his own judgment, either by express delegation (judicial discretion), or by the use of indeterminable words which demand an appraisal of values, such as the phrase "important ground," or "sufficient basis." Finally, such an appraisal of interests on the part of the judge is required in all cases where it is demanded by the guiding ideas pervading the legal system as a whole, but where statutory evaluations are contradictory or entirely lacking. In such cases the judge must render that decision which he would propose if he were the legislator.
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> If we attempt to characterize judicial decision of cases according to the principles outlined, we cannot describe it as a mere cognitive function. The judge has not merely to apply ready-made rules of law, but in addition he has to frame rules himself. To create law is one of his functions. To be sure, the rules established by him do not have the force of legislative rules. They are not binding on other judges. ... He is bound by those evaluations of interests which are laid down by legislation; it is only in a subsidiary capacity that his individual evaluation may intervene.[8]

Dworkin has become the champion of this approach within the analytical philosophical community. Although Dworkin is the philosopher most credited with this kind of position, constitutional constructivism hardly lacks adherents in legal studies. Bruce Ackerman notes that "It is one thing to say that rules have not been all-important; another thing to say they are unimportant. Taken by themselves, rules are lifeless things. ... Once placed within a setting of principles, institutions, and precedents, they can play a useful supporting role."[9] And all of this seems remarkably consistent with the claims of Cass Sunstein that "in constitutional law, judges tend to use abstractions only to the extent necessary to resolve a controversy," and on a case-by-case ("minimalist") basis.[10] Sunstein writes

> that courts should not decide issues unnecessary to the resolution of a case; that courts should refuse to hear cases that are not "ripe" for decision; that courts should avoid deciding constitutional questions; that courts should respect their own precedents; that courts should not issue advisory opinions; that courts should follow prior holdings but not necessarily prior dicta; that courts should exercise the "passive virtues" associated with maintaining silence on great issues of the day.[11]

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[8] Magdalena Schoch, Editor and Translator, *The Jurisprudence of Interests* (Cambridge: Harvard University Press, 1948), pp. 40–42.

[9] Bruce Ackerman, *We the People* (Cambridge: Harvard University Press, 1998), p. 416.

[10] Cass Sunstein, *One Case at a Time* (Cambridge: Harvard University Press, 1999), p. xi.

[11] Sunstein, *One Case at a Time*, pp. 4–5. I construe Cass Sunstein's minimalist theory of judicial discretion as a version of constitutional constructionism both in that he explicitly

Moreover, as I shall make evident, Benjamin N. Cardozo articulates a version of constructivism that predates significant aspects of Dworkin's basic position, so it is helpful for the sake of theoretical perspective to delve into Cardozo's theory prior to assessing Dworkin's.

Benjamin Cardozo on the Nature of Law

First, it is noteworthy that Cardozo himself cites some European jurists who have held some of the views he espouses, ones that—along with Cardozo himself—I contend are predecessors of Dworkin's theory of law as integrity.[12] Writing in 1921, Cardozo states that "Not a judge on the bench but has had a hand in the making" of the "brew" of law.[13] There are, of course, easy cases in which statutes or the U.S. Constitution are applied straightforwardly. However, Cardozo writes: "codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared."[14] Continuing to elaborate his version of constitutional constructionism, he writes of judicial interpretation of the law:

> Interpretation is often spoken of as if it were nothing but the search and discovery of a meaning which, however obscure and latent, had nonetheless a real and ascertainable pre-existence in the legislator's mind. The process is, indeed, that at times, but it is often something more.[15]

Quoting John Chipman Gray, Cardozo continues:

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rejects originalism (6f. In fact, Sunstein goes so far as to argue that maximalist originalist judges do not promote democracy, properly understood: pp. 261–262) and because his theory about how judges ought to decide cases seems to not run logically counter to the basics of constructionism in light of his concession that "Minimalism is not always the best way to proceed" (p. 263). Rather, they can be construed as advice for constructionist judges of a minimalist bent. In making this claim, however, I do not necessarily endorse Sunstein's minimalist position, as I shall concur, below, with those who argue that the governmental checks and balances require U.S. Supreme Court Justices to sometimes "correct" what it seems is a flaw in executive and/or congressional reasoning. This means that I would favor what Sunstein would refer to as a "maximalist" Court when necessary and on occasion.

[12] Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), pp. 16f.

[13] Cardozo, *The Nature of the Judicial Process*, p. 11.

[14] Cardozo, *The Nature of the Judicial Process*, p. 14.

[15] Cardozo, *The Nature of the Judicial Process*, p. 15.

> "The fact is," says Gray in his lectures on the "Nature and Sources of the Law," "that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present."[16]

Contrary to constitutional originalism and intentionalism, Cardozo states that "... we reach the land of mystery when constitution and statute are silent, and the judge must look to the common law for the rule that fits the case. He is the 'living oracle of the law' in Blackstone's vivid phrase."[17] Foreshadowing Dworkin's Hercules, Cardozo writes of the judge: "The first thing he does is to compare the case before him with the precedents, whether stored in his mind or hidden in the books."[18] And, not unlike Dworkin's Hercules, "it is when ... there is no decisive precedent, that the serious business of the judge begins. He must then fashion law. ... "[19] Rules have their limits of applicability, of course. For "hardly a rule of today but may be matched by its opposite of yesterday."[20]

More specifically, Cardozo writes of the judge's role in "fashioning law,"

> In this perpetual flux, the problem which confronts the judge is in reality a twofold one: he must first extract from the precedents the underlying principle, the *ratio decidendi*; he must then determine the path or direction along which the principle is to move and develop. ... [21]

However, judicial adherence to precedent must be the rule rather than the exception if social and legal stability is to be maintained, argues Cardozo.[22] In fact, Cardozo is careful to explain the limits of judicial fashioning of the law. As Dworkin argues that judges must not strike out on their own in interpreting the Constitution, Cardozo writes that "We must not throw to the winds the advantages of consistency and uniformity to do justice in the instance."[23] Indeed, Cardozo states that there is a principle of fit to which judges must adhere: " ... the final principle of selection for judges, ... is one of fitness to an end."[24] Moreover, judges must heed the mores of their

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[16] Cardozo, *The Nature of the Judicial Process*, p. 15.
[17] Cardozo, *The Nature of the Judicial Process*, pp. 18–19.
[18] Cardozo, *The Nature of the Judicial Process*, p. 19.
[19] Cardozo, *The Nature of the Judicial Process*, p. 21.
[20] Cardozo, *The Nature of the Judicial Process*, p. 26.
[21] Cardozo, *The Nature of the Judicial Process*, p. 28.
[22] Cardozo, *The Nature of the Judicial Process*, p. 34.
[23] Cardozo, *The Nature of the Judicial Process*, p. 103.
[24] Cardozo, *The Nature of the Judicial Process*, p. 103.

times.[25] As we shall see, this dimension of fit (though not an explicitly goal-oriented one) finds its later expression in Dworkin's theory as well.

Contrary to a Borkian account of judicial decision-making, Cardozo argues that it is not simply that judges can interpret and fashion law in congruence, when possible, with precedents and principles, etc., but that it must be done consciously by the judiciary so as to be done responsibly as part and parcel of what judges willingly do *qua* judges:

> We do not pick our rules of law full-blossomed from the trees. Every judge consulting his own experience must be conscious of times when a free exercise of will, directed of set purpose to the furtherance of the common good, determined the form and tendency of a rule which at that moment took its origin in one creative act. . . . Law is, indeed, an historical growth, for it is an expression of customary morality which develops silently and unconsciously from one age to another. . . . But law is also a conscious or purposed growth, for the expression of customary morality will be false unless the mind of the judge is directed to the attainment of the moral end and its embodiment in legal forms. Nothing less than conscious effort will be adequate if the end in view is to prevail. The standards or patterns of utility and morals will be found by the judge in the life of the community. They will be found in the same way by the legislator.[26]

By his last statement here, Cardozo does not intend a kind of relativism, legal or moral. For "a jurisprudence that is not constantly brought into relation to objective or external standards incurs the risk of degenerating into . . . a jurisprudence of mere sentiment or feeling."[27]

While Bork's account of the nature of the judicial process sees the law as being fixed from the judge's perspective (see the previous chapter), Cardozo thinks differently: "My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law."[28] The uniformity that results from the judge's use of precedents ought not to lead to wrongful decisions that harm others. Stability and uniformity must sometimes be "balanced against the social interests served by equity and fairness or other elements of social welfare. These may enjoin upon the judge the duty of . . . staking the path along new courses, of marking a new point of departure from which others who come after him will set out upon their journey."[29] Indeed, Cardozo seems to foreshadow Dworkin's notion of the "dimension of fit," mentioned below.

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[25] Cardozo, *The Nature of the Judicial Process*, p. 104.

[26] Cardozo, *The Nature of the Judicial Process*, pp. 104–105.

[27] Cardozo, *The Nature of the Judicial Process*, p. 106.

[28] Cardozo, *The Nature of the Judicial Process*, p. 112.

[29] Cardozo, *The Nature of the Judicial Process*, p. 113.

Cardozo also notes that judges are to fill the gaps in the law. In this sense, the judge is a law-maker: "He fills the open spaces in the law. How far he may go without traveling beyond the walls of the interstices cannot be staked out for him on a chart."[30] When Cardozo describes the judge's role, it is as if he were describing Dworkin's Hercules:

> He must learn it for himself as he gains the sense of fitness and proportion that comes from years of habitude in the practice of an art. Even within the gaps, restrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer, hedge and circumscribe his action. They are established by the traditions of the centuries, by the example of other judges, his predecessors and his colleagues, by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law.[31]

Furthermore, the judge is a creative law-maker in such circumstances, just like Dworkin's Hercules being a judge as legislator: " . . . within the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made."[32] And Cardozo reminds us that this is not some ethereal philosophy of law that is unworkable in courts: "There is in truth nothing revolutionary or even novel in this view of the judicial function. It is the way that courts have gone about their business for centuries in the development of the common law."[33] Thus Cardozo's description of the judge's duty as interpreter of law is both normative and descriptive, consonant with what is necessary for a plausible theory of law as noted earlier in this chapter.

Recall that for Bork, where the law is silent, so must judges be silent in deciding cases. For Cardozo, however, where the law is silent, judges *cannot* be. In fact, judges in such instances have a duty to *not* remain silent. They have a "duty to make law when none exists."[34] Cardozo sides, then, not with the likes of Coke, Hale, and Blackstone, but neither does he agree with Austin who argued that "even statutes are not law because the courts must fix their meaning."[35] This implies, of course, that the law is what judges say it is. Citing Jethro Brown who stated that statutory law is at most "ostensible" law, Cardozo disagrees with the claim that not even present decisions are law except for the parties litigant: "Law never *is*, but is always about to be. It is realized only when embodied in a judgment, and in being realized,

[30] Cardozo, *The Nature of the Judicial Process*, pp. 113–114.
[31] Cardozo, *The Nature of the Judicial Process*, p. 114.
[32] Cardozo, *The Nature of the Judicial Process*, p. 115.
[33] Cardozo, *The Nature of the Judicial Process*, p. 116.
[34] Cardozo, *The Nature of the Judicial Process*, p. 124.
[35] Cardozo, *The Nature of the Judicial Process*, pp. 124–125.

expires. There are no such things as rules or principles: they are only isolated dooms."[36] So Cardozo's position is a moderate one between these extremist positions, arguing that "Analysis is useless if it destroys what it is intended to explain. . . . We must seek a conception of law which realism can accept as true."[37] It is in point of fact consistent with Learned Hand's general position of judicial discretion: "On the one hand he must not enforce whatever he thinks best. . . . On the other, he must try as best he can to put into concrete form what that will is, not by slavishly following the words, but by trying honestly to say what was the underlying purpose expressed."[38] Constitutional constructionism, then, is a moderate position between the extremes of original intent, on the one hand, and the equally extreme theories of law of Coke, Hale, Blackstone, and Austin, on the other.

Cardozo has an interesting conception of the basis of the judge's discretion in hard cases where gaps need to be filled. It is not that the judge has a right to do so, but that she has the *power* to. What grounds her power is, as already mentioned, her *duty* as a judge to legislate where the law is silent.[39] He writes: " . . . the judge is under a duty, within the limits of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience."[40] And further:

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. . . . He is to draw his inspiration from consecrated principles. . . . He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.[41]

Moreover, this judicial duty is a matter of degree, according to Cardozo.[42] It is not that judges always conduct themselves in this way *qua* judges. Each case that presents itself is in some way and to some degree such that it obliges judges to construct law in order to fill in the gaps of the law.

But where does natural law or morality fit into Cardozo's picture of the judge? When custom and precedent fail, judges must be used.[43] Nonetheless, adherence to precedent, again, must be the rule and not the exception lest

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[36] Cardozo, *The Nature of the Judicial Process*, p. 126.

[37] Cardozo, *The Nature of the Judicial Process*, p. 127.

[38] Learned Hand, *The Spirit of Liberty*,(New York: Alfred A, Knopf, 1952), p. 109.

[39] Cardozo, *The Nature of the Judicial Process*, p. 129.

[40] Cardozo, *The Nature of the Judicial Process*, pp. 133–134.

[41] Cardozo, *The Nature of the Judicial Process*, p. 141.

[42] Cardozo, *The Nature of the Judicial Process*, pp. 161–162.

[43] Cardozo, *The Nature of the Judicial Process*, p. 142.

the law become unstable. But the notion of a precedent is more complex than most seem to recognize, he argues. "We have to distinguish between the precedents which are merely static, and those which are dynamic."[44] Far more precedents are static than are dynamic, Cardozo admits. Most cases are easy ones. But in hard cases, legal development or fashioning is required of judges. This is when the judge becomes, if even for the case at hand, a "law-giver."[45] It is in such cases where the judge creates law rather than discovers it.[46] Implied in Cardozo's conception of the judicial process is the claim that "the legal system is not and never can be a fully grown and finally developed organ."[47] Or, as Cardozo himself states: "The Law, like the traveler, must be ready for the morrow. It must have a principle of growth."[48]

Former U.S. president Theodore Roosevelt also recognized the interpretive role and power of the judiciary when he insisted:

> The chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy. . . . [49]

We have, then, in Cardozo's theory of jurisprudence, a "precedent" for what stands in mainstream analytic philosophy of law as a "third theory of law" between legal positivisms and natural law theories. One gets the sense that Cardozo has stolen much of Dworkin's thunder roughly half a century prior to Dworkin's description of Hercules. Although we shall recognize in Dworkin's theory of law what has already been plainly articulated in Cardozo's,[50] it is nonetheless important to examine Dworkin's theory for plausibility.

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[44] Cardozo, *The Nature of the Judicial Process*, pp. 163–164.

[45] Cardozo, *The Nature of the Judicial Process*, p. 166.

[46] Cardozo, *The Nature of the Judicial Process*, p. 166.

[47] Dennis Lloyd, *The Idea of Law* (New York: Penguin Books, 1976), p. 299.

[48] Quoted in Lloyd, *The Idea of Law*, p. 326.

[49] Cardozo, *The Nature of the Judicial Process*, p. 171.

[50] It is rather curious that in Ronald Dworkin's magnum opus for his theory of legal interpretation, he cites Benjamin Cardozo only once [Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), p. 10], only to grossly oversimplify Cardozo's position as it is articulated in *The Nature of the Judicial Process*. But as the reader can see for herself from the above more in-depth account, Cardozo's picture of judicial discretion is one that in several significant ways, if not completely, foreshadows Dworkin's.

Ronald Dworkin's Cardozian Theory of Law

Dworkin's theory of the nature of law has received a great deal of attention in recent decades.[51] Indeed, Dworkin himself has spent great effort in replying to certain of his critics, and so I will not focus on those particular discussions of his theory.[52] The purpose of this section is to do the following: (1) provide a concise description of Dworkin's early formulation of his theory of legal interpretation; (2) note some leading criticisms of it; (3) defend his theory against such criticisms (drawing heavily, though not exclusively, from *Law's Empire*[53]); (4) set forth an internal critique of Dworkin's theory; and (5) outline part of the groundwork of a theory of legal interpretation, which is congruent with what is most fundamental to Dworkin's Cardozian view. In so doing, I assume a legitimate connection between constitutional and legal theory, one which rests at least on their common interest in legal interpretation, and, more precisely, the nature and determinacy of law.[54]

In "A Model of Rules,"[55] Dworkin makes a distinction between principles, policies, and rules. A principle is a standard observed simply because it is a requirement of justice, fairness, or another dimension of morality. An example of a principle is "no one may profit by one's own wrongdoing." A policy is a standard that sets out a goal to be reached. An example of a policy is that auto accidents are to be decreased. A rule, however, is different from a principle. An example of a rule is "a will is invalid unless signed by three witnesses." Rules are applicable in an all-or-nothing way. If the facts a valid rule stipulates are present, then what the rule says must be respected. A principle, however, states a reason for something but does not necessitate a

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[51] Marshall Cohen, Editor, *Ronald Dworkin and Contemporary Jurisprudence* (Totowa: Rowman and Allanheld, 1983). Also see *The Journal of Ethics*, 5 (2001), pp. 197–268, devoted to Ronald Dworkin's contributions to philosophy of law; J. W. Harris, *Law and Legal Science* (Oxford: Clarendon Press, 1979), Chapter 22.

[52] See, for instance, Dworkin's replies to Stanley Fish, "Working on the Chain Gang," *Texas Law Review*, 60 (1982), pp. 551–567; "Wrong Again," *Texas Law Review*, 62 (1983), pp. 299–316, in Ronald Dworkin, "My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Anymore," in W. J. T. Mitchell, Editor, *The Politics of Interpretation* (Chicago: University of Chicago Press, 1983); *A Matter of Principle* (Cambridge: Harvard University Press, 1985), Chapter 7. Also see Cohen, Editor, *Ronald Dworkin and Contemporary Jurisprudence*, Part 5.

[53] Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986).

[54] David O. Brink, "Legal Theory, Legal Interpretation, and Judicial Review," *Philosophy and Public Affairs*, 17 (1988), pp. 105–148.

[55] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), Chapters 2 and 3.

particular decision. It inclines without necessitating. Principles, but not rules, have weight. Principles can conflict and be assigned weights, but when rules conflict only one of them can be valid. This is, of course, a modest point in light of Roscoe Pound's claim that "Modern juristic analysis shows law operating through four distinct categories—principles, standards, concepts, and rules," where principles are the broad reasons that ground a rule of law and provide for the law's life, growth, and development, and where concepts are categories of classification rigidly determined by the law, and where standards depend on ideas of what is reasonable for their application, and where rules are stated precisely and are applicable in absolute terms, assuming that they are unambiguous.[56]

Distinguishing between his own and H. L. A. Hart's[57] approach to the role of principles in judicial decision-making, Dworkin argues that legal principles are binding as law and must be taken into account by judges who make decisions imposing legal obligation. The law includes principles as well as rules. As Ackerman argues, "there is more to law than rules."[58] And as Dworkin elaborates: "Legal history and political morality both count in deciding what the law is."[59] Judges are wrong to not apply principles when they are relevant to a case. Hart, on the other hand, argues that principles are not binding as rules are. They are extra-legal considerations that judges are free to follow in hard cases, if they wish. Dworkin objects that Hart's theory of judicial discretion allows judges to appeal to ordinary policies and to make retroactive laws. Dworkin also argues that Hart's model of rules is inadequate and misleading; that the rule of recognition is not the only law that is binding because it is accepted (some principles are binding as well); judges have discretion only in a trivial sense on Hart's view.

Dworkin argues that *Riggs v. Palmer* shows that principles play an essential part in arguments supporting judgments about legal rights and obligations.[60] For a rule does not exist before the case is decided, the court cites principles to justify adopting or applying a new rule. In *Riggs v. Palmer*, the court decided the case by appealing to the principle that no one may profit

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[56] Roscoe Pound, *Philosophy of Law* (New Haven: Yale University Press, 1959), pp. 115–143.

[57] H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961).

[58] Ackerman, *We the People*, p. 30.

[59] Ronald Dworkin, "Replies to Endicott, Kamm, and Altman," *The Journal of Ethics*, 5 (2001), p. 263.

[60] Of course, Roscoe Pound notes that there are in every legal system not only concepts and a method of how they are to be applied but extra-legal ideals giving direction to the development of law (Roscoe Pound, *Philosophy of Law*).

from one's own wrongdoing as a principle against which to read the statute of wills.[61] Such an approach is often necessary because the rules relevant to a case are often vague or ambiguous. Rules require interpretation. Thus judges need to appeal to principles in interpreting rules. As noted in the previous section, this point is also made long ago by Cardozo, among others.[62] As one scholar puts it, "The Constitution—as illuminated by history and philosophy—provides a vision, but not all the details about how that vision should be achieved or approximated."[63] For Dworkin, principles originate from the sense of appropriateness developed in the legal profession and the public over time.

But "whether in the application of a settled rule, or in the creation of new law, we cannot avoid the influence of the personal factor,"[64] which leads to the issue of judicial discretion in interpreting the law. And as Pound argues: "Almost all of the problems of jurisprudence come down to a fundamental one of rule and discretion, of administration of justice by law and administration of justice by the more or less trained intuition of experienced magistrates."[65]

There are three meanings of "discretion," according to Dworkin. There are two weak senses and one strong sense of this concept. One weak sense of discretion is that rules that a judge applies are not done so mechanically, but demand the use of judgment. Another weak sense of discretion is that a judge has the final authority to decide a case. The strong sense of discretion is that on some issues a judge is not bound by standards set by an authority. This delineation of judicial discretion somewhat deepens the one articulated by G. W. Paton:

> In truth, discretion is used in two senses—sometimes it means a power to depart from rules, sometimes it means a power of choice within fixed limits set up by law. In this second sense a judge may have discretion as to the sentence he will impose, the upper and sometimes the lower limits being fixed by law. . . . In truth, we can make a clear-cut distinction between the certainty of rules and discretion

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[61] See also, Cardozo, *The Nature of the Judicial Process*, pp. 40–41.

[62] "The process of legal judgment, as it is empirically observed, involves the use of rules and principles for a clarification of what the law is and what the issue presented for judgment may be treated as" [Edwin N. Garlan, *Legal Realism and Justice* (New York: Columbia University Press, 1941), p. 39].

[63] Richard Fallon, *Implementing the Constitution* (Cambridge: Harvard University Press, 2001), p. 5.

[64] G. W. Paton, *A Text-Book of Jurisprudence*, 2nd Edition (Oxford: The Clarendon Press, 1951), p. 169.

[65] Pound, *Philosophy of Law*, p. 111.

> as to their application, only if we regard law as a set of detailed rules and ignore the elastic nature of general standards and broad principles.[66]

Dworkin then goes on to discuss Hart's theory of judicial discretion in hard cases. Hard cases are the result of a gap in the law, argues Hart. The judge must apply extra-legal social policies and his own moral convictions and create new law to fill the gap. This creates new rights and duties that the judge then assigns retroactively to the case at hand. Hart thus argues that judges have discretion in a strong sense. Dworkin objects that (a) Hart's view permits *ex post facto* legislation and the losing party will be punished or deprived of property because he violated a new duty created after the event; (b) the winning party will not have his rights vindicated and will not be given the award he had a prior right to; and (c) it is inappropriate for a judge to appeal to policy to decide a case.

Dworkin defines a hard case as one in which no settled law or rule dictates a judicial decision one way or another because either (a) legislative intent is uncertain due to vagueness or ambiguity or (b) it is a case of first impression.[67] More specifically, there are many possible sources of hard cases. Some result from vagueness of language, such as a statute that prohibits vehicles on grass but fails to specify what counts as a vehicle. Others result from divided authority, as in *Spartan Steel & Alloys Ltd. v. Martin & Co*. Still other hard cases result from first impression, where new technology (such as an "abortion pill") makes it difficult to determine cases. Others result from essentially contested concepts such as "fair" when used in statutes. How such concepts are interpreted makes a difference as to the outcome of a case. This point is made clear by Edwin N. Garlan:

> . . . while it is accepted doctrine in American constitutional law that the doctrine of police power is a controlling principle, limited only by a standard of proper exercise both with respect to ends and means which are in turn estimated by the standards of reasonableness and the "due process of law" clause, it is an equally accepted criticism of constitutional law that the police power clause is what the courts say it is, or, in other words, is basically an elastic, indeterminate instrument of decision.[68]
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> The indefinite elasticity of the conception of justice, as embodied in legal formulae, provides a convenient instrument in the judicial process both for growth and for the limitation of change.[69]

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[66] Paton, *A Text-Book of Jurisprudence*, p. 170.

[67] Dworkin, *Taking Rights Seriously*, Chapter 4.

[68] Garlan, *Legal Realism and Justice* (New York: Columbia University Press, 1941), p. 60.

[69] Garlan, *Legal Realism and Justice*, p. 70.

Still other hard cases result from the necessity of having to interpret the rules of the game in question, while others result from the ambiguity of legislative purpose.

Dworkin then provides his own theory of law and judicial discretion, using the character Hercules as his ideal judge. Hercules uses settled law as data and seeks the theory that best explains and justifies this settled body of law. He then applies this theory to hard cases. Hercules' theory of law contains the following sorts of data: (a) a corpus of valid statutes; (b) a corpus of settled precedents; (c) constitutional rights; (d) implied principles of key settled decisions; (e) incorporated community principles of justice; (f) principles of settled "heavy weight," such as *stare decisis*.

We might ask, "How does Hercules identify mistaken past decisions and how does he deal with them?" Correct decisions in hard cases are those that provide the best fit over their alternative decisions in accordance with the one political theory, which gives the best justification for the past decisions already decided. Thus Dworkin's legal coherentism entails two dimensions of justification for decisions in hard cases: the "dimension of fit" and the "dimension of political morality." Consonant with Cardozo's view, the dimension of fit states that one political theory is a better justification than another if it fits established law better. The dimension of political morality states that one political theory provides a better justification than the other, degree of fit being the same, if it best captures the rights people have as a matter of political morality. This constitutes Hercules' justification test for previous decisions. Although Hercules will sometimes have to reject some earlier decisions as mistaken, even he must limit the number of past decisions he rejects so as not to threaten the stability of the law itself.

Dworkin uses a literary analogy to explain how Hercules decides hard cases. Hercules first asks which decision best fits with other parts of settled law. Then he asks which way of reading the law makes it holistically better. All along Hercules must bear in mind that the legislator's intent is not always relevant to judicial decision-making. Instead, Dworkin argues, judges are like authors of a chain novel, where all but the first author have the dual responsibilities of interpreting and creating. The judge must read past cases and advance the enterprise of law rather than strike out in an entirely new direction. Hercules must decide cases in such a way that his decisions fit with settled law, and the decision must show the value of settled law as if it were a "seamless web." In so doing, Hercules both explains (fits) the law and justifies it.[70] With Dworkin's view, both the meaning and the evaluation of the law merge. These are the two tasks of judicial decision-making. Whereas

[70] In discussing the First Amendment's protection of free speech, Dworkin argues that:

the judge's or legislator's intent is not always relevant to judicial decision making, it might be that the judge gives the law an intention of its own, just as the author of a novel gives a novel its own intention. On Dworkin's view, the judge is both interpreter and creator of law (mostly interpreter). Unlike a novelist, however, judges must be willing to at times sacrifice some aspects of law that threaten the overall consistency and integrity of law.[71]

J. L. Mackie's Critique of Dworkin's "Third Theory of Law"

J. L. Mackie[72] notes Dworkin's puzzlement[73] in explaining why antislavery "positivist" judges such as Judge Joseph Story did not simply exercise their strong discretion on behalf of fugitive slaves. Mackie questions why Dworkin is puzzled. Was not Story simply following his judicial duty of enforcing the law of the land (which ran contrary to his own moral views)?

Dworkin argues that the matter is not so simple because the Fugitive Slave Laws were not settled, but controversial. He notes three types of principles a "third theory" judge might have invoked from the U.S. Constitution in deciding cases for the fugitive slave: the concepts of individual freedom, procedural justice, and federalism. Instead, Story and other judges decided to follow the policies of the United States Constitutional Convention, according

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> The First Amendment, like the other great clauses of the Bill of Rights, is very abstract. It cannot be applied to concrete cases except by assigning some overall *point* or *purpose* to the amendment's abstract guarantee of "freedom of speech or of the press." That is not just a matter of asking what the statesmen who drafted, debated, and adopted the First Amendment thought their clauses would accomplish. Contemporary lawyers and judges must try to find a political justification of the First Amendment that fits most past constitutional practice, including past decisions of the Supreme Court, and also provides a compelling reason *why* we should grant freedom of speech such a special and privileged place among our liberties [Ronald Dworkin, *Freedom's Law* (Cambridge: Harvard University Press, 1996), p. 199].

[71] Dworkin's view here is not inconsistent with John Rawls' claim that " . . . when legal argument seems evenly balanced on both sides, judges cannot resolve the case simply by appealing to their own political views. To do that is for judges to violate their duty" [John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), p. 168].

[72] J. L. Mackie, "The Third Theory of Law," *Philosophy and Public Affairs*, 7 (1977), pp. 3–16.

[73] Ronald Dworkin, "Review of Robert Cover, *Justice Accused*," *Times Literary Supplement*, 5 December 1975.

to Dworkin. He and Robert Cover[74] agree that Story saw himself in a subordinate role as a judge, bound to make the Fugitive Slave Laws coherent with the Constitution. Dworkin argues that this is a failure of the judge, a failure based on the fact that he adhered to a positivist view of judicial discretion. If Story had adhered to Dworkin's theory of law, then Story would have searched and found in the Constitution a principle antagonistic to slavery, which would have justified a quite different judicial response (i.e., *against* the Fugitive Slave Laws). Consistent with Dworkin's reasoning, here is the consideration that Story's opinion in *Prigg v. Pennsylvania* reflects some basic aspects of antebellum U.S. culture and values insofar as it reflects the idea that one human being can own another as property simply on the basis of race or ethnicity, and insofar as it seeks to quell discussion of the legality and justification of U.S. slavery as a dehumanizing institution.[75] As such, Story's decision exemplifies the content of the proposition that "Western history is a running commentary on the efforts of the powerful to impose a conception of reality on those they would rule."[76] More specifically,

> When Justice Story interpreted the Fugitives-From-Service-or-Labor-Clause of the Constitution in *Prigg v. Pennsylvania* as though it had entirely to do with harmonizing polities and nothing to do with the whips and shackles of slave-catchers, his interpretation did not alleviate the weight of those whips and shackles upon the black limbs he licensed them to fall on.[77]

Mackie objects that any restrictions on the Fugitive Slave Laws were overridden at the federal level. Knowing this, Story decided correctly. The only basis on which Story would have a right to decide against the Fugitive Slave Laws was if it violated due process. However, Mackie argues, the fugitive slave was not denied due process. For the slave was simply returned to the home state for a trial.

At the very least, the debate between Dworkin and Mackie on constitutional interpretation and the Fugitive Slave Laws represents an example of how Dworkin's third theory of law and legal positivism represent ways in which the legal system contains competing cultures contesting for control over conceptions of human living.[78] The question, though, is which theory of law is correct and to what extent ought judges to be free to "make" law in hard cases such as these.

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[74] Robert Cover, *Justice Accused* (New Haven: Yale University Press, 1975).

[75] Anthony Amsterdam and Jerome Bruner, *Minding the Law* (Cambridge: Harvard University Press, 2000), p. 217.

[76] Amsterdam and Bruner, *Minding the Law*, p. 225.

[77] Amsterdam and Bruner, *Minding the Law*, p. 226.

[78] Amsterdam and Bruner, *Minding the Law*, p. 231.

Andrew Altman's Critique of Dworkin's Theory of Law

Another set of objections to Dworkin's theory of judicial interpretation of the law is proffered by Andrew Altman. Altman[79] calls "intuitionism" the view according to which relative weights are directly apprehended in each case without there being any higher-order standard in virtue of which each principle has its particular weight. Dworkin holds that there is a legal fact of the matter regarding the weight of a given principle in a given case, and this weight is determined by the weight assigned that principle according to the soundest theory of law (i.e., the most defensible moral and political theory that coheres with and justifies settled law). Legal decisions are the outcomes of reasoning reconstructed according to principles that can be articulated and understood. This means a judge cannot simply appeal to her inner sense that a particular principle is weightier than some competing one. Instead, she must believe there is some higher-order principle that makes the one weightier than another, and that higher-order principle must be articulated. Dworkin also holds a theory of mistake that admits some things in settled law inevitably conflict.

Critical legal studies thinkers, according to Altman, argue that there is no discoverable higher-order principle for assigning weights to principles. This places the burden of argument on Dworkin to defend his thesis. Moreover, there are competing principles embedded in settled law (e.g., legal rules and doctrines accepted as authoritative by the community), but the respective weights of these principles are determined by ideological power struggles. So settled law is the result of such ideological conflict. Thus Dworkin's claim that there is a system of norms that governs the weighting of principles is implausible.

This leads to what Altman refers to as the critical legal studies' "patchwork theory" of law, which holds that the law is a set of irreconcilably opposed ideologies. Ideological conflicts in politics are also present in law. The law is a mirror, which faithfully reflects the fragmentation of politics. There is a sense in which the critical legal studies position politicizes legal theory.[80]

The critical legal studies thinkers deny Dworkin's claim that there is any soundest theory of law because of the internal contradictions present in the fundamental doctrines of law. The concept of the soundest theory, critical

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[79] Andrew Altman, "Legal Realism, Critical Legal Studies, and Dworkin," *Philosophy and Public Affairs*, 16 (1986), pp. 205–235.

[80] This claim is not meant to be a value judgment, but a mere description of the critical legal studies position on the nature of law.

legal studies argue, really has more than one referent. Dworkin's reply to this critical legal studies objection is twofold. First, he argues that it is rather improbable that in the complex U.S. system of law several theories of law would fit the settled law sufficiently. Second, he argues, even if there were several theories that fit well enough, that does not defeat his claim that the soundest theory would be the one from among the several which meets the condition of political morality as well.

Altman responds to Dworkin's reply by arguing that the critical legal studies objection is not that there are several soundest theories of law, but that there are none. Thus Dworkin's reply misses the critical legal studies point. The indeterminacy thesis (i.e., the thesis that in most cases the law fails to determine a specific outcome) holds precisely because there just is no soundest theory of law.

The second critical legal studies criticism of Dworkin's theory, according to Altman, is that there is a range of ideological conflict affecting legal doctrine. Even if there were a soundest theory of law, it would impose no practical constraints on judges whose preferred ideology is in conflict with the soundest theory. Thus the soundest theory would have no effect on judges who fail to share its view.

Altman cites two possible responses Dworkin might provide to rebut this objection. First, Dworkin might deny that political ideological conflicts are not altogether found in the realm of law due to the fit requirement. Second, Dworkin might deny that the legitimacy of political adjudication in hard cases hinges on whether or not ideological conflict in law ranges as wide as in politics. Both of these tries fail on Altman's view. Thus there stand problems facing Dworkin's theory of law.

In Defense of Dworkin's Theory of Law

As we have seen, Mackie poses a threefold objection, which charges Dworkin with "playing fast and loose with the law," while Altman discusses two critical legal studies criticisms of Dworkin's theory. I shall now defend Dworkin's theory against each of these sets of objections. My principle aim in defending Dworkin's theory is not to provide a set of conclusive arguments for his position. Rather, it is to either defeat or neutralize Mackie's and Altman's respective objections to it so as to render Dworkin's view, or one like it, plausible.

As mentioned, Dworkin argues that legal principles are binding as law and must be taken into account by the judges who make decisions imposing legal obligation. The law includes principles as well as rules. Judges are wrong not to apply principles when they are relevant to a case. Correct decisions in

hard cases are those that provide the best fit over their alternative decisions in accordance with the one political theory that gives the best justification for the past decisions already decided. Thus Dworkin's legal coherentism entails two dimensions of justification for decisions in hard cases: the dimension of fit and the dimension of political morality. The dimension of fit states that one political theory is a better justification than another if it fits established law better. The dimension of political morality states that one political theory provides a better justification than competing theories, degree of fit being the same, if it best captures the rights people have as a matter of political morality. This constitutes Hercules' justification test for previous decisions. Although Hercules will sometimes have to reject some earlier decisions as mistaken, even he must limit the number of past decisions he rejects so as not to threaten the stability of the law itself. Dworkin also holds that there is a legal fact of the matter regarding the weight of a given principle in a given case, and this weight is determined by the weight assigned to that principle according to the soundest theory of law (i.e., the most defensible moral and political theory, which coheres with and justifies settled law, where "settled law" consists in the legal rules and doctrines accepted as authoritative by the community).

The main point of Mackie's discussion, as we have seen, centers on the positivist judges in regards to the Fugitive Slave Laws and whether or not the law was settled. Dworkin takes the position that the law was unsettled, seeing judges like Story in a quandary as to what to do: to either uphold positive law or decide cases according to deeply held moral principles. Mackie argues that the law was settled and the judges simply fulfilled their obligation to uphold positive law. This explains why Story decided cases against his moral convictions.

It is at this point where Mackie objects to Dworkin's third theory of law. He argues that Dworkin's theory construes as unsettled cases those that are settled on the positivist account. Second, even if Story decided cases according to Dworkin's theory, he might still have reached the same conclusions as he would have by using the positivistic approach to deciding cases. Third, the adoption of Dworkin's theory, argues Mackie, makes the law less certain and less determinate that it would be on the positivist approach.

In reply to Mackie's first concern, it might be argued that it begs the question as to the status of law to imply that the positivist account of law is correct when it construes certain laws as settled when Dworkin does not. Thus this first point of criticism fails to count against Dworkin's theory unless it can be shown, by way of independent argument, that either the positivist construal of law is correct or that Dworkin's is false (or both). Mackie's claim that they construe certain laws differently does nothing to show either the correctness of the positivist view or the falsity of Dworkin's view.

In reply to Mackie's second concern with Dworkin's theory, it might be argued that even rival theories can at times end up espousing similar conclusions. What makes them rivals is that a significant number of claims crucial to the respective theories conflict in important ways. Thus it does not count against Dworkin's theory that the use of principles might lead one to the same conclusion reached by the positivist. Thus Mackie's second criticism misses the point.

Mackie's third concern with Dworkin's view begs the question as to the settled nature of law. Simply because positivism construes law in a more certain and determinate way, this does nothing to count against Dworkin's theory that the law is less certain and less determinate. Nor does it discount Dworkin's "right answer thesis," which states that most, if not all, cases have right answers as a matter of law, that as a matter of principle there is a right or best answer for judges to conflicting claims in a courtroom, all relevant things considered. Mackie's objection here amounts to a simple denial of Dworkin's theory, not a refutation of it. The fact that judges have, on Dworkin's theory, much more discretion than they do on the rival theory does nothing to show that Dworkin's position is wrong. In fact, Dworkin would be glad to have judges possess such discretion!

Mackie's threefold criticism of Dworkin's third (Cardozian) theory of law represents a mere denial of the Dworkinian hypothesis in regards to the nature of law. But there is no reason, for all Mackie says, why one ought to conclude that the third theory is problematic in a fatal way. What Mackie needs to show is that Dworkin's account entails significant inconsistencies, not merely that it is juxtaposed to positivism (or any other theory of law). Absent its positivist (and question-begging) presuppositions, in other words, Mackie's objections to Dworkin's theory have no significance one way or another for the overall plausibility of Dworkin's analysis of the nature of law.[81]

Thus Mackie's concerns with Dworkin's third theory do not point to any important worry one ought to have about law as integrity. Let us, then, turn to Altman's criticisms of Dworkin's theory and see if the critical legal studies criticisms of Dworkin's theory can be plausibly rebutted.

According to Altman, then, the critical legal studies thinkers deny Dworkin's claim that there is any soundest theory of law because of the

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[81] For a reconsideration of part of Mackie's critique of Dworkin's Cardozian theory of law, see Brian Leiter, "Objectivity, Morality, and Adjudication," in Brian Leiter, Editor, *Objectivity in Law and Morality* (Cambridge: Cambridge University Press, 2001), pp. 66–98. It is noteworthy, however, that Leiter's discussion is predicated on a somewhat subjectivist account of morality without which Mackie's criticism carries little weight.

internal contradictions present in the fundamental doctrines of law. The concept of the soundest theory, critical legal studies scholars argue, really has more than one referent.

Dworkin's reply to this critical legal studies objection is twofold. First, he argues that there is a very low probability that in the complex U.S. system of law several theories of law would fit the settled law sufficiently. Second, he argues, even if there were several theories that fit well enough, that fact does not defeat his claim that the soundest theory would be the one from among the several which meets the condition of political morality as well.

Altman responds to Dworkin's reply by arguing that the critical legal studies objection is not that there are several soundest theories of law, but that there are none. Thus Dworkin's reply misses the critical legal studies point. The indeterminacy thesis (i.e., the thesis that in most cases the law fails to determine a specific outcome) holds precisely because there just is no soundest theory of law.

A similar skeptical point is made by Stanley Fish when he argues, "I believe neutral principles to be the empty vehicles of partisan manipulation."[82] Fish is opposed to the use of principles by judges because even neutral ones are problematic for at least two reasons. First, they do not exist as value neutral as value neutrality is an illusion. Second, they often lead to bad results in the courts.[83] But surely Fish's argument, like all skeptical ones, is self-defeating (a caution to which Cardozo alerts us, above). Fish himself utilizes various principles in order to persuade his readers. Are we to think that his principles somehow escape his own apparent radical skepticism toward principles? It may be true that Fish's skeptical antifoundationalism[84] regarding legal norms stands as a refutation of the foundationalism found in constitutional originalism. But does it follow from the supposition that absolute basic legal norms do not exist that there are no legitimate legal norms? Fish saves himself from committing this hyperskeptical error by adopting a

[82] Stanley Fish, *The Trouble With Principle* (Cambridge: Harvard University Press, 1999), p. 8.

[83] Fish, *The Trouble With Principle*, 2f.

[84] See Fish, *The Trouble With Principle*, p. 279, where Fish writes: "There is nothing that undergirds our beliefs, nothing to which our beliefs might be referred for either confirmation or correction." The problem with this kind of skepticism is that it fails to recognize the self-defeating nature of its broad epistemological claims. For philosophical assessments of this sort of skepticism, see Alvin I. Goldman, *Epistemology and Cognition* (Cambridge: Harvard University Press, 1986), Chapter 2; Alvin I. Goldman, *Pathways to Knowledge* (Oxford: Oxford University Press, 2002); Keith Lehrer, *Theory of Knowledge*, 2nd Edition (Boulder: Westview Press, 2000), Chapter 9.

form of coherentism,[85] a legal version of which I shall defend below. To be an antifoundationalist as Fish is does not commit him to a strong skepticism into which less thinking persons would fall: "Foundations have to be sought," he argues, "and as pragmatism tells us, they are never found."[86]

As to his second criticism of principles, it does not follow, logically or otherwise, from the fact that principles can be misused that they always will be: abuse does not negate the value of proper use. The real question here is, contrary to Fish, not whether principles ought to be used in legal decision-making, but precisely which ones, when, and why. It might be right that principles are "politics all the way down" and that principled neutrality, as the critical legal studies scholars argue, is a myth. By this, Fish means that "politics is everywhere" and has no normative or antinormative implications.[87] And to those liberals who rant about the "politics of hegemony," Fish argues, "all politics is the politics of hegemony."[88] However, this fails to discount the attempt of Dworkin and other liberals to arrive at those that are most reasonable, all things considered, for this or that legal purpose. Once this modest but reasonable aim of Dworkin's and other liberals is recognized and accepted, the sting of the critical legal studies and Fish's skepticism loses its force. Liberals need not, then, be stymied by Fish's cynical remarks: "Principles and abstractions don't exist except as the rhetorical accompaniments of practices in search of good public relations."[89]

On behalf of Dworkin against the critical legal studies line of criticism in particular, one might reply that the claim that there is no soundest theory is nonsense. Given that there is an array of theories of law, there must be one, which, *ceteris paribus*, is the soundest. Now by this it is not meant that such a theory is adequate or truly sound, but that such a theory competes with and beats each and every one of its competitors.[90] So it simply does not make sense to say that there is no soundest theory of law. What the critical legal studies thinkers likely mean is that there is no adequate or sound theory of law, which amounts to a skeptical stance toward legal theory as a whole. For indeterminacy in the law suggests the fundamentally open-textured nature of law, implying that positive theories of legal interpretation are implausible insofar as they hold, as Dworkin's does, to the possibility of legal interpretation. Now this is a quite different claim, one that is far from being

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[85] Fish, *The Trouble With Principle*, pp. 280–281.

[86] Fish, *The Trouble With Principle*, p. 296.

[87] Fish, *The Trouble With Principle*, p. 126.

[88] Fish, *The Trouble With Principle*, p. 136.

[89] Fish, *The Trouble With Principle*, p. 45.

[90] For a philosophical analysis of theory soundness, see Lehrer, *Theory of Knowledge*.

nonsensical. But it is incumbent on the critical legal studies thinkers to show why such a theory is, in principle, impossible. Altman gives us no help on this point, nor do I expect anyone else to do so. For such a strong skeptical stance in legal theory fails for the same reasons it fails in epistemology: it is self-defeating and internally contradictory.[91] Thus the first critical legal studies objection to Dworkin's view is not telling.

Furthermore, in *Law's Empire* Dworkin argues that one problem with the critical legal studies criticism of his theory is that it conflates competing theories with conflicting ones.[92] Just because there are several competing soundest theories of law does not mean they all conflict. And even if the soundest theory contains internal conflict, such conflicts may not be fundamentally damaging to that theory. For there are varying degrees to which a theory might contain internal inconsistencies or other sorts of weaknesses.

As we saw, the second critical legal studies criticism of Dworkin's theory is that there is a range of ideological conflict effecting legal doctrine. Even if there were a soundest theory of law, it would impose no practical constraints on judges whose preferred ideology is in conflict with the soundest theory. Thus the soundest theory would have no effect on judges who fail to share its view.

This objection does not rest on the nonsensical claim that there is no soundest theory of law, but argues that fundamental ideological conflict inevitably precludes consensus on the nature of settled law. This poses practical problems for judges, who—even on Dworkin's theory—need settled law to decide hard cases.

In reply to this objection, it might be argued that it is unlikely that the ideologies of lawmakers and judges are so polarized that some agreement on the nature of law is precluded. But for the sake of argument, let us assume that this is true, as the critical legal studies thinkers argue. Does this pose a threat to Dworkin's theory? It is a skeptical view in regards to a shared meaning of law, as Dworkin states in *Law's Empire*. But Dworkin admits, "we cannot ignore the possibility that some globally skeptical view about the value of legal institutions is, in the end, the most powerful and persuasive view."[93] Moreover, the critical legal studies criticism seems not to be incompatible with a fundamental tenet of Dworkin's theory, namely that judicial discretion often means that judges will use principles to interpret

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[91] Lehrer, *Theory of Knowledge*, Chapter 9. For an argument against open-textured theories of legal interpretation, see David Lyons, "Open Texture and the Possibility of Legal Interpretation," *Law and Philosophy*, 18 (1999), pp. 297–309.

[92] Dworkin, *Law's Empire*, pp. 274–275.

[93] Dworkin, *Law's Empire*, p. 79.

the law in hard cases. There is nothing in Dworkin's theory, especially in *Law's Empire*, which implies that judges will not decide cases without being influenced by their respective and often conflicting ideologies. As he argues, "Interpretive claims are interpretive, that is, and so dependent on aesthetic or political theory all the way down."[94] Dworkin never denies this as a basic feature of a judge's human cognitive architecture. In fact, he argues that "... legal practice in an exercise in interpretation not only when lawyers interpret documents or statutes but generally. Law so conceived is deeply and thoroughly political. Lawyers and judges cannot avoid politics in the broad sense of political theory."[95]

What is important about this critical legal studies criticism is that it admits that judges often utilize such principles in making decisions in hard cases. What the critical legal studies thinker does not see, however, is that such a point does nothing to count against Dworkin's view. For Dworkin never denies the obvious point that judges will, as a matter of cognitive decision-making, decide cases based on principles that are influenced to some extent by their respective ideologies. Indeed, he argues that

> ... We must insist, instead, on a general principle of genuine power: the idea, instinct in the concept of law itself, that whatever their views of justice and fairness, judges must also accept an independent and superior constraint of *integrity* in the decisions they make.
>
> Integrity in law has several dimensions. First, it insists that judicial decision be a matter of principle, not compromise or strategy or political accommodation. ... Second, ... integrity holds vertically: a judge who claims that a particular liberty is fundamental must show that his claim is consistent with principles embedded in Supreme Court precedent and with the main structures of our constitutional arrangement. Third, integrity holds horizontally: a judge who adopts a principle in one case must give full weight to it in other cases he decides or endorses, even in apparently unrelated fields of law.
>
> ... The point of integrity is principle, not uniformity: ... [96]
>
> Integrity does not, of course, require that judges respect principles embedded in past decisions that they and others regard as *mistakes*. It permits the Supreme Court to declare, as it has several times in the past, that a given decision or string of decisions was in error, because the principles underlying it are inconsistent with more fundamental principles embedded in the Constitution's structure and history. The Court cannot declare everything in the past a mistake; that would destroy integrity under the pretext of serving it. It must exercise its power to disregard past decisions modestly, and it must exercise it in good faith.[97]

[94] Dworkin, *A Matter of Principle*, p. 168.

[95] Dworkin, *A Matter of Principle*, p. 146.

[96] Ronald Dworkin, *Life's Dominion* (New York: Alfred A. Knopf, 1993), p. 146.

[97] Dworkin, *Life's Dominion*, p. 158.

Thus neither of the critical legal studies criticisms Altman discusses poses a problem for Dworkin's third (Cardozian) theory, and as we saw earlier, neither do Mackie's concerns.[98] We have been given, therefore, inadequate reason by these philosophers to think that Dworkin's theory is seriously flawed. However, there might be a genuine reason why Dworkin's otherwise insightful theory of law needs rethinking.

Constitutional Coherentism

Dworkin argues in favor of a theory of judicial interpretation, which he calls "Law as Integrity."[99] According to this theory, there are two relevant principles: "We have two principles of political integrity: a legislative principle, which asks lawmakers to try to make the total set of laws morally coherent, and an adjudicative principle, which instructs that the law has been seen as coherent in that way, so far as possible."[100] What this means is that the laws must be made as coherent as possible, and that they must be interpreted in such a way that the law remains coherent.[101] It also means that laws express a coherent scheme of justice and fairness:[102] "According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."[103] Finally, Dworkin's theory entails that the coherence test is appropriate for hard or new cases. He writes, Law as integrity asks judges to assume ... that the law is structured by a coherent set of principles about justice and fairness and procedural due

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[98] Indeed, there are other noted concerns with Dworkin's theory of law as integrity that seem also to miss the mark of legitimate criticism. Richard H. Fallon, Jr., for instance, argues for an "implementation" theory that is meant to supplement Dworkin's where the "function of putting the Constitution effectively into practice is a necessarily collaborative one, which often requires compromise and accommodation" (Fallon, *Implementing the Constitution*, p. 5). But Fallon's description of Dworkin's theory is far from generous and rather overstated (Fallon, *Implementing the Constitution*, pp. 3–12; 26–36), casting doubt on the veracity of his claims despite Fallon's attempts to not overstate his case. Nothing in Fallon's theory of constitutional implementation (Fallon, *Implementing the Constitution*, pp. 37–44) seems to run counter to, nor discount, Dworkin's theory of law, properly understood.

[99] Dworkin, *Law's Empire*, 176f.

[100] Dworkin, *Law's Empire*, p. 176.

[101] Dworkin, *Law's Empire*, p. 219.

[102] Dworkin, *Law's Empire*, p. 221.

[103] Dworkin, *Law's Empire*, p. 225.

process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just, according to the same standards.[104]

These aspects of Dworkin's theory of legal interpretation are unproblematic. Some of what he goes on to propound, however, is in need of rethinking. For Dworkin also states, "Law as integrity, then, requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole."[105]

Just what *is* coherence for Dworkin? It is logical consistency between legal propositions or claims, which constitute laws. It concerns what he refers to as "questions of fit."[106] It requires judges to make legal decisions in hard cases that bring the least amount of incoherence to the legal system of rules than any rival decision would.[107] "Convictions about fit will provide a rough threshold requirement that an interpretation of some part of the law must meet if is to be eligible at all."[108]

Dworkin recognizes that fit or coherence is not a sufficient condition of judicial interpretation. It is not enough that the laws with which a judge has to decide cases contains propositions, which are logically consistent. Such laws must be justified.[109] Although Dworkin does not give a detailed account of what justification amounts to in this context, it is clear that more than mere coherence is required for judicial decision-making, which is in accordance with law as integrity.

This is Dworkin's Cardozian theory of legal interpretation, which he calls "Law as Integrity." It is a twofold view. First, it requires that laws be enacted such that they are logically coherent and interpreted as being a logically consistent set of legal claims. Second, it states that such laws must be justified.

But is Dworkin's theory of law as integrity theoretically adequate? I shall argue that it is not, and then sketch an alternative theory of judicial interpretation, which I refer to as "constitutional coherentism."

There is at least one fundamental problem with Dworkin's theory. Recall that he holds that judges should interpret the law in hard cases so that inconsistency within the law is minimized. But nowhere in his account does Dworkin explicitly describe the justificatory status of established law. What

[104] Dworkin, *Law's Empire*, p. 243.
[105] Dworkin, *Law's Empire*, p. 245.
[106] Dworkin, *Law's Empire*, p. 246.
[107] Dworkin, *Law's Empire*, pp. 246–247, 255.
[108] Dworkin, *Law's Empire*, p. 255.
[109] Dworkin, *Law's Empire*, p. 255.

he writes in some places seems to imply that established and justified laws are to be utilized by a judge in a coherent manner to decide hard cases.

However, cannot the "hardness" of a case render some "established" laws reversible or null and void? Dworkin implies that the answer to this question is "yes" in that coherence, which is a matter of degree, can be attained by the judge by the reversing of a decision that was, for instance, part of a "bad chapter" of law. The difficulty with this view is that its plausibility is contingent on a view of whether or not established law is foundational or beyond reproach. But even in a Rawlsian well-ordered society,[110] there is imperfect legislative decision-making. So one can expect that there will always be a certain amount of conflict or incoherence among laws. On Dworkin's account, the answer to this problem is to minimize such inconsistency. But why not rid the law of inconsistency altogether? Why not argue that *no* law is, in principle, beyond justificatory reproach? Thus in hard cases, it might be that certain long-established laws are in need of rethinking or are simply reversible due to their lack of ultimate (non-question-begging) justification.

"Constitutional coherentism," as I call it, is a version of constitutional constructivism, which sees the *law as a dynamic set of justified legal rules or propositions which should be made and interpreted as coherent with one another and with the most plausible set of moral and other extra-legal principles*. This much it shares with law as integrity, and hence constitutional coherentism is intended to be a friendly amendment to Dworkin's position. But constitutional coherentism goes on to state that *any law, in principle, can justifiably be rejected if rejecting it preserves the overall integrity of law and the most reasonable moral principles. The law as a whole must be made as perfectly coherent as can reasonably be expected by humans, even if that means some (previously) established laws—even constitutional amendments—must be rejected by judges interpreting them if reason and circumstance dictate as much*. It draws part of its inspiration from the following statement:

> Justice, empirically viewed, assumes the appearance of a collective concept open at both ends with a membership list of rights and pressures that is constantly changing. Law is not, nor ought it to be, ever completely sure of the character of any one member. Membership therein is always on good behavior. Old members sometimes stay long after they have served their usefulness and the grounds which made them members have long departed. New members fail of admittance

[110] For an understanding of this concept, see John Rawls, *A Theory of Justice*, 2nd Edition (Cambridge: Harvard University Press, 1999); *Political Liberalism* (New York: Columbia University Press, 1993); *Collected Papers*, Samuel Freeman, Editor (Cambridge: Harvard University Press, 1999); *The Law of Peoples*; *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press, 2001).

> frequently because of cliques of old members who oppose them. But membership is never absolute, neither in time nor in authority. No member is a member except in the perspective and context which made it a member. This is the character of justice in its empirical content as we meet it in the courts.[111]

Constitutional coherentism, then, runs contrary to Antonin Scalia's conservative idea that "It certainly cannot be said that a constitution naturally suggests changeability: to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away."[112] It is a view that Scalia pejoratively refers to as "constitutional evolutionism"[113] in that " . . . the record of history refutes the proposition that the evolving Constitution will invariably enlarge individual rights."[114] Perhaps, it might be argued, not "invariably" so, but it can effectively protect such rights from the class, racist, and sexist intentions underlying both the framers and ratifiers, as well as those contemporaries of ours whose intentions emulate, however unfortunately, those framers' and ratifiers' intentions.

It might be objected that constitutional coherentism provides no way by which to decide which established laws are candidates for rejection under circumstances where rejection of a law to retain or attain coherence is necessary. This is an objection that must be answered adequately if constitutional coherentism is to become a plausible theory.

In reply to this objection, it might be said that there are at least two sets of laws: "long-established laws" and "recently established laws." The former are those laws within a community established prior to the community's current generations of citizens. The latter are those laws of a community established during the community's current generations. Constitutional coherentism states that where there is a clear logical inconsistency between laws in hard cases and other things being equal insofar as the general plausibility of the competing laws is concerned, recently established laws take precedence over long-established laws because a community is more directly bound to the rules which it itself adopts freely than those which it inherits

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[111] Garlan, *Legal Realism and Justice*, p. 53.

[112] Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," p. 40.

[113] Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," p. 42. Dworkin exposes the straw man fallaciousness of Scalia's "chameleon" portrait of what Dworkin refers to as a "moral and principled reading of the Constitution" (Ronald Dworkin, "Comment," in Amy Gutmann, Editor, *A Matter of Interpretation* (Princeton: Princeton University Press, 1997), p. 123.

[114] Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," p. 43.

from a previous generation. In either case, however, no law is "established" in a strong sense of its being foundational or beyond revision or rejection if reason demands it.

This aspect of constitutional coherentism is based on a principle of textual criticism. For instance, if one wants to answer the question, "What does Immanuel Kant think about punishment?" one faces a decision. One might attempt to answer this question by studying Kant's entire corpus of writings for textual clues, seeking to provide a generally coherent set of Kant's views about punishment. Or, one might consult only the most recent works by Kant (*The Metaphysical Elements of Justice*, for example) in order to give an adequate reply to the question, recognizing that the use of older texts precludes (whenever inconsistency arises) the possibility that Kant might change his mind about punishment from one text to the next and for good reasons. Thus it is best to interpret historical philosophers, as with contemporary ones, in such a way that later works take precedence over earlier ones when there is conflict between them. Yet no single statement by such a philosopher would serve as "the" guide to the interpretation of that philosopher's ideas. It would be one claim among many that the philosopher makes, and the interpreter ought not to assign it special significance unless instructed to do so by the philosopher being interpreted.

The same principle ought to hold for legal interpretation. Judges should, when it is necessary, give precedence to recently established laws over long-established laws (except, of course, those long-established laws that are affirmed by the current generations) because recently established laws represent (presumably) society's most considered legal views at that time and because there is a stronger obligation to obey the law that is binding on a society and laws that it adopts as opposed to laws it simply inherits. Thus in a hard case where there is significant and logically irreconcilable conflict between some recently established laws and some long-established laws, the judge should decide the case in light of recently established laws should the balance of human reason justify it.

Constitutional coherentism has the benefit, then, of evading the charge that established laws are beyond rejection or justificatory doubt. It reduces the difficulty of legislative intent and judicial decision-making in that it is the content, coherence, and justification of a law that matter for judges in deciding hard cases, not the intent of inaccessible framers of a law. The basic reason why original intent holds no privileged position in constitutional coherentism is that legal legitimacy is not somehow inherited from one generation to the next. In a democratic society, legitimacy derives from the free and informed consent of the people wherein the constitution or law of the land is something the contents of which are approved by the majority of citizens.

In order for there to be an obligation to obey the law, the law must be legitimate. In order for the law to be legitimate, it must be the case that most of its adult citizens understand and approve of the law for them. This requires that the law must undergo a continual process of becoming what rational and reasonable people desire it to be, with the proviso that it is not significantly unjust. For as the natural law theorists argue, an unjust law is no law at all; e.g., it is a law not morally requiring our obedience. Significant injustice within the law vitiates the obligation to obey the law. So if a society is unjust, there is no obligation of its citizenry to obey the law that governs it. For such injustice nullifies the social contract between citizens of an otherwise reasonably just regime. This implies Cardozo's point that the law is a dynamic set of claims that bind the very community which authors and approves it. And it implies further that there are few limits on the Court's role in bringing about racial reform, a concern registered by Bell.[115] Because history shows that the Court in interpreting the Constitution has made just decisions only sporadically *vis a vis* racial issues, constitutional coherentism is offered as a theory of interpretation that does not bind the Court to U.S. society's often perverted mores. Instead, the Court can stand as the voice of reason in all cases, correcting as it needs to executive, legislative and societal biases that lead to injustice. For as Bell himself urges, "something must be done ... action must be taken."[116] And the legal system ought to be granted more opportunities to contribute to the correction of the numerous injustices that lay in its own and the society's past (and present). All the while, of course, heed must be granted to Bell's claim that "We simply cannot prepare realistically for our future without assessing honestly our past."[117]

Assumed within this constitutional coherentist framework is the demythologization of the original intent of the U.S. Constitution. Just as the writings of the Christian scriptures, for instance, ought not to be taken always in their literal meanings and are in need of being demythologized[118] or seen

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[115] Derrick Bell, *And We Are Not Saved* (New York: Basic Books, Inc., 1987), p. 61.

[116] Derrick Bell, *Faces at the Bottom of the Well* (New York: Basic Books, Inc., 1992), p. 199.

[117] Bell, *Faces at the Bottom of the Well*, p. 11.

[118] Rudolph Bultmann, *History and Eschatology* (New York: Harper Torchbooks, 1957); Rudolph Bultmann, *Jesus Christ and Mythology* (New York: Charles Scribner's Sons, 1958); Rudolph Bultmann, "New Testament and Mythology," in Hans Werner Bartsch, Editor, *Kerygma and Myth* (New York: Harper Torchbooks, 1961), pp. 1–44; Rudolph Bultmann, *Primitive Christianity* (New York: The World Publishing Company, 1956); Rudolph Bultman, "The Study of the Synoptic Gospels," in Frederick C. Grant, Translator, *Form Criticism* (New York: Harper Torchbooks, 1934), pp. 1–76; Rudolph

for what the texts meant to those who wrote them for their times and places and then stripped of their mythological framework, so too must the text of the Constitution be construed, not as some timeless, inerrant, "sacred" text that ought to be applied to all times and places in the U.S. And just as the Christian scriptures, though authoritative for Christians, ought to be construed as speaking to Christians as authenticating and autonomous selves through the spirit of God, so ought the Constitution to hold authority for U.S. citizens, though not in a way that threatens legitimate rights-respecting autonomous individuals who answer ultimately to the higher dictates of reason, and not to some ultimately authoritative and sacred political document where that document inhibits genuine freedom.

The only way in which the words of the Constitution ought to be taken on their face value is if we first understand that they were not meant to apply equally, if at all, to those who are not white. This is a simple fact of constitutional history, as alluded to above. Second, we must accept whatever truths of the Constitution are able to survive the process of demythologization, opening it and ourselves to the future of mutable constitutional content for the sake of eliminating injustice. Given whatever changes to the Constitution the legislature might make, the Court also must fulfill its role as one check in the balancing of federal power. This implies the Court's ability to interpret, discover, and even make law based on both precedent and extralegal principles or merit. The Constitution, then, becomes a living document that is to be revised as ways of genuinely improving it are discovered in light of new circumstances that cry out for novel ways of legal address. Ever important here is that the framers and ratifiers be stripped of the myths that surround the making of the text itself. Until it can be shown that the framers and ratifiers had for the most part morally pure motivations for their document, the document ought to hold no absolute authority over U.S. citizens, or the Court acting in its legitimate authority. After all, our ultimate interest is justice and all that it entails. And as Clarence Darrow states: " . . . justice can never grow on injustice." So if the morally unjust ideologies of framers and ratifiers infect the content of the Constitution, that document must be demythologized in the court's decision, making it possible that justice can be "the cause of law," as Garlan avers.

Finally, just as demythologizing the Christian scriptures makes the individual Christian self-authenticated and truly autonomous, so too the de-

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Bultmann, *Theology of the New Testament* (New York: Charles Scribner's Sons, 1955); Rudolph Bultmann, "The Idea of God and Modern Man," in Robert W. Funk, Editor and Translator, *Translating Theology into the Modern Age* (New York: Harper Torchbooks, 1965), pp. 83–95.

mythologization of the Constitution rids U.S. citizens of the illusion that the framers and ratifiers were motivated by a legitimate concern for others as well as their own self-interests, and paves the way for U.S. citizens to make out their own present and future lives in becoming authenticated and autonomous selves. For gone is the mythology of what in fact are racist, classist, and sexist framers and ratifiers who legalized the oppression of those other than themselves. Replacing their hidden agendas (relative to the text of the Constitution) is a text revised and approved by "We the People"! Instead of a singular relationship of the Constitution and its original intent to the members of the Court, we have a dialectical relationship between a Constitution in the constant state of becoming and We the People, represented in some measures by the Court as well as the Legislature. In this way, the Constitution is a truly living document, one with which the Court and We the People can engage and ultimately determine. It is under these kinds of contexts that the Constitution gains its genuine legitimacy and can, therefore, demand our assent and obedience. It is, in the truest sense, *ours*. This answers plausibly the allegedly "most glaring defect" of what Scalia disparagingly refers to as "Living Constitutionalism," namely, that "there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution."[119] In further reply to Scalia's cynicism regarding a constitution that lives by the will of We the People, it might be argued that it is *democracy* that will, however fallibly, provide the answers toward social evolutionary change. This is no way implies the truth of Scalia's claim that "By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all."[120] For the Constitution need not "do" everything, but enough to effect genuine social, moral, and political progress for the people it is meant to serve.

In summary, having in the previous chapter assessed Bork's version of original intent and found it to be highly problematic on numerous grounds, I then in this chapter described one of the earlier statements of constitutional constructionism in the view of Cardozo. Subsequently, I defended Dworkin's theory of law as integrity (itself being foreshadowed by Cardozo's position) against the onslaught of objections set forth by Mackie and Altman, respectively. To be sure, there are other criticisms of Dworkin's Cardozian theory of law, and important ones. However, if my defense of Dworkin's account against Mackie's and Altman's respective criticisms is adequate, then

[119] Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," pp. 44–45.

[120] Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," p. 47.

substantial philosophical progress has been made in discovering the overall plausibility of Dworkin's Cardozian theory. It is hoped that my own internal criticism of Dworkin's theory is one that lends congenial support to the spirit of his informative enterprise. Finally, I articulated and defended a version of constitutional coherentism, a theory of law that stands in opposition to the doctrines of textual originalism and original intent, though it shares in common with constructionism the idea that judges are endowed with the moral right (implying that they ought to have a legal right) to responsibly fashion law in hard cases. On the assumption that recently established laws are important, we must recognize that there are, as Dworkin points out, bad chapters in law such as the one already alluded to concerning the Court's interpretation of First Amendment cases from about 1890 to 1921. Nonetheless, to the extent that there has been genuine progress in legal and political philosophy and the Court's decisions in general, it seems reasonable to place this interpretive emphasis on recently established laws.

Having treated critically some of the most influential contemporary theories of legal interpretation, I now turn to specific issues of the nature of global justice, followed by philosophical analyses of the moral foundations of rights. For any feasible system of international law must have rules that are subject to interpretation by judges who apply them, and we must also become ever clearer about the nature of rights so that such interpretation is plausible.

Part II
Justice

Chapter 3
International Law

Decent societies should have the opportunity to decide their future for themselves—John Rawls.[1]

The culture indigenous to a country, its folk-customs, its art, all this must have free scope or there is no such thing as freedom for the world—W. E. B. DuBois.[2]

"The search for justice is the major enterprise of law, and the attempt to characterize justice is inseparably connected with that which characterizes law. Justice not only gives rise to law but arises out of law. It is the cause of law. . . . "[3] Moreover, "International law is premised on the idea that all political communities have a strong interest in peace and in the protection of basic human rights, and that the interests of the members are greater than what divides them."[4] The truth of these words justifies the inclusion of this chapter and the next in this book on some of the philosophical and ethical dimensions of justice and rights. Law and justice are so propinquently related that it is not hyperbolic to state that justice is the lineament of law [5] in the sense that a reasonably morally sound system of law is one having the administration of justice as its primary goal. So it is fitting given the proliferation of philosophical work on international law and global justice that the most influential theory of global justice is discussed herein now that I have already staked out a position on constitutional interpretation. And once there is a fully established system of international law, its rules, duly adopted by each state or many states separately or a coalition of such

[1] John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), p. 85.

[2] W. E. B. DuBois, *An ABC of Color* (New York: International Publishers, 1963), p. 103.

[3] Edwin N. Garlan, *Legal Realism and Justice* (New York: Columbia University Press, 1941), p. 20.

[4] Larry May, *Aggression and Crimes Against Peace* (Cambridge: Cambridge University Press, 2008), p. 52.

[5] Alternatively, "What law ought to be is what justice is, . . . " as we find in Garlan, *Legal Realism and Justice*, p. 21.

J.A. Corlett, *Race, Rights, and Justice*, Law and Philosophy Library 88, DOI 10.1007/978-1-4020-9652-5_4,
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states,[6] there can be a philosophical investigation into some of the problems endemic to the judicial interpretation and application of such rules.

It has been stated that "In order to fulfill her historic mission, a nation must be prepared to grant other nations a status in the international arena not inferior, but equal, to her own,"[7] and "The making of any international agreement requires the existence of two partners negotiating on a basis of equality with a view to being equally bound by the provisions of the agreement for which they are working."[8] Among other things, these claims assume that countries, not just nations, agree to treat one another as fellows rather than as others. In the context of international law and justice, I shall assume that it is not only possible, but probable that a meaningful degree of this sort of attitude is achievable by a sufficient number of powerful countries that a viable system of international law is not a mere utopian ideal. As that same legal theorist notes:

> It would be futile to try to impose a legal superstructure upon a world of social and political instability where a common ground of interests, moral standards, and mutual understanding between men and nations is missing. Before starting

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[6] Herein I recognize various ways in which international law (not necessarily reasonably just international law) might accrue. First, and perhaps ideally, a system of international law might amount to the noncoercive ratification of a system of rules by each and every state and/or peoples on earth. Second, it might amount to the noncoercive ratification of a system of rules by a subset of such states and/or peoples each representing their own interests. Third, an international legal system might accrue as the result of a coalition of states and/or peoples noncoercively ratifying a system of rules. And in each case, the question arises pertaining to whom the rules apply: (a) only those who ratify the rules and no one else; (b) the entire global order of states and peoples. Insofar as the scope of the international system of law is concerned, (a) might be referred to as a narrow system, whereas (b) might be construed as being much wider. In what follows, I assume that a reasonably just international system of law will be a wide one, the rules of which are ratified by a coalition of states and/or peoples that is as wide as practicality will permit, inclusive of a wide range of representative political and religious moralities.

Larry May discusses international law specifically in terms of criminal law, and notes three ways in which human rights can be violated internationally: crimes against humanity, war crimes, and crimes against the peace (May, *Aggression and Crimes Against Peace*, p. 55). My discussion of international law is more general in scope and will not focus on May's important distinctions. While May's discussion concerns crimes against humans, my discussion pertains to the more general constitutionally constructed laws that would form the basis of statues against such crimes.

[7] Gerhardt Husserl, "Interpersonal and International Reality: Some Facts to Remember for the Re-Making of International Law," *Ethics*, 52 (1942), p. 152.

[8] Husserl, "Interpersonal and International Reality: Some Facts to Remember for the Re-Making of International Law," pp. 131–132.

> to rebuild the international order by setting up an international legal machinery, a basic change of attitude in the international sphere as between the various nations is required.[9]

Having in Chapters 1 and 2 assessed various theories of legal interpretation in the development of an answer to the question of the nature of law, it is my task in this chapter to shift the topic of philosophical and ethical analysis to questions of international law and justice. By "philosophical and ethical" is meant a normative approach intended to accompany an appropriately descriptive one. For as one commentator states, "... knowing all the facts and all the circumstances of a given cultural situation does not in itself enable us to reach any conclusions of legal relevance. It is impossible to solve a single problem of legal theory without resorting to normative standards which transcend the actual given facts."[10] In light of this statement, I shall assume that we can "specify as necessary certain limited requirements which constitute the conditions of any rightful relations among nations; and it is equally possible, by projecting these formal conditions to an idealized perfection, to view their ultimate achievement as a possible reality and to implement an approximation to that ideal."[11]

This chapter seeks to address some of the fundamental problems of international law from the standpoint of philosophy of law, unlike most other works in philosophy of law which have rather little to say about such matters as they typically focus on matters of domestic law. This chapter focuses on the relatively undeveloped state of philosophy of law in terms of international issues. And though some important work has been done on precisely these problem areas, this chapter addresses a limited number of such concerns.

More specifically, I shall first consider general arguments by Immanuel Kant and H. L. A. Hart, respectively, as to whether or not an international legal system is even possible, and if so, whether it is a desirable thing. Among other things, I assume that considered judgments about international justice ought to undergird the building of an international legal system. In the following chapter, I shall raise a particular concern about Rawls' theory of international justice as he articulates and defends it in *The Law of Peoples*. Finally, I shall consider the cosmopolitan liberal critique of Rawls' stance on global justice, raising concerns about it, including the same problem that

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[9] Husserl, "Interpersonal and International Reality: Some Facts to Remember for the Re-Making of International Law," p. 129.

[10] Gerhart Niemeyer, *Law Without Force* (Princeton: Princeton University Press, 1941), p. 134.

[11] William Sacksteder, "Kant's Analysis of International Relations," *The Journal of Philosophy*, 51 (1954), p. 855.

plagues Rawls' theory. For it seems that in most, if not all, of the recent philosophical discussions about global justice and whether or not it is a good thing to achieve by way of an international system of law, sufficient philosophical attention has not been paid to the problem of compensatory justice. For if a realistic utopia is what is desirable, both by Rawlsian and cosmopolitan liberals alike, and if it is a necessary condition of global justice that significant harmful wrongdoings are remedied as well as humanly possible, then the problem of compensatory justice surely must be considered along with the several other issues of distributive justice facing Rawlsian and cosmopolitan liberals.

Among other things, I shall assume that *legal realism* regarding international law is not clearly plausible, where "legal realism" is the view that moral theorizing about issues of international law is worthless because morality does not work itself out in the realm of international law. Even if this were true as a descriptive claim, it hardly follows that it has normative import. I shall proceed, then, with the assumption that moral theorizing about international law can assist in the improvement of the international legal system, whatever condition it is in currently. So even if it is true that there is a lack of a global consensus on the nature of justice, it hardly follows that moral theorizing about international law cannot help in the structuring of the international legal system in better ways. Moreover, from the fact of imperfect consensus on basic legal norms, it does not follow that such consensus cannot improve as moral theorizing about such matters increases.

I also assume the implausibility of *legal nihilism* as it pertains to international law, understood as either the descriptive claim that there is no system of international law, or as the normative claim that even if there is such a system, there ought not to be. As for the first way of making the claim of legal nihilism, it would appear that it is patently false as there is an international legal system, problematic as it is "What we call international law is sufficiently law-like . . . ," as one commentator argues.[12] As for the second construal of legal nihilism, there appear to be some good *prima facie* reasons to at least attempt to devise one: the prevalence of wars, terrorism, secession, and other forms of violence, along with global poverty and other forms of human and nonhuman misery that accompanies various forms of state and nonstate actions, omissions, and attempts. Thus in order to avoid a Hobbesian state of nature, it seems at least minimally plausible, if not maximally so, to adopt at this juncture of human history the cautiously optimistic attitude that there appears to be no principled reason why a system of international law is

[12] Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford: Oxford University Press, 2005), p. 51.

both impossible or undesirable, provided that the principles that underlie the system are sound and employed with reasonable fairness.

However incomplete this set of basic assumptions is, I think it is reasonable so long as it is understood that there are fundamental limits to the very enterprise in which we are now engaged. One such limit is one that Rawls makes plain in *The Law of Peoples*, namely, that the principles for a reasonably just liberal society cannot simply be executed in the sphere of international law. The vast array of considerations regarding individual and group rights, duties, liberties, etc. within states simply does not carry over straightaway to international law. However, this challenge ought not to deter the serious philosopher of law from attempting to fulfill her moral duty to think philosophically in attempting to construct ideas that might positively influence the development of the international legal system. For as Bernard Boxill notes, "... international emergencies, from famines to debt crises to terrorism, have destroyed any remaining illusions of the insularity of domestic political theory, and require that philosophers reflect on treasured principles from a global perspective."[13]

The philosophy of international law and justice has its own background history, however scant compared to international legal studies. Although I shall not provide such a history in this chapter, I would like to give a brief glimpse into some of the philosophical background of international law and justice, most of which focuses on contemporary sources of thought.

Immanuel Kant on International Law

According to Immanuel Kant, "*The greatest problem for the human species, the future of which nature compels him to seek, is that of attaining a civil society which can administer justice universally.*" Kant continues:

> The highest purpose of nature ... can be fulfilled for mankind only in society ... This purpose can be fulfilled only in a society which has not only the greatest freedom, and therefore a continual antagonism among its members, but also the most precise specification and preservation of the limits of this freedom in order that it can co-exist with the freedom of others.[14]

[13] Bernard Boxill, "Global Equality of Opportunity and National Integrity," *Social Philosophy & Policy*, 5 (1987), p. 144.

[14] Immanuel Kant, "Idea for a Universal History with a Cosmopolitan Purpose," in Hans Reiss, Editor, *Kant: Political Writings* (Cambridge: Cambridge University Press, 1991), p. 45. Emphasis in original.

This, of course, was what Rawls by and large sets out to do in *A Theory of Justice*, namely, to construct a philosophical theory of justice for the state.

But Kant further argues that "*The problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed* ***external relationship*** *with other states, and cannot be solved unless the latter is also solved*."[15] Just as within states there is conflict between individual and group members concerning the exercise of their freedoms, so too will states have conflicts regarding the exercise of their freedoms. Each requires, then, a constitution or law that will adjudicate such conflicts that will, in effect, serve to spell-out the basic rights of each state as a matter of global justice. Just as a state's constitution serves as the supreme authority for individuals and groups within its territories, so too states themselves require a constitution or body of law that can govern effectively international affairs. He refers to this as a "cosmopolitan system of general political security."[16] It is for this reason that matters of legal interpretation are fundamentally relevant both to state constitutions and to the legal rules that are meant to govern peoples. Whatever else international law includes, Kant argues that it ought to include a "principle of equality" in order to guard against a war of all against all, i.e., a state of nature between states. For Kant, peace between states is the main purpose of international law.[17]

But Kant understands that the creation of a viable system of international law must be predicated on some factors of human development. First, he states, "we are still a long way from the point where we could consider ourselves *morally* mature."[18] I take this statement to be generally true of human beings taken as a whole. Indeed, it is quite an understatement of the horrific actions of various individuals and states throughout even just modern history. Moreover, Kant avers, "as long as states apply all their resources to their vain and violent schemes of expansion, thus incessantly obstructing the slow and laborious efforts of their citizens to cultivate their minds, and even

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[15] Kant, "Idea for a Universal History with a Cosmopolitan Purpose," p. 47. Emphases in original.

[16] Kant, "Idea for a Universal History with a Cosmopolitan Purpose," p. 49. Emphasis in original.

[17] Mine is an avowedly statist interpretation of Kant's views on this topic. For an interpretation of Kant's words on international law that is less statist and more in line with cosmopolitan liberalism, see Fernando Tesón, *A Philosophy of International Law* (Boulder: Westview Press, 1998), p. 9. Also see Pauline Kleingeld, "Kant's Cosmopolitan Patriotism," *Kant-Studien*, 94 (2003), pp. 299–316.

[18] Kant, "Idea for a Universal History with a Cosmopolitan Purpose," p. 49. Emphasis in original.

deprive them of all support in these efforts, no progress in this direction can be expected."[19] Furthermore, "*The history of the human race as a whole can be regarded as the realization of a hidden plan of nature to bring about an internally—and* ***for this purpose*** *also externally—perfect political constitution as the only possible state within which all natural capacities of mankind can be developed completely*."[20] And "*A philosophical attempt to work out a universal history of the world in accordance with a plan of nature aimed at a perfect civil union of mankind, must be regarded as possible and even as capable of furthering the purpose of nature itself*."[21] Thus we have in Kant the urging of a "universal *cosmopolitan existence*" and a philosophical attempt to work out principles of a system of international law. Indeed, the "burden of history," Kant writes, is this "cosmopolitan goal."[22]

Of course, one is entitled to wonder precisely how fair-minded and unbiased Kant is about justice for "mankind," as he has written rather harsh words about those of the "Negroid race" in particular.[23] It is a bit like the framers and ratifiers of the U.S. Constitution in their statements and quests for justice and rights that turn out, in practice, to be self-serving at various turns. Nonetheless, it is important to consider Kant's principled cosmopolitanism as it serves as a philosophical basis for contemporary theories of international justice.

What seems to motivate Kant's quest for cosmopolitan justice and a system of international law is his recognition of the fact that world history is replete with injustices by one state against another: ". . . it cannot be reconciled with the morality of a wise creator and ruler of the world if countless vices, even with intermingled virtues, are in actual fact allowed to go on accumulating."[24] I take this to imply (or at least make room for), among other things, the need for a system of international law that would both prevent further injustices from occurring, but also one that would require the compensation of harmful wrongdoings or "vices." And this interpre-

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[19] Kant, "Idea for a Universal History with a Cosmopolitan Purpose," p. 49.

[20] Kant, "Idea for a Universal History with a Cosmopolitan Purpose," p. 50. Emphases in original.

[21] Kant, "Idea for a Universal History with a Cosmopolitan Purpose," p. 51. Emphasis in original.

[22] Kant, "Idea for a Universal History with a Cosmopolitan Purpose," p. 53. Emphasis in original.

[23] See Robert Bernasconi and Tommie Lott, Editors, *The Idea of Race* (Indianapolis: Hackett Publishing Company, 2000).

[24] Immanuel Kant, "On the Common Saying: 'This May Be True in Theory, But it Does Not Apply in Practice'," in Hans Reiss, Editor, *Kant: Political Writings* (Cambridge: Cambridge University Press, 1991), p. 88.

tation of Kant's words seems to draw rather strong support from his theory of retributive justice.[25] Moreover, Kant has a progressive idea of the world in which it ought to be in continual improvement for the sake of posterity, implying that we have an "inborn duty" to at least attempt to ensure this progress. And to those who would object that the attempt to create a system of international law is idealistically utopian, Kant retorts, "It is quite irrelevant whether any empirical evidence suggests that these plans, which are founded only on hope, may be successful. For the idea that something which has hitherto been unsuccessful will therefore never be successful does not justify anyone in abandoning even a pragmatic or technical aim."[26]

But what exactly does Kant have in mind with his notion of cosmopolitan justice? By a "*cosmopolitan* constitution," he means that persons "must" "form a state which is not a cosmopolitan commonwealth under a single ruler, but a lawful *federation* under a commonly accepted *international right*."[27] Thus he urges a federation of states that freely and jointly concur on a constitution or system of international law for the protection of the rights of all states. And all of this is to be realized, Kant writes, on the basis of a social contract. "Just as individual sovereign states can contribute to the growth of human freedom, so, too, can various forms of cooperation among states including ultimately a federation of states."[28] Thus Kant's theory of international law mirrors his theory of the state in this regard. Both are based on social contract theory. But the social contract must make it such that "each state must be organized internally in such a way that the head of state, for whom the war actually costs nothing (for he wages at the expense of others, i.e., the people), must no longer have the deciding vote on whether war is to be declared or not, for the people who pay for it must decide" so that "posterity will not be oppressed by any burdens which it has not brought upon itself, and it will be able to make perpetual progress towards a morally superior state." He continues, "Each commonwealth, unable to harm others

[25] J. Angelo Corlett, *Responsibility and Punishment*, 3rd Edition (Dordrecht: Springer, 2006), Library of Ethics and Applied Philosophy, Volume 9, Chapter 3.

[26] Kant, "On the Common Saying: 'This May Be True in Theory, But it Does Not Apply in Practice'," p. 89.

[27] Kant, "On the Common Saying: 'This May Be True in Theory, But it Does Not Apply in Practice'," p. 90. Emphasis in original.

[28] Burleigh T. Wilkins, "Kant on International Relations," *The Journal of Ethics*, 11 (2007), pp. 147–159. See also Burleigh T. Wilkins, "Teleology in Kant's Philosophy of History," *History and Theory*, 5 (1966), pp. 172–185. For more on Kant's view of international law, see Brian Orend, "Kant on International Law and Armed Conflict," *Canadian Journal of Law & Jurisprudence*, 11 (1998), pp. 329–381.

by force, must observe the laws on its own account, and it may reasonably hope that other similarly constituted bodies will help it to do so."[29] In short, Kant bases his main plea for a system of international justice on what might be termed the "state of nature argument" wherein states are in constant war and otherwise in conflict with one another, preventing international and even domestic stability.

To those who would argue that cosmopolitan justice as Kant describes it is a fanciful theory with no application in the real world,[30] Kant replies in a normative way, placing his faith in what individuals and states ought to do according to what is right, and that we are permitted to assume its possibility in practice. Kant's optimism about the world "cannot and will not see it as so deeply immersed in evil that practical moral reason will not triumph in the end, after many unsuccessful attempts." For "whatever reason shows to be valid in theory, is also valid in practice."[31] Ought implies can.

H. L. A. Hart on International Law

Moving from Kant to more contemporary philosophers of law, we come to H. L. A. Hart's analysis of international law. And unlike Kant who showed an optimistic attitude toward international law, in Hart we find arguments against it. But in the end they are overcome by various considerations Hart brings to bear on the problem.[32]

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[29] Kant, "On the Common Saying: 'This May Be True in Theory, But it Does Not Apply in Practice'," p. 91.

[30] One scholar writes: ". . . it would involve a considerable act of faith on the part of great states such as the U.S.A., to renounce their ultimate independence by submitting all disputes to an independent court" [Dennis Lloyd, *The Idea of Law* (New York: Penguin Books, 1976), p. 336].

[31] Kant, "On the Common Saying: 'This May Be True in Theory, But it Does Not Apply in Practice'," p. 92.

[32] Jeremy Bentham did not have much to write about "international jurisprudence" or the "law of nations," except that he seems to be the first philosopher in the English-speaking world to use the former term, however cautiously, as he argued that it involved the mutual transactions between sovereigns. He had nothing normative to convey about international law. He neither affirmed nor denied its possibility, or its oughtness [Jeremy Bentham, *The Principles of Morals and Legislation* (New York: Haefner Press, 1948), pp. 326–327]. H. L. A. Hart argues that "Bentham, the inventor of the expression 'international law', defended it simply by saying that it was 'sufficiently analogous' to municipal law" [H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), p. 231]. However, the problems with Hart's interpretation of Bentham are that, first, Bentham never used the term "international law," but rather "international jurispru-

Hart begins his discussion of international law by asking the crucial question of whether or not it even constitutes law: "... international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules."[33]

This set of facts raises for Hart "two principal sources of doubt" about international law. One is "How can international law be binding?" This is not a concern about the applicability of international law, as Kant addresses, but one of legal status. Just as in the case of constitutional law that does not reflect a democratic legitimacy and hence does not bind all citizens to oblige in the case of domestic law,[34] the argument goes, so too there is a problem at the global level. For, can such "laws" be binding on states in light of "the absence from the system of centrally organized sanctions"?[35] And if such laws are not legitimate and binding in this sense, then in what sense, argues Hart, is it law at all? For "all speculation about the nature of law begins from the assumption that its existence at least makes certain conduct obligatory."[36] In the end, Hart rejects this concern: "... no simple deduction can be made from the necessity of organized sanctions to municipal law, in its setting of physical and psychological facts, to the conclusion that without them international law, in its very different setting, imposes no obligations, is not 'binding', and so not worth the title of 'law'."[37] Hence, the objection that international law lacks the sanctions that grant legal legitimacy that imply legal obligation can be met "if one day international law were reinforced by a system of sanctions."[38] This is rather consistent with Kant's optimistic attitude about the possible development of a viable system of international law.

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dence" and "law of nations," as indicated above, and second, Bentham in no way "defended" the idea at all. In fact, Bentham barely writes enough to mention the category. Equally problematic is the claim by Morton A. Kaplan that Bentham actually "doubted the character of international law" [Quoted in Joseph Modeste Sweeney, Covey T. Oliver and Noyes E. Leech, Editors, *The International Legal System*, 2nd Edition (Mineola: The Foundation Press, Inc., 1981), p. 1215].

[33] Hart, *The Concept of Law*, p. 209.

[34] Recall the concern registered with theories of original intent in Chapter 1, namely, that insofar as the original intent of legal rules are fraught with racist, sexist, or classist meanings, this may well have the effect of nullifying the legitimacy of law *vis-a-vis* the matter of legal obligation is concerned.

[35] Hart, *The Concept of Law*, p. 212.

[36] Hart, *The Concept of Law*, p. 212.

[37] Hart, *The Concept of Law*, p. 215.

[38] Hart, *The Concept of Law*, p. 215.

Another objection to the idea of international law, argues Hart, is that it violates the sovereignty of states, and that any system that does this is unjustified. On this view, "the doctrine of sovereignty is not easily reconcilable with the establishment of fundamental human rights."[39] Hart points out that this kind of argument works neither in the case of individuals within a state nor in the context of international law. The reason is that, just as individuals have limited sovereignty delimited legitimately by the rights of others that can impose reasonable boundaries for individual sovereignty, so too states have no absolute sovereignty. The notion of absolute sovereignty, where individual or collective, is a myth and stands as a reasonable objection neither to domestic law limiting the autonomy of individuals nor international law limiting the autonomy of states.[40] Moreover, Hart argues, "There is no way of knowing what sovereignty states have, till we know what the forms of international law are and whether or not they are merely empty forms."[41]

For Hart, the basic issue regarding the viability of a system of international law rests with "the great difficulties in formulating the 'basic norm' of international law."[42] This is the necessary and sufficient condition of such a system's becoming law. And while there are those who would doubt the possibility of there being such a basic norm, Hart sides with Kant that there seems to be no good reason to rule out on *a priori* grounds alone that such a norm could become a reality globally. And of course it is an empirical question as to whether the past almost half century of work in international law has produced a set of primary and secondary rules that would indeed qualify as law, internationally speaking. Hart does not rule out this possibility, and with good reason. But he is more cautious than Kant in expressing a normative desire for such a system. As a practical caution to both, it is suggested by one commentator that "Before international law can be effective, a reasonable alternative to war as a solution to international problems must be found."[43]

Other objections to the idea of international law include that it is improbable that the threat of prosecution of powerful states causing unjust wars would ever deter them if they are bent on conquest (the deterrence objection). However, like the other concerns, there seems to be no principled reason to

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[39] Lloyd, *The Idea of Law*, p. 339.

[40] Hart, *The Concept of Law*, p. 218.

[41] Hart, *The Concept of Law*, p. 218.

[42] Hart, *The Concept of Law*, p. 228.

[43] G. W. Paton, *A Text-Book of Jurisprudence* (Oxford: Oxford University Press, 1951), p. 65.

not pursue plausible answers to them. My goal in this chapter is to explore some of the foundations of a viable system of international law.

Requirements for a Viable System of International Law

The previous and related concerns, I believe, serve as the grounds for the following requirements for a viable international legal system. First, there must be a genuine sense of global community and sufficient basis for core shared values. Implied here is the idea that principles of international law ought not to reflect only Western ideals (or Eastern ones, for that matter), unless, of course, those ideals can be supported by independent and non-question-begging argument. Otherwise, it would seem that the system of international law would be vulnerable to criticisms regarding its universality. And recall that Kant seeks a universal system of international law. The principles of international law simply cannot become those which foster the interests of power elites, Western or otherwise.[44] This also means that theories of international law ought not to presume that Western values are common grounds for agreement on matters of global justice. Nor ought they to presumptuously think or imply that indigenous cultures have unsophisticated views of rights unless informed by Western ideals.[45]

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[44] Consider the following argument from a Marxist standpoint:

> The rules of international law being borne in the process of struggle and co-operation between states, are the result of the clash and coordination of the wills of the ruling classes of different states. They are created by sovereign states. The wills of the ruling classes in the different countries, . . . are juridically equal. But it goes without saying that in moulding international law the actual influence exerted by these wills is not at all identical [Quoted in Sweeney, Oliver and Leech, Editors, *The International Legal System*, p. 1218].

From this perspective, it is argued that the concept of a world government is both utopian and dangerously reactionary. What is needed instead is something like a workable federation of states that in a United Nations fashion works toward the resolution of common problems.

[45] Consider the following assertion made by Allen Buchanan, apparently in ignorance of the fact that the Crees (as well as many other indigenous groups), in the very source that he cites, demonstrate a keen awareness of the notion of human rights as it played a role in their own governance: ". . . the Crees have come to appreciate the power of the discourse of human rights. Moreover, while they may have at first embraced the concept of human rights only as an effective though uncomfortably alien instrument, many Crees now seem to have a sincere belief in human rights, . . . " (Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 153). The difficulty is Buchanan's use of the locutions "have come," "alien instrument," and "now" indicate an implied presumption that the Cree

Second, there must be the legal workings such that laws are developed speedily and with enough clarity to address new and evolving conditions. Related to the first requirement, this one might remain unfulfilled in that genuine agreement cannot be found on universalizable principles of international law. For instance, the principle of equality in whatever form it might take might not be as universally accepted as political liberals of various stripes tend to assume.

Third, there must be an authoritative legislature of federated states that has the legitimacy to demand obedience to its statutes and has the power to enforce its laws. This point seems to occupy the minds of most who have thought critically about international law.[46]

And it should be remembered that each of these three requirements are interrelated. Perhaps, then, they ought to be construed as one. In any case, one worry here is that there can be an underestimation of raw political, economic, and military power that exerts itself in international affairs and that, being as powerful as it is, will always succeed in subverting the authority of international law—however well-intentioned and well-conceived. This, coupled with the fact that there are several acting groups in the world other than the states themselves, poses a problem for the assumption that international law and its courts are to be the primary instruments of international law. Although these are important concerns in the development and maintenance of an international legal system, they also arise for states, but in no way prohibit the good faith attempts to create and maintain laws of states. The rules of international law must take into account these factors. But they do not pose principled or conceptual obstacles to the workability of international law. In

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had no conception of human rights until recently. Buchanan owes it to the Cree and to those of us who respect the Cree to either substantiate his claim, or retract it, as there is substantial evidence that they and various other indigenous groups in North America held the concept of land rights as a human right long before Western contact [Grand Council of the Crees of Quebec, *Sovereign Injustice* (Quebec: The Grand Council of the Crees, 1995); J. Angelo Corlett, *Race, Racism, and Reparations* (Ithaca: Cornell University Press, 2003), pp. 165–168]. It will not do to argue that Buchanan's claim concerns only the narrow point that the Crees only recently believed in *human* rights, as distinct from other rights. For the Crees and many other indigenous peoples, rights to land are as deep as rights can get, and the distinction between human rights and other rights has little meaning in the context of their genocidal violations.

[46] One scholar distinguishes two kinds of legitimacy, each of which is required for a state to enjoy full protection under international law: horizontal legitimacy and vertical legitimacy. "The former denotes the legitimacy of the social contract among the citizens that form the state, their political association. The second denotes the legitimacy of the agency contract between the subjects and the governed—the legitimacy of the government itself" (Tesón, *A Philosophy of International Law*, p. 40).

fact, rather than serving as an argument against the viability of international law, these considerations ought to serve as powerful reasons and impetus for the establishment of law and order in the global community.

It is for this reason that there is a fourth requirement, namely, that the international system of law adequately distinguish and handle matters of international public law from those of international private law. The former concern the relations of states to one another, while the latter concern the relations of individuals, groups (such as nongovernment organizations), corporations as they relate to one another across state territorial lines.[47]

From these four requirements, at least eight more can be devised in line with Lon Fuller's requisites for a legitimate legal system in his notion of the "internal morality of law:"[48] First, rules of international law must be general and not *ad hoc* commands. They must, be general enough to protect the interests that nonhumans possess, whether or not they have rights. For if international law is truly global in scope, then it ought to exist for the protection of all good things, human and nonhuman. It is understood, of course, that such laws will favor human welfare over the welfare of nonhumans. But they ought not to do so excessively.

Second, the rules of international law cannot be secret or unpromulgated ones. All peoples should be invited to participate in and contribute to the process of international law, and on as much common ground as possible.

Third, international law cannot be *ex post facto*. This is no trivial matter, as one of the most notorious cases in the 20th century was the Nuremberg trials, wherein Nazi defendants were tried and many convicted. But William O. Douglas points to an interesting fact about the war crimes trials of some Nazi officials:

> . . . no matter how many books are written or briefs filed, no matter how finely the lawyers analyze it, that crime for which the Nazis were tried had never been formalized as a crime with the definiteness required by our legal standards . . . , nor outlawed with a death penalty by the international community. By our standards that crime arose under an *ex post* facto law.[49]

The point here is not that what the Nazis did to millions of ethnic and other minorities in Europe was somehow a good thing—it was evil. But that it was in fact an administration of international *ex post* facto "justice" indicates the

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[47] Barry Carter and Phillip Trimble, *International Law* (Boston: Little, Brown, & Company, 1995), pp. 1–2.

[48] Lon Fuller, *The Morality of Law*, Revised Edition (New Haven: Yale University Press, 1969).

[49] William O. Douglas, *An Almanac of Liberty* (New York: Doubleday and Company, Inc., 1954), p. 96.

dire need for international law to speedily, but carefully, adopt sound rules so that even currently unforeseen (but not unforeseeable) atrocities cannot go unpunished, yet without the administration of odious *ex post facto* determinations. What the International Criminal Court and international war crimes tribunals do not want to engage in is a kind of "victor's justice," which, of course, is no justice at all in the natural law sense.

Fourth, the rules of international law must be formed and translated such that they are understood by the common folk in each country and nation. This satisfies Rawls' publicity requirement for valid law that requires legal obligation based on the principle of fair play.

Fifth, the laws cannot be in any way contradictory, either internally or externally. An example of an internally contradictory legal system is that found in the U.S. insofar as the U.S. Congress in 1940 made it a crime to advocate or teach the overthrow of the government by force, effectively retracting a basic right and duty forged into the Declaration of Independence. Since the Congress has not formally nullified the informational content of the Declaration of Independence (for it to do so would prove quite embarrassing to the "patriotic" who hold the document in such high esteem), we can assume legal and internal contradiction and at the highest of levels. Normatively, I assume here that while the U.S. Constitution and Declaration of Independence have different legal statuses (legal, political, moral, etc.) that the latter has such a status that commands some significant measure of legal respect, if only in the form of a set of important legal principles.

Sixth, the rules of international law must not demand actions, inactions, or attempts thereof beyond a normal state's ability to perform, fail to perform, or attempt to perform (as the case may be). Thus to make an international law that requires all states to relieve the poverty of others, or to never fall into poverty for any reason whatsoever, is a bad law because there are various causes of poverty that are external to human volition and hence beyond the control of various states to relieve at one time or another given contingencies of circumstances faced by such states.

Seventh, the content of the rules of international law must not be in such constant flux that states attempting to abide by them in good faith cannot do so without disobeying them. Changing the international rules of law every day, week, month, or year would cause such confusion and instability that most, if not all, states would decide against compliance—and with good reason.

Finally, there must be at least a minimum of correspondence between the informational content of the rules of international law and how they are administered, say, in the International Criminal Court and other courts of international law. These requirements, at least, are quite parallel, if not identical,

to what goes into making a viable legal system at the state level. Perhaps, as Kant hopes, sufficient global interest and seriousness will be gained over time to make a system of international law a reality.

However, even if the above 11 requirements are satisfied robustly, it is unclear whether their satisfaction is sufficient for a plausible system of international justice. For as Julius Stone reminds us, "It is at least probable, that the magic circle of the unresolved classical problems will not be broken until we cease to assume that the categories, and methods of municipal law are sufficient, or even necessarily relevant, either for testing the validity of international law or for understanding its actual operation."[50] An example of how this caution applies to the problem of international law and justice is the fact that there are various ways to construe the possible relationship between state law and international law, and each requires special argumentative support in order to establish itself as the basic norm of international relations. First, there is the view that international law, properly construed, has proper authority over states' law in both international and states' decisions. Second, there is the position that international law, properly construed, has proper authority over states' laws in international matters, while states' laws have proper authority over international law in matters within states. A third perspective holds that states' laws have legitimate authority over international law in all affairs, while a fourth view is that we ought not to assume any conflict between states' laws and international law such that competing authorities become a real issue.

Now the fourth position is rather unrealistic, as history reveals that there are some drastically conflicting sets of states' laws, which implies that no viable system of international law could possibly accommodate them all without violating the above requirement against the development of a contradictory system of international law—internally or externally. The third position seems to rule out the possibility of an authoritative international law altogether, being skeptical for whatever reasons of its legitimacy. While this view ought not to be presumed untenable, it does suffer from the defect of its not even allowing the development of a system that would resolve disputes between states that would in some cases avert war, terrorism, and other forms of violence. As long as it is at least possible in principle to resolve such problems by way of a system of international law, the question then becomes one of not whether or not there ought to be serious attempts in good faith to establish one such system, but how it ought to be accomplished.

[50] Quoted in Sweeney, Oliver and Leech, Editors, *The International Legal System*, pp. 1205–1206.

This leaves the first two possible approaches to international law. The second view separates the authorities of the respective states and the international legal system according to what counts as states matters on the one hand and international matters on the other. But this begs the question as to what truly counts as being a matter of international justice. What this view requires is a plausible account of precisely when a problem is one for the states to resolve themselves, without interference of the international legal order, properly construed, and when it is beyond the purview of global justice. Lacking such an account, this position's plausibility is quite uncertain.

The first view of the relationship between states' authority and that of the international legal system, properly construed, is akin to the supremacy clause in the U.S. Constitution, which declares the authority of the U.S. Constitution over all 50 states within its ever-expanding domain. Thus if a law in one state, for example, conflicts with a rule stipulated in the U.S. Constitution, it is said to be "unconstitutional" and ought to be struck down. As a possible example of how even a state's constitution or law might conflict with the "law of the land" in the U.S., I offer the fact that Jim Crow laws throughout the U.S. South declared racial segregation to be the law of the South. But as is plain, Jim Crow found itself on a collision course with the Fourteenth Amendment to the U.S. Constitution, and was doomed to eventual death in the courts. Another example might be in the case of the Constitution of the State of California. While Article 1, Section 3 supports the supremacy clause of the U.S. Constitution in declaring that "the Constitution of the United States is the supreme law of the land," Section 4 seems to delimit the right to "liberty of conscience" in a way that the U.S. Constitution does not: "... the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State." Understood is the supreme law of the land's Tenth Amendment granting states rights to pass and enforce laws that are not prohibited by it. Nonetheless, what in effect the U.S. Constitution allows for the California Constitution does not. If this does represent a contradiction between the two constitutions, the view of international law under consideration would argue that just as the U.S. Constitution is the supreme authority in matters where states' laws conflict with it, so too the system of international law, properly devised, should override states' laws wherein there is a conflict between international law and states' laws. The main difficulty with this position on international law is that it asserts the possibility of devising a workable and properly just international legal system wherein states are subject to international law and to the penalties for violating it. While this is a daunting task, I shall, along with Kant, proceed

with a cautious degree of optimism that significant progress can be made in this area. Indeed, with Kant I surmise that the fate of the world depends on success in this arena. And it is with this attitude that I now venture into contemporary theories of global justice as possible grounds for a system of international law.

Chapter 4
Global Justice

I am a citizen of the world—Diogenes the Cynic

. . . international emergencies, from famines to debt crises to terrorism, have destroyed any remaining illusions of the insularity of domestic political theory, and require that philosophers reflect on treasured principles from a global perspective—Bernard Boxill.[1]

. . . justice can never grow on injustice—Clarence Darrow[2]

. . . For whatever the constitution of a government may be, if a single man is found who is not subject to the law, all the others are necessarily at his discretion. And if there is a national leader and a foreign leader as well, whatever the division of authority they may make, it is impossible for both of them to be strictly obeyed and for the state to be well-governed—Jean-Jacques Rousseau.[3]

In recent years, there has been a proliferation of philosophical research on global justice. My aim in this chapter is not to canvass it, but to focus on two of the main ways of conceptualizing global justice. One such view is expressed in John Rawls' *The Law of Peoples*. Another is cosmopolitan liberalism. While there are important variations of each of these respective theories of international justice, I shall focus on their general representative positions. While I find that a certain criticism of Rawls' theory of international justice explicated in this chapter is important and requires his theory to be supplemented by additional principles,[4] I also believe that Rawls' theory

[1] Bernard Boxill, "Global Equality of Opportunity and National Integrity," *Social Philosophy & Policy*, 5 (1987), p. 144.

[2] Clarence Darrow, *Verdicts Out of Court* (Chicago: Quadrangle Books, 1963), p. 144.

[3] Jean-Jacques Rousseau, *Discourse on the Origin of Inequality*, Donald A. Cress (trans.) (Indianapolis: Hackett Publishing Company, 1992), p. 2.

[4] Of course, Rawls was keenly aware that his principles of international justice were incomplete.

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is more promising than cosmopolitan liberalism, which suffers not only from the "problem of compensatory justice," but in ways much deeper than Rawls' theory does. Rawls' theory of global justice, in its focus on sovereignty and tolerance (i.e., liberty) of peoples, suffers from incompleteness, and I will attempt to commence to rescue the Law of Peoples from that difficulty. However, cosmopolitanism of the variety that I engage is inadequate, suffering from fundamental flaws that do not appear to be corrected without doing acute damage to its essential focus on the "equality" of individual persons.

John Rawls' Law of Peoples and Compensatory Justice

In *The Law of Peoples*, Rawls sets forth and defends "principles and norms of international law and practice"[5] and "hopes to say how a world Society of liberal and decent Peoples might be possible."[6] His view is of one of a realistic utopia to the extent that "it extends what are ordinarily thought of as the limits of practical political philosophy"[7] and "because it joins reasonableness and justice with conditions enabling citizens to realize their fundamental interests."[8] In working toward his realistic utopia, Rawls employs a modified version of the original position employed in his earlier works.[9] However, his conception of the veil of ignorance is "properly adjusted" for the problems of international justice: the free and equal parties in the second (globalized) original position do not know the size of the territory or population or relative strength of the people whose basic interests they represent.[10] Although such parties know that reasonably favorable conditions possibly exist for the foundation of a constitutional democracy, they do not know the extent of their natural resources, the level of their economic development, etc.[11] Moreover, Rawls states,

> Thus, the people's representatives are (1) reasonably and fairly situated as free and equal, and peoples are (2) modeled as rational. Also their representatives are (3) deliberating about the correct subject, in this case the content of the Law of

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[5] John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), p. 3.

[6] Rawls, *The Law of Peoples*, p. 6.

[7] Rawls, *The Law of Peoples*, p. 6.

[8] Rawls, *The Law of Peoples*, p. 7. See pp. 11–23 for his elaboration of the nature of a realistic utopia.

[9] See, for example, John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971); *Political Liberalism* (New York: Columbia University Press, 1993).

[10] Rawls, *The Law of Peoples*, p. 32.

[11] Rawls, *The Law of Peoples*, p. 33.

> Peoples. . . . Moreover, (4) their deliberations proceed in terms of the right reasons (as restricted by a veil of ignorance). Finally, the selection of principles for the Law of Peoples is based (5) on a people's fundamental interests, given in this case by a liberal conception of justice (already selected in the first original position).[12]

From this procedure, Rawls argues, the following "principles of justice among free and democratic peoples" will be selected:

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and are parties to the agreements that bind them.
4. Peoples are to observe a duty of nonintervention.
5. Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.
6. Peoples are to honor human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political or social regime.[13]

I shall refer to these as "Rawls' principles of global justice." And I shall argue that they do not include, but neither do they rule out, principles of compensatory justice consonant with "human rights" mentioned in 6, above.

It is interesting to note that over a decade before Rawls himself published *The Law of Peoples* and prior to cosmopolitan liberalism's attack on Rawls' Law of Peoples, Bernard Boxill had observed that the informational content of Rawls' fair equality of opportunity principle and the difference principle (as they are articulated in *A Theory of Justice*) might be extended globally.[14] However, Boxill also provided a set of criticisms of the early theory of cosmopolitan justice devised by Charles Beitz: "that a global principle of fair

[12] Rawls, *The Law of Peoples*, p. 33. One criticism of Rawls' procedure is voiced in the following terms: ". . . he says nothing to help us distinguish between a proper humility or appropriate caution in the light of the several sources of disagreement among reasonable people and a failure to exercise even rather minimal critical scrutiny regarding the quality of the reasoning we or others use to support conceptions of justice" [Allen E. Buchanan, *Justice, Legitimacy, and Self-Determination*, (Oxford: Oxford University Press, 2005), p. 166, 173f.]. It is deemed that Rawls' theory of international justice is overly tolerant of nonliberal societies, resulting in injustice that could and should otherwise be addressed. But compare David Reidy, "A Just Global Economy: In Defense of Rawls," *The Journal of Ethics*, 11 (2007), pp. 193–236.

[13] Rawls, *The Law of Peoples*, p. 37.

[14] Boxill, "Global Equality of Opportunity and National Integrity," p. 144.

equality of opportunity would undermine cultural diversity, national autonomy, and individual self-respect, and create international instability; and it probably presupposes the dangerous institution of a world government."[15] Throughout my discussion of cosmopolitan liberalism, I shall refer to Boxill's concerns as the "objection from diversity," the "objection from national autonomy," the "objection from individual self-respect," and the "objection to a world government," respectively.

Various questions might be raised about Rawls' theory of international justice,[16] including one concerning the possible lexical ordering of Rawls' Law of Peoples principles [(1)–(8)] because such an ordering is essential to the proper application of such principles under conditions of uncertainty and rights conflicts.[17] But whether or not, and, if so, how the principles ought to be lexically ordered, this set of principles is importantly incomplete, especially in light of Rawls' repeated claim that "decent" peoples have rights to property, territory, and life. And consonant with Rawls' admission that "other principles need to be added, . . . "[18] I offer a new international principle of justice that complements Rawls' own list.

International Justice and Compensatory Justice

While recognizing Boxill's seminal discussion of the possible extension Rawls' fair equality of opportunity and difference principles to global contexts, I shall focus on Rawls' global justice principles as he states and defends them in *The Law of Peoples*.[19] Rawls' eight principles of international justice seem to lack any mention or guarantee of compensatory justice between peoples. Yet without such a principle, there can hardly be a realistic global utopia as Rawls desires in that part of what helps to ensure social stability at the global level would be absent: remediation through compensation when certain rights are violated. Insofar as Rawls' principles of international justice are to protect basic rights that would best ensure

[15] Boxill, "Global Equality of Opportunity and National Integrity," p. 145.

[16] Thomas Pogge, "Rawls on Global Justice," *Canadian Journal of Philosophy*, 18 (1988), pp. 227–256; "Rawls on International Justice," *The Philosophical Quarterly*, 51 (2001), pp. 246–254.

[17] Burleigh T. Wilkins, "Principles for the Law of Peoples," *The Journal of Ethics*, 11 (2007), pp. 161–175.

[18] Rawls, *The Law of Peoples*, p. 37.

[19] I return to Boxill's extension of Rawls' fair equality of opportunity principle to global contexts below when I assess cosmopolitanism's critique of Rawls.

global stability, and insofar as rights of remediation are basic rights along with substantive rights,[20] then Rawls' principles lack an important aspect of what is essential to international justice in a realistic utopia. Liberal and decent peoples simply must compensate those whom they wrongfully harm, as is implied by the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. It is their duty correlated with the right of those they wrongfully harm to be compensated. And it simply will not do to argue in Rawls' defense that matters of compensatory justice are not the proper domain of Rawls' theory of global justice, as Rawls' principles reflect a concern for conditions of war and poverty and so imply remedial rights. Thus it is an omission on Rawls' part—not to mention on the parts of various other philosophers who write on global justice—that there is not even a mention of a basic principle of compensatory justice. This would imply that reasonably just societies have no duties to compensate other societies they have harmed by way of, say, reparations for past and severe injustices. Because such injustices are so prevalent even in societies that Rawls believes are reasonably just, the issue of compensatory justice is especially important. Why would a party in the international original position select principles 1–8 above without some principle(s) of remedial rights that help(s) to guarantee them—either by their deterrent effect or by their granting the authority to an international court of justice to award reparations or other appropriate compensation to severely and wrongfully harmed peoples by those who have wrongfully harmed them? It is reasonable and rational for those Peoples in the original position to select not only Rawls' principles, but principles of compensatory justice that properly and fairly undergird them. But precisely what might some such principle be in the context of international justice?

Consider the following principle of compensation which I shall call the "principle of international compensatory justice" (PICJ) as it is intended to supplement Rawls' eight principles of international justice, though in such a way that it does not indicate a lexical ordering:

> PICJ: To the extent that peoples wrongfully harm other peoples, they have a duty to compensate those they wrongfully harm in proportion to the harm caused them, all things considered.

Now this principle of international justice is phrased in terms of a *duty* of peoples to compensate others whom they wrongfully harm wherein the

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[20] Hence the old legal adage: "Absence of remedy is absence of right." One author repeatedly accuses Rawls of devising a "lean" and "truncated" list of rights [Buchanan, *Justice, Legitimacy, and Self-Determination*, pp. 160–161]. Apparently, Buchanan fails to take Rawls seriously when Rawls prefaces his listing of human rights with the locution: "Among the human rights are . . . " (Rawls, *The Law of Peoples*, p. 65).

object of the duty has a corresponding right to the compensation in question. But it might also be couched in terms of a *right* that all peoples have to such compensation for experienced harmful wrongdoings wherein the object of the right has a duty to compensate the peoples they have wrongfully harmed:

> PICJ: To the extent that peoples are wrongfully harmed, they have a right to be compensated in proportion to the harms suffered, all things considered.

Yet these principles of international justice are themselves vague, as they do not indicate precisely who ought to compensate whom, for it is open for someone to argue that even third parties have a duty of compensation toward those who have been wronged, whether or not the third parties have served as contributory causes of the harmful wrongdoing in question. Perhaps the precedent of anti-bad Samaritan legislation in certain jurisdictions of the U.S. and elsewhere, for example, might serve as grounds for such a claim. Thus clarification is in order if sense is to be made of the idea of international compensatory justice as a principle of international justice.

Consider this revised version of the duty of compensatory justice for the Law of Peoples:

> PICJ*: To the extent that peoples wrongfully harm other peoples, they have the primary *duty* to compensate those they wrongfully harm in proportion to the harm caused them, all things considered.

According to our revised principle of international justice, peoples who wrongfully harm other peoples have a duty of compensation to them pursuant to our newly revised PICJ, and the corollary rights version of the compensatory PICJ seems likewise to hold:

> PICJ*: Peoples have a *right* to be compensated in proportion to the harms wrongfully suffered, all things considered, at the hands of their primary offender(s).

I shall refer to both the duty and rights versions of PICJ* as one such principle. One point here is that no genuinely third party peoples have a duty to compensate what another people has a primary duty to compensate. Additionally, what Rawls himself refers to as "outlaw" states or societies are not to escape their compensatory duties toward those they have wrongfully harmed. And it is inconceivable that free and equal parties in the international original position would ignore compensatory justice considerations. For if they were to do so, then the Law of Peoples would lack a basic component to any legitimate and workable legal order. And recall that it is Rawls himself who seeks to articulate and defend principles of international justice that can be implemented with reasonable workability in a *realistic* utopia. Even in a realistic utopia rights are violated now and then, and require rectification if it is to remain a reasonably just social scenario. Nothing about Rawls'

international original position excludes the possibility of the international principle of compensatory justice.

Moreover, principle of international compensatory justice (PICJ*) fits well into Rawls' list of eight principles. It supports (1) in that it provides a basic rule in cases wherein peoples' rights to independence and freedom are disrespected by other peoples. Peoples wrongfully harming other peoples are to compensate those they harm to the extent of their harming them, all things considered. Furthermore, PICJ* implies that rules (4) and (5) of Rawls' list of principles, above, can be broken by decent peoples in certain cases where the ninth rule (PICJ*) is violated in a flagrant manner by an outlaw state. Indeed, third-party peoples might consider it their duty to confront the guilty peoples who refuse to adequately compensate the wronged party. Indeed, in cases wherein an outlaw state refuses to compensate peoples it has wrongfully and severely harmed, (5) must be supplemented by a corollary one stating that in defense of others war and certain other forms of political violence may be justified. I have in mind here cases where generations of race-based slavery (a case Rawls himself discusses) go uncompensated, or where indigenous peoples are victimized by genocide for the sake of societal expansion—again, without compensation. In such instances, it is clear that (5) can be broken in light of his claim (a claim that he never recanted) that at times militancy is justified.[21] Indeed, it would appear that the PICJ* upholds (6) insofar as it is plausible to think that (1) relies on such general rights being protected by compensatory rights. PICJ* further implies, in the waging of war or other means of political violence, that certain restrictions are to be obeyed in terms of going to war or engaging in political violence for the sake of enforcing laws of compensation and protecting compensatory rights. Finally, as mentioned earlier, PICJ* is congruent with (8) in that the former allows for the assistance of third-party peoples to involve themselves in the administration of compensatory justice in cases where offender peoples refuse to compensate those peoples whom they have wrongfully harmed, or where such compensation is forthcoming but grossly inadequate to return the compensated peoples to a decent level of living subsequent to the harms caused by the wrongful action of the offender peoples.

Thus a plausible principle of international compensatory justice (PICJ*) is both necessary for the Rawlsian analysis of international justice, and congruent with many of the principles as stated. This revised version of the duty and right of compensatory justice should be added to Rawls' eight principles [(1)–(8)] in order to better locate peoples in Rawls' realistic utopia. For if

[21] Rawls, *A Theory of Justice*, p. 368: "Now in certain circumstances militant action and other kinds of resistance are surely justified."

consistently respected, such a principle would serve to maintain stability between peoples with good intentions regarding a reasonably just global order. Perhaps additional principles of remedial justice are needed to complement Rawls' principles of global justice.

Justice, Cosmopolitan Style

As one commentator puts it: "A lot is at stake in the current debate about the most desirable type of world order and this is why we need to examine carefully the arguments of those who assert that with the end of the bipolar world the opportunity now exists for the establishment of a cosmopolitan world order."[22] My discussion considers some of the arguments by leading cosmopolitan critics of Rawls' Law of Peoples, and considers cosmopolitan liberalism on its own terms. But it does not highlight the various differences between cosmopolitan theories.[23] Rather, it seeks to concentrate on some ideas that most, if not all, cosmopolitan liberals share with each other.

Among the various differences between cosmopolitanism and Rawls' Law of Peoples is that the former indexes the subjects of international justice to individual persons, while Rawls places the emphasis on justice between states. One of numerous examples of this view is found in the assertion that "We must come to see all humanity as tied together in a common moral network. . . . Since morality is universalistic, its primary focus must be on the individual, not the nation, race, or religious group."[24] One is struck, however, by the unreasonableness of being asked to choose between focusing concerns about global justice on either individuals or collectives, and one is left wondering precisely why this is a choice one *must* make, especially when it is not conceptually absurd to simultaneously affirm the need to *both* address concerns of justice between individuals and those between groups. This leads to a second difference between these theories, as cosmopolitan liberals criticize Rawls' position for not being equipped to address questions of injustice within states since the point of Rawls' theory of international justice is justice between states. Thus, it is argued by cosmopolitan liberals, Rawls' Law of

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[22] Chantel Mouffe, *On the Political* (London: Routledge, 2005), p. 90.

[23] Samuel Scheffler, "Conceptions of Cosmopolitanism," *Utilitas*, 11 (1999), pp. 255–276; reprinted in Samuel Scheffler, *Boundaries and Allegiances* (Oxford: Oxford University Press, 2001), Chapter 7.

[24] Louis Pojman, "The Moral Response to Terrorism and Cosmopolitanism," in James Sterba, Editor, *Terrorism and International Justice* (Oxford: Oxford University Press, 2003), p. 146.

Peoples fails to address deeper injustices in the form of inequalities within states, and this will lead to toleration of states that mainstream injustices in the form of inequality.[25]

Of course, the cosmopolitan position here is often charged with a kind of cultural imperialism in the form of Bernard Boxill's objection from cultural diversity,[26] or in legal terms, paternalism. This point of criticism is latent in Rawls' own theory of domestic justice when he states that "the principle of fair opportunity can only be imperfectly carried out, at least as long as the institution of the family exists."[27] And Boxill extends Rawls' reasoning to the global context: so long as there are variations in how families raise their children, and analogously, as long as there are variations in how states behave culturally, the principle of fair equality of opportunity is limited in its application. If cultural ideals, for instance, interfere with the ideals favored by other cultures, this might well amount to a barrier to the implementation of the Rawlsian principle of fair equality of opportunity in global contexts. Indeed, Boxill argues, fair equality of opportunity might very well abolish cultural diversity![28] For it would be paternalistic and imperialistic (or, as Boxill argues, "invidious and presumptuous") to insist according to which values equality ought to be realized.[29] And there are degrees to which paternalism can manifest itself. While few would endorse hard paternalism wherein the state is justified in intervening into the affairs of citizens whenever it sees fit and despite the fact that the actions are voluntary because such an interference violates personal autonomy, others might endorse a softer

[25] It is important, however, to understand that it is quite possible that the difference between Rawlsian statism and cosmopolitan liberalism on the basic structure of international law might well turn out to be less than well-grounded. As Buchanan points out,

> Once we take the idea of bundling sovereignty seriously we must consider the possibility that the contrast between a "state-centered" and a "world-state" system will become blurry. The more political differentiation there comes to be within states . . . and the stronger international legal structures become, the more difficult it will be to draw a sharp contrast between a state-centered and a world-state system (Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 57).

[26] Boxill, "Global Equality of Opportunity and National Integrity," 148f. Basically, the objection is that "the world is made up of different societies with different cultures and different standards of success" and that these pose insurmountable roadblocks before the cosmopolitan liberal attempt to successfully apply the Rawlsian principle of fair equality of opportunity.

[27] Rawls, *A Theory of Justice*, p. 73.

[28] Boxill, "Global Equality of Opportunity and National Integrity," p. 150.

[29] Boxill, "Global Equality of Opportunity and National Integrity," p. 148.

version of it, wherein the state is sometimes justified in interfering into the affairs of its citizens only when it is to prevent serious harm to other citizens and where the actions of said citizens are voluntary. This Millian position is endorsed by, among others, Joel Feinberg and Gerald Dworkin, respectively.[30] And it is vital to see how Boxill's objection from cultural diversity serves as a challenge to cosmopolitan liberalism's reliance on a rather strong principle of global equality of opportunity.

Since the goal of this chapter is not to provide a comprehensive account of cosmopolitan liberal theories, but rather to juxtapose certain aspects of them to the Rawlsian account of international justice, I shall provide a set of claims with which I believe most, if not all, cosmopolitan liberals[31] concur:

(1) Various global structures (political, economic, cultural, etc.) eventuate, intentionally or not, in conditions that create and sustain injustice for millions of persons globally;
(2) The injustices in (1) include, but are not limited to, inequalities of opportunity to realize basic and essential conditions of living;
(3) The global structures in (1) are often, if not typically, those of the ruling and wealthiest countries in the world;
(4) Those who cause the injustices in question have duties to address them systemically by way of humanitarian intervention;
(5) Corresponding to the duties of those responsible for the injustices in (1) are rights that all persons in the world possess to equality of opportunities to realize the basic and essential conditions of living.

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[30] On paternalism, see John Stuart Mill, *On Liberty* (Indianapolis: Hackett Publishing Company, 1978); Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press, 1980), Chapter 5; Gerald Dworkin, "Paternalism," in Joel Feinberg and Hyman Gross, Editors, *Philosophy of Law*, 5th Edition (Belmont: Wadsworth Publishing Company, 1995), pp. 208–19; Gerald Dworkin, "Paternalism: Some Second Thoughts," in Joel Feinberg and Hyman Gross, Editors, *Philosophy of Law*, 5th Edition (Belmont: Wadsworth Publishing Company, 1995), pp. 219–223. Also see Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965), Chapter VI.

[31] Some of the leading philosophical proponents of some version or another of cosmopolitan liberalism include: Brian Barry, *Liberty and Justice* (Oxford: Oxford University Press, 1989); Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979); Buchanan, *Justice, Legitimacy, and Self-Determination*; Darrel Moellendorf, *Cosmopolitan Justice* (Boulder: Westview Press, 2002); Onora O'Neill, *Towards Justice and Virtue* (Cambridge: Cambridge University Press, 1996); Thomas Pogge, *World Poverty and Human Rights* (London: Polity Press, 2002); Fernando Teson, *A Philosophy of International Law* (Boulder: Westview Press, 1998).

We must bear in mind that there may be some cosmopolitan liberals who do not subscribe to all of these claims, as "there is no consensus among contemporary philosophers and theorists about how the precise content of a cosmopolitan position is to be understood."[32] Nonetheless, the above claims seem to capture a sufficiently robust version of what I shall refer to as "justice cosmopolitanism"[33] that is helpful in our quest to assess some of its central tenets. As Samuel Scheffler notes in describing this version of cosmopolitanism:

> Cosmopolitanism about justice is opposed to any view that posits principled restrictions on the scope of an adequate conception of justice . . . it opposes any view which holds, as a matter of principle, that the norms of justice apply primarily within bounded groups comprising some subset of the global population. For example, this type of cosmopolitanism rejects communitarian and nationalistic arguments to the effect that the principles of distributive justice can properly be applied only within reasonably cohesive social groups . . . cosmopolitanism about justice is equally opposed to liberal theories which set out principles of justice that are to applied in the first instance to a single society,. . . . While remaining otherwise sympathetic to Rawls's ideas, these cosmopolitan critics have sought to defend the application of his principles of justice to the global population as a whole.[34]

In casting cosmopolitanism primarily in terms of considerations of justice, I am not ignoring "cultural cosmopolitanism," which normatively construes persons as citizens of the world instead of nationalistic ones. My discussion shall focus mainly on justice cosmopolitanism, though I shall delve into issues that raise concerns about culture. In fact, the issues I raise about cosmopolitan liberalism's denial of the moral relevance of culture, ethnicity, etc.[35] amounts to a disrespecting of the rights to compensatory justice for various groups that were and are oppressed by certain states and those organizations and individuals supporting them.

While it is admirable that cosmopolitan liberals seek a global order that would hold countries and nongovernmental organizations to duties of justice in making sure that those without have enough to make it in the world, it is unclear how such duties are to be well-grounded so as to avoid a kind of

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[32] Scheffler, *Boundaries and Allegiances*, p. 111.

[33] A similar view is referred to as "moral cosmopolitanism" in Charles Beitz, "Cosmopolitanism and Global Justice," *The Journal of Ethics*, 9 (2005), pp. 11–27.

[34] Scheffler, *Boundaries and Allegiances*, p. 112.

[35] Consider Martha Nussbaum's assertion that "To count people as moral equals is to treat nationality, ethnicity, religion, class, race, and gender as 'morally irrelevant'—as irrelevant to that of equal standing" [Martha Nussbaum, "Reply," in Joshua Cohen, Editor, *For Love of Country* (Boston: Beacon Press, 1996), p. 133].

"fuzzy innocence" against which Richard Falk cautions.[36] Just what is the duty in question? Is it a duty of assistance to relieve *poverty*, as Thomas Pogge and many other cosmopolitan liberals advocate? Or, is it a duty of assistance to address those truly in *need*? For as Larry Temkin argues, an individual or a group can be poor relative to others within their society, but be relatively wealthy, globally speaking. This suggests that poverty is a comparative notion, though the concept that seems to justify a duty of assistance seems to be one of need (another comparative concept), not poverty.[37]

Cosmopolitanism, Equality, and the Duty of Humanitarian Assistance

Once bases of need are determined, *can* they be realized in the way that cosmopolitan liberalism seems to suppose they can? This question poses an "ought implies can" problem for global justice, as it might be argued that there are genetic differences between humans that prevent conditions of equality from obtaining even with significant efforts to equalize humans. It is noteworthy, however, that genetics does *not* support such a skepticism about global equality.[38] Moreover, precisely how ought these duties to be distributed? Just who or what has them? The moral duty to provide for those in need who are victims of natural disasters, I think, can be well-grounded in the duty of assistance based on anti-bad Samaritan laws at the state level. And a corollary duty can be well-grounded at the international level, though cosmopolitan liberals need to explain precisely the content of such an international duty along these lines and how it might be incorporated into international law. That much is relatively uncontroversial, so long as the duty is construed as an imperfect one, and the duty's fulfillment does not pose an unreasonable risk of harm[39] to those carrying out the duty in good faith.

But a number of difficulties arise here for the cosmopolitan liberal account of global justice and equality. G. A. Cohen points out that the Marxist notion

[36] Richard Falk, "Revisioning Cosmopolitanism," in Joshua Cohen, Editor, *For Love of Country* (Boston: Beacon Press, 1996), p. 57.

[37] Larry Temkin, "Thinking About the Needy: A Reprise," *The Journal of Ethics*, 8 (2004), pp. 412–413. For a discussion of global poverty and need, see *The Journal of Ethics*, 8:4 (2004); Garrett Cullity, *The Moral Demands of Affluence* (Oxford: Oxford University Press, 2004); Paulette Dieterlen, *Poverty* (Amsterdam: Rodopi, 2005).

[38] Theodosius Dobzhansky, *Genetic Diversity & Human Equality* (New York: Basic Books, Inc., 1973).

[39] For an analysis of the concept of harm, see Joel Feinberg, *Harm to Others* (Oxford: Oxford University Press, 1984).

of voluntary equality within a state assumes plenary abundance driven by capitalist modes of production. But Marxism is problematic in its insistence on equality in light of the lack of effectively limitless productive power.[40] This "pre-green" mentality has an interesting parallel to cosmopolitanism in that the global equality that cosmopolitan liberals advocate seems unrealistic in light of the realities of quite limited powers of production coupled with the lack of abundance of food, shelter, and clothing relative to the ever-increasing numbers of humans on earth. Thus it is unclear that the cosmopolitan ideal of wealthier states and nongovernment organizations assisting those in poverty can succeed in the long run, though with proper education, perhaps this problem can be dealt with in part by convincing all states and individuals to cease overpopulating the earth such that now dwindling natural resources will in fact sufficiently serve humans in the future. For just as it is "unrealistic to hope for voluntary equality in a society which is not rich,"[41] it is unrealistic to hope for global equality in a world wherein most individuals and societies continue, for whatever reasons, to overpopulate with reckless abandon, thereby threatening the viability of future generations with a significant lack of sufficient natural resources. Nonetheless, the cosmopolitan liberal may counter with a cautious optimism, ". . . we may envisage a level of material plenty which falls short of the limitless conflicts-dissolving abundance projected by Marx, but which is abundant enough so that, although conflicts of interest persist, they can be resolved without the exercise of coercion."[42] So it is at least logically possible, and even practically so, to evade this pragmatic concern with cosmopolitan egalitarian distributive justice. But precisely how probable this prospect is in light of history is, of course, unclear.

Related to the problem of over-population of humans, however, is a difficulty confronting Marxists and equality, one that seems to also face cosmopolitanism insofar as it is committed to the latter. "Starving people," Cohen argues, "are not necessarily people who have produced what starving people need; and if what people produce belongs by right to them;[43] . . . then

[40] G. A. Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge: Cambridge University Press, 1995), p. 127. See also G. A. Cohen, *If You're an Egalitarian, How Come You're So Rich*? (Cambridge: Harvard University Press, 2000), p. 114.

[41] Cohen, *Self-Ownership, Freedom, and Equality*, p. 129.

[42] Cohen, *Self-Ownership, Freedom, and Equality*, p. 131.

[43] "The great cry of world Justice today is that the fruit of toil go to the Laborer who produces it" [W. E. B. DuBois, *An ABC of Color* (New York: International Publishers, 1963), p. 109].

starving people who have *not* produced it have no claim on it."[44] Now as Cohen ingeniously explains, this

> . . . forces a choice between the principle of a right to the product of one's labor embedded in the doctrine of exploitation and the principle of equality of benefits and burdens which negates the right to the product of one's labor and which is required to defend support for very needy people who are not producers and who are, *a fortiori*, not exploited.[45]
>
> When those who suffer dire need can be conceived as those coinciding with, or as a subset of, the exploited working class, then the socialist doctrine of exploitation does not cause much difficulty for the socialist principle of distribution according to need. But once the really needy and the exploited producers no longer coincide, then the inherited doctrine of exploitation is flagrantly incongruent with even the minimal principle of the welfare state.[46]

And what Cohen reveals about these Marxist principles, seemingly assumed or even adopted explicitly by cosmopolitan liberals, concerning states appears to apply globally. Given the environmental crises we have been facing for decades, it is far from obvious that material consumption will be matched by material production such that cosmopolitan ideals of global equality can be realized without posing serious problems for the well off. This poses the problem of good Samaritanism, which states that there are duties of assistance to endangered strangers, but that such duties hold only to the point at which those assisting others are themselves placed at genuine risk of their own well-being. And it is an empirical question as to how much worse off the better off must become for the cosmopolitan ideal of global equality and redistributive justice to be deemed unreasonable. Cohen states the problem in cautionary terms:

> When aggregate wealth is increasing, the condition of those at the bottom of society, and in the world, can improve, even while the distance between them and the better off does not diminish, or even grows. Where such improvement occurs (and it has occurred, on a substantial scale, for many disadvantaged groups), egalitarian justice does not cease to demand equality, but that demand can seem shrill, and even dangerous, if the worse off are steadily growing better off, even though they are not catching up with those above them. When, however, progress must give way to regress, when average material living standards must fall, then poor people and poor nations can no longer hope to approach the levels of amenity which are now enjoyed by the world's well off. Sharply falling average standards mean that settling for limitless improvement, instead of equality, ceases to be an option, and huge disparities of wealth become correspondingly more intolerable, from a moral point of view.[47]

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[44] Cohen, *If You're an Egalitarian, How Come You're So Rich*? p. 106.

[45] Cohen, *If You're an Egalitarian, How Come You're So Rich*? p. 108.

[46] Cohen, *If You're an Egalitarian, How Come You're So Rich*? pp. 110–111.

[47] Cohen, *If You're an Egalitarian, How Come You're So Rich*? pp. 113–114.

This leads to a related problem for cosmopolitan liberalism, call it the "economic imperialism objection to global equality."[48] It is related to Boxill's objection from cultural diversity, and states that as cosmopolitan liberals are inclined to argue, poverty may prevent people from realizing many ideals, cultural and otherwise. But, this objection presses, if to eradicate such poverty means that exclusively Western values must be implemented, then to the extent that economics dictates culture, which implies that Western values will control the values of Westerners and non-Westerners alike, it will threaten to destroy non-Western cultures and ways of being. The point of this objection is not to insist on the immutability of cultures, Western or otherwise. Rather, cosmopolitan liberals, if they want to demonstrate a genuine concern for cultural differences, must explain how combating and preventing global poverty will not pressure unnecessarily those in non-Western cultures from succumbing to Western ideals when they would not otherwise desire to do so. The replication of any ideals—Western or not—ought always to be done voluntarily, not because one is economically coerced to do so in order to survive or to avoid dire poverty. This is especially the case where the consequences of poverty and need can be averted without cultural change. As Boxill exclaims, ". . . we may not yet be in a position to confidently claim that poor countries must replicate the West to escape from poverty."[49]

Given the above considerations and what is at stake, it would appear that cosmopolitanism has an empirical burden of demonstrating how cultural diversity can be maintained in the midst of addressing the needy. For "if cultural diversity can thrive in a world without poverty, and if the distinct cultures can, while changing, yet retain distinct standards of success, global fair equality of opportunity may remain an unapproachable ideal."[50] Why is the preservation of cultural diversity important? This is where Boxill grounds the objection from cultural diversity in the objection from individual self-respect. As Boxill notes, cultural diversity lies at the heart of self-respect,[51] which is, he implies, a necessary condition of justice. There simply cannot be a just social order, domestically or globally, without those in it being respectful of themselves. And community life is essential to cultural elements that ground self-respect. After all, "By what reasoning do we know that desires for higher incomes will be satiated before pluralism is obliterated? And if they are not, why should we believe that any ideal will displace the sole and triumphant desire for

[48] The idea behind this objection is borrowed from Boxill, "Global Equality of Opportunity and National Integrity," pp. 150–151.

[49] Boxill, "Global Equality of Opportunity and National Integrity," p. 152.

[50] Boxill, "Global Equality of Opportunity and National Integrity," p. 152.

[51] Boxill, "Global Equality of Opportunity and National Integrity," p. 154.

wealth?"[52] The concern, of course, is to realize a world of autonomous, sovereign, and culturally diverse states, each with its own sustaining power of growth[53] within environmental limits. Yet "a nation which is less affluent than others can still be autonomous. A nation which is the least-advantaged class of other nations is likely to lose its autonomy, and to have to order its affairs according to their dictates."[54] A prime example of this problem is the Westernization of Mexico and Latin American countries that see as their way out of poverty the adopting of Western values, values that to a certain extent can and often do endanger the family values that are so central to our way of life as Latinos/Hispanics. One way this occurs is when so many of us Latinos cross the U.S. border for employment, and end up adopting Western values that are incongruent with our original ones. It is unclear whether this happens as a natural process of acculturation in the meeting of peoples, or whether it is necessary in order to secure and maintain the employment so desperately needed to survive. In either case, it strongly suggests a caution that the equality that cosmopolitan liberals advocate must concern itself with safeguards against the threats to cultural and ethnic identity that lie at the foundation of self-respect.

It is dubious, then, that cosmopolitan liberalism's quest for global distributive justice is realizable in that of the problems that it seems to pose for diverse cultures, which serve as bases of self-respect, which in turn is necessary for justice. Global poverty and need must be dealt with in ways that retain cultural diversity as much as practically possible, and when that is not possible, cultures ought not to be modified or changed by economic or other coercive means. Intuitively, it seems possible to address at least most needs of global peoples with no economic or cultural strings attached. But this sort of an approach to the needy tests the motives of those addressing the needs. And some of Rawls' principles for global justice are precisely intended to speak to this problem, delimiting the conditions under which it is justified to assist in the eradication of need.

But what about need and injustices that are caused, wrongfully, by humans? Do the victims of such harmful wrongdoings have *rights* that are global insofar as who the duty-bearers are concerned? It would seem to distort plausible notions of collective responsibility to think that anyone but those who are significantly responsible for nonnatural harmful wrongdoings

[52] Boxill, "Global Equality of Opportunity and National Integrity," p. 155.
[53] Boxill, "Global Equality of Opportunity and National Integrity," p. 168.
[54] Boxill, "Global Equality of Opportunity and National Integrity," p. 158.

have duties *of compensation* to address the problems. But as Temkin states in terms of good Samaritanism[55] and the pool lounger case:

> After all, I *can* have a moral obligation to save a drowning child that someone else has thrown in a pool, or to drive a bleeding hit and run victim to the hospital. Of course, . . . my obligations towards others can be limited by the extent to which I can effectively aid them and the costs to me of my doing so, but the mere fact that another agent is responsible for someone's plight is not sufficient to automatically absolve me of obligations towards them.[56]

Thus there might be a duty to assist, either in a causally focused or a causally amorphous manner,[57] those in need either by results of natural events beyond their control or due to the actions of others. And while the former kinds of cases are relatively unproblematic in that most everyone believes that it is morally problematic to not assist those who are victimized by way of famines caused by, say, natural disasters beyond our control or predictability, the latter kinds of cases fall clearly within the purview of anti-bad Samaritan statutes and in no way excuse from responsibility those who could assist those in need without undue cost to themselves. But these are not duties of compensation, but of assistance. For duties of compensation pertain to those that are bound to make the injured parties as whole as they were prior to being injured. There are, rather, duties of assistance to those in need because of circumstances not of their own doing. In such cases, then, the well-off cannot simply ignore the needy without being subject to serious moral criticism.[58]

Cosmopolitanism and Compensatory Justice

But the problem of poverty or genuine need caused by harmful wrongdoing requires a more fine-grained analysis of who is or ought to be responsible for what. It is implausible to argue, as many cosmopolitan liberals do, that an entire country has a duty to assist in the eradication of global poverty and to address long-term issues of inequality if in fact only a certain, say, powerful elite in that country were indeed responsible for the problems in question, due to fraud, nepotism, etc. And this is true despite the fact that

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[55] For discussion of anti-bad Samaritanism, see Joel Feinberg, *Freedom and Fulfillment* (Princeton: Princeton University Press, 1992), Chapter 7; John Kleinig, "Good Samaritanism," *Philosophy and Public Affairs*, 5 (1975), pp. 382–407.

[56] Temkin, "Thinking About the Needy: A Reprise," pp. 421–422.

[57] This distinction is borrowed from Peter Unger, *Living High and Letting Die* (Oxford: Oxford University Press, 1996), p. 48.

[58] Temkin, "Thinking About the Needy: A Reprise."

such responsible agents may have been elected by the people in some meaningfully democratic way. This is true not simply because of the widespread problem of the diffusion of responsibility in social contexts, but because of the fact that the citizens may not have (or could not reasonably be said to have) known about the workings of the primary responsible agents of the harmful wrongdoings in question. The most that can be said here is that, to the extent that the citizens of that country could and should have known about what their elected leaders did that might or would likely lead to harmful wrongdoings of others, that is the extent to which the citizens should be held liable and have a duty of addressing the problems adequately. But this is at best a secondary form of responsibility.

It would seem reasonable under the circumstances to adopt a differentialist model of addressing serious instances of substantial nonnatural injustice. First, all primary responsible agents have duties of compensation toward those they have seriously and wrongfully harmed. Only subsequent to depleting all of their personal assets in addressing an injustice for which they are primary responsible agents would it be justified to hold citizens of the responsible country liable for compensatory damages, and this is largely because of the deeper pockets that groups have.[59] This strategy ensures that those who make the worse decisions and have them carried out are held accountable for what they do to significantly and wrongfully harm others. So if global need is caused by, say, a policy of the U.S., then the first question to ask is who enacted and directly supported the policy and should have known the deleterious effects it would have on others. Another key question is who, of secondary agents, knew or should have known about it. In some cases, holding primary agents responsible for their harmful wrongdoings is sufficient to solve even problems of poverty. After all, if the primary agents are high-level government and corporate executives, there are plenty of personal assets for resolving, or come close to resolving entire circumstances of need, at least in many cases. Only after all such personal assets are depleted in compensating for the damages incurred should any attempt be made to approach those indirectly responsible for their part in the wrongful harms. Assumed here, of course, is a plausible principle of proportional compensation according to which all wrongful harms should be compensated according to the levels or degrees of responsibility of those who are responsible (liable) for them. Thus most or much of the compensation should be paid, if possible given the situational factors of the case, by those most responsible for the creation of the injustice in the first place. This plan is not meant to

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[59] After all, in many cases the compensatory pockets of such primary responsible agents, no matter how deep, will not be sufficient to adequately compensate their victims.

address (or deny the importance of) the cosmopolitan liberals' concern with equality of opportunity. Rather, it is to address the harms themselves and those directly responsible for them.[60]

Those wrongfully harmed have rights to compensation, while those primarily responsible have duties of compensation. And no theory of governmental or corporate limited liability carries sufficient moral weight to override these factors.[61] In their single-minded search for principles of distributive justice, the cosmopolitan liberals seemed to have downplayed, if not given short-shrift to, principles of compensatory justice. An example of this is found in Pogge's attempt to address the "effects of a common and violent history:"

> The present circumstances of the global poor are significantly shaped by a dramatic period of conquest and colonization, with severe oppression, enslavement, even genocide, through which the native institutions and cultures of four continents were destroyed or severely traumatized. This is not say (or deny) that affluent descendants of those who took part in these crimes bear some special restitutive responsibility toward impoverished descendants of those who were victims of these crimes. The thought is rather that we must not uphold extreme inequality in social starting positions when the allocation of these positions depends upon historical processes in which moral principles and legal rules were massively violated. A morally deeply tarnished history should not be allowed to result in *radical* inequality.[62]

One difficulty with this approach is that it wrongly construes the solution to the problem, not as one of reparative justice in terms of compensation as outlined above, but in terms of equal opportunities for those who are the least advantaged by historic injustice. In short, it subsumes any putative right to compensatory justice under the presumed right to equality.

To see the problematic nature of this position, one need only think about it in terms of current U.S. law. Currently under the law in the U.S. those who wrongfully harm others can be held liable under certain circumstances for

[60] Note that I do not mention those who, perhaps as secondary responsible agents, benefit from such harmful wrongdoing of their government gone awry. This is because it is unclear precisely why merely benefiting from harmful wrongdoing qualifies one as a compensator of it, absent some other relevant responsibility relevant factor. I thank an anonymous referee for bring this problem to my attention.

[61] It might be asked whether the International Criminal Court or state governments ought to decide such cases of personal liability of government and corporate wrongdoers. As the ICC itself urges, all cases of global import are to seek adequate resolutions at the state levels prior to bringing such cases to the ICC. With this double-tiered system in mind, it is hopeful that most cases will be resolved fairly. I thank an anonymous referee for bringing this problem to my attention.

[62] Thomas Pogge, *World Poverty and Human Rights* (London: Polity, 2002), p. 203.

compensatory damages. And if my amendment to Rawls' theory of global justice holds, then what are needed are remedial principles of compensatory justice to support the rights affirmed in his substantive principles of justice. Indeed, there is no conceptual absurdity in this idea, nor is it a practical impossibility even at the level of international law—assuming that an international system of justice is possible in the first place. But what Pogge asserts is that, instead of compensating those who are victimized by harmful wrongdoings, the perpetrators of the harmful wrongdoings are to pay no compensation whatsoever. His words "This is not to say (or to deny) that affluent descendants of those who took part in these crimes bear some special restitutive responsibility" simply undermine the point of compensatory justice and reveal how unconcerned Pogge is with it. His real concern is with distributive justice—apparently, even when history is clear as to the identity of the perpetrators of severe harmful wrongdoing! Moreover, Pogge's claim reveals that he does not understand that it is not only the wealthy descendants who would owe, but *any and all* such descendants, revealing once again his bias toward distributive justice and against compensatory justice. Furthermore, Pogge misunderstands the point of compensatory justice when he asserts that "A morally deeply tarnished history must not be allowed to result in *radical* inequality."[63] Apparently, the implication here is that such a history of "grievous wrongs" might be allowed to result in something other than "radical" inequality. And he goes on to argue that "This is the moral rationale behind Abraham Lincoln's 40-acres-and-a-mule promise of 1863,. . . . "[64]

It is difficult to imagine a more distorted picture of U.S. history than Pogge's on what constitutes compensation. The U.S. government withdrew the suggestion of reparations to newly freed ex-slaves because it simply did not want to pay them in that it was too costly for those deemed first-class citizens. Most whites thought they owed nothing to legally freed mostly Africans, many Indians, and some others. After all, many of them with great political and economic influence had just lost their investments due to the abolition of slavery, and if they paid reparations to newly freed blacks, then they would have to answer the repeated calls for reparations on behalf of generations of Indians, which was quite out of the question as it was not in line with the terms of Manifest Destiny and the Doctrine of Discovery. And it would have left most whites in dire poverty because of how much they would have owed to those whose relatives they murdered or had murdered by the U.S. Army in order to steal millions of acres of land, and to those who were forced to do their labors, unpaid. But if compensatory rights are

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[63] Pogge, *World Poverty and Human Rights*, p. 203.

[64] Thomas Pogge, "Real World Justice," *The Journal of Ethics*, 9 (2005), pp. 38–39.

to be taken seriously, such compensation is *deserved* for those whose human rights are violated in such ways.

Rights to compensation have little or nothing to do with matters of inequality, normatively speaking. And it is this point that many cosmopolitan liberal philosophers cannot seem to fathom given their commitment to their particular yet vague ideology of equality. This underscores my suspicions about both the agenda of cosmopolitan liberals, namely, that they are inadequately concerned with compensatory justice. Hence they have no plans for or interest in reparations except insofar as they can (however mistakenly) construe them in terms of affirmative action programs, which have already been shown to be a category mistake.[65] They are simply concerned about equality instead of compensation and the true justice that it, when properly administered, can provide in terms of supporting autonomy and sovereignty rights. Indeed, my claim is that these liberals have at best articulated and defended half-truths about justice, for distributive justice without compensatory justice is grossly incomplete justice at best, as my argument is intended to make clear. For those who might construe this statement as hyperbole, consider the fact that continual denials of rights to compensation will always have the effect of withholding from right holders what is their due, which in turn is a significant injustice. I concur, then, with David Miller when he argues that cosmopolitanism does not err in making equality of central importance in dealing with world poverty. But it goes wrong in thinking that equality is all that is central to global justice.[66]

However, I would extend Miller's observation in the following way. Many cosmopolitan liberals seem to subscribe to a notion of equality that is too extreme for even many who have defended more reasonable and nuanced versions of egalitarianism. As Temkin argues quite apart from cosmopolitan liberalism,

> Moral responsibility matters to the egalitarian. On my view, this is because the concern for equality is ultimately a concern about comparative *fairness*, and it is not unfair if I am morally *responsible* for being worse off than you. This is why prior wrongdoing can matter. If I am worse off than you due to my own prior wrongdoing, the inequality between us need not be unfair, or in any other way morally objectionable.[67]

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[65] J. Angelo Corlett, *Race, Racism, and Reparations* (Ithaca: Cornell University Press, 2003), pp. 164–165.

[66] David Miller, "Against Global Egalitarianism," *The Journal of Ethics*, 9 (2005), pp. 55–79.

[67] Temkin, "Thinking About the Needy: A Reprise," p. 431.

Thus it is not obvious that cosmopolitan liberals, whose theories of global (distributive) justice are grounded in some rather restrictive notion of egalitarianism, are working with a viable notion of equality. The cosmopolitan liberal notion of equality seems to be far to the extreme of many of those who have been analyzing the concept of equality before cosmopolitanism resurfaced in recent philosophical discussions. The cosmopolitan notion of global equality, it appears, is rather unmitigated and facile compared to the conceptions of equality of Richard Arneson,[68] John Broome,[69] G. A. Cohen,[70] Ronald Dworkin,[71] Rawls, John Roemer,[72] Samuel Scheffler,[73] Amartya Sen,[74] Peter Singer,[75] Temkin,[76] Peter Unger,[77] Bernard Williams,[78] and others.[79] This lends credence to Beitz's claim that "For the

[68] Richard J. Arneson, "Egalitarian Justice Versus the Right to Privacy," *Social Philosophy and Policy*, 17 (2000), pp. 91–119; Richard J. Arneson, "Equality and Responsibility," *The Journal of Ethics*, 3 (1999), pp. 225–247; Richard J. Arneson, "Luck and Equality," *Proceedings of the Aristotelian Society*, 75 (2001), pp. 73–90.

[69] John Broome, *Weighing Goods* (Oxford: Oxford University Press, 1991); *Weighing Lives* (Oxford: Oxford University Press, 2004).

[70] Cohen, *If You're an Egalitarian, How Come You're So Rich*?; *Self-Ownership, Freedom, and Equality*. For discussions on the latter book, see *The Journal of Ethics*, 2:1 (1998).

[71] Ronald Dworkin, "What is Equality? Part 1: Equality of Welfare," *Philosophy and Public Affairs*, 10 (1981), pp. 185–246; "What is Equality? Part 2: Equality of Resources," *Philosophy and Public Affairs*, 10 (1981), pp. 283–345; "What is Equality? Part 3: The Place of Liberty," *Iowa Law Review*, 73 (1987), pp. 1–54; "What is Equality? Part 4: Political Equality," in Thomas Christiano, Editor, *Philosophy & Democracy* (Oxford: Oxford University Press, 2003), pp. 116–137.

[72] John Roemer, *Equality of Opportunity* (Cambridge: Harvard University Press, 1998); *Theories of Distributive Justice* (Cambridge: Harvard University Press, 1996), Chapters 7–8.

[73] Samuel Scheffler, "What is Egalitarianism?" *Philosophy and Public Affairs*, 31 (2003), pp. 5–39.

[74] Amartya Sen, *On Economic Inequality*, Expanded Edition (Oxford: Oxford University Press, 1978); *Inequality Reexamined* (Cambridge: Harvard University Press, 1992).

[75] Peter Singer, "Famine, Affluence, and Morality," *Philosophy & Public Affairs*, 1 (1972), pp. 229–243.

[76] Larry Temkin, *Inequality* (Oxford: Oxford University Press, 1993).

[77] Peter Unger, *Living High and Letting Die* (Oxford: Oxford University Press, 1996). See especially pp. 8–10 for an argument for the incompleteness of Singer's argument for assisting those in need.

[78] Bernard Williams, *In the Beginning Was the Deed* (Princeton: Princeton University Press, 2005), Chapter 8.

[79] Christopher Lake, *Equality and Responsibility* (Oxford: Oxford University Press, 2001); Michael Otsuka, *Libertarianism Without Inequality* (Oxford: Oxford University

subject of political equality, the need for closer theoretical attention is especially acute."[80] And this places the burden of argument on cosmopolitan liberals to defend their version of equality—especially one that either omits considerations of compensatory justice, or devalues them absent supportive argument.

Imagine being an American Indian or a descendant of African slaves in the U.S. Also imagine being informed by Pogge that what you really need is to be made "equal" (in some equal opportunity sense) to U.S. whites, many of whose forebears were significantly responsible for the genocide, enslavement, and part of the greatest land theft in human history that greatly effects your life situation and prospects even today. This means that many of such descendants benefited from such evils by the bequeathals of lands and other forms of wealth, unlike American Indians and blacks. Also bear in mind that it is the "culture" of the U.S. that systematically and intentionally destroyed the cultures of the said people. To be fair, also imagine Pogge insisting that the U.S. has a duty to create a system of life that would provide you with an equal opportunity in life. Would you not think that Pogge's plan would fall far shy of what compensatory justice requires, not only in the genuine amounts of compensation owed, but also in terms of effectively forcing cultural integration with those who are descendants of the evil people who murdered, enslaved, and stole what is now the territory of the U.S. from your ancestors? It is here where the paternalistic cultural imperialism of Pogge's cosmopolitanism rears its ugly head. While Rawls simply neglects to include any principles of compensatory justice in his statement of principles of international justice, Pogge implies that there is no room for any hearty ones in his theory of global justice. Pogge quite readily indexes equality to what the West regards to be minimally required for (distributive) justice. But such a notion neglects equality of *compensatory and cultural opportunities* independent of Western dominance. Why would anyone desire to become a part of a global scheme of equality that denied rights to compensation and cultural freedom that would best ensure, if anything can ensure, liberation from the oppressive forces of at least parts of the West?

Pogge addresses the Objection from Western Imperialism:

Press, 2003); Hillel Steiner, "How Equality Matters," *Social Philosophy and Policy*, 19 (2002), pp. 342–356. The notion of equality of opportunity is criticized in Matt Cavanaugh, *Against Equality of Opportunity* (Oxford: Oxford University Press, 2002). Also see Andrew Levine, *Rethinking Liberal Equality* (Ithaca: Cornell University Press, 1998), for a critical assessment of some theories of equality. For a historical account of recent egalitarian reforms in the United States, see J. R. Pole, *The Pursuit of Equality in American History* (Berkeley: University of California Press, 1978).

[80] Charles Beitz, *Political Equality* (Princeton: Princeton University Press, 1989), p. ix.

> When human rights are understood as a standard for assessing only national institutional orders and governments, then it makes sense to envision a plurality of standards for societies that differ in their history, culture, populations size and density, natural environment, geopolitical context and stage of economic and technological development. But when human rights are understood also as a standard for assessing the *global* institutional order, international diversity can no longer be accommodated in this way. There can be, at any given time, only *one* global order. If it is to be possible to justify this global order to persons in all parts of the world and also to reach agreement on how it should be adjusted and reformed in the light of new experience or changed circumstances, then we must aspire to a *single, universal* standard that all persons and peoples can accept as the basis for moral judgments about the global order that constrains and conditions human life everywhere.[81]

But this reply to the antiimperialism objection to cosmopolitan liberalism both misses the point and falls prey to Boxill's Objection to a World Government. What Pogge does in the above words is essentially to reassert the position of cosmopolitanism, rather than defending it from the stated objection. Where Pogge claims that what is needed is a "universal standard that all persons and peoples can accept," he seems to not understand that this is precisely the point of argument that is being challenged by the objection under consideration. And it will not do for him to state what he does if the charge is that the imperialism of cosmopolitan liberalism is precisely that which will hinder such agreement in the first place.

Cosmopolitanism and Human Rights

Perhaps a clue to the cosmopolitan confusion lies with its rather vague conception of human rights, which are conceived as rights that all persons possess and are morally binding on others who have duties of compliance with the terms of such rights. Pogge avers: "Once human rights are understood as moral claims on our global order, there simply is no attractive, tolerant, and pluralistic alternative to conceiving them as valid universally." And, "Our global order cannot be designed so as to give all human beings the assurance that they will be able to meet their most basic needs *and* so as to give all governments maximal control over the lives and values of the peoples they rule *and* so as to ensure the fullest flourishing. . . . " Finally, he states:

> It is, for the future of humankind, the most important and most urgent task of our time to set the development of our global order upon an acceptable path. In order

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[81] Thomas Pogge, "Human Rights and Human Responsibilities," in Andrew Kuper, Editor, *Global Responsibilities* (London: Routledge, 2005), p. 24.

> to do this together, peacefully, we need international agreement on a common moral standard for assessing the feasible alternatives. The best hope for such a common moral standard that is both plausible ands capable of wide international acceptance today is a conception of human rights. At the very least, the burden now is on those who reject the very idea of human rights to formulate and justify their own alternative standard for achieving a global order acceptable to all.[82]

Of course, "Human rights as moral rights entail obligations on others."[83] In other words, there is in general a correlation of rights and duties such that if I have a right to something, then others have a duty to refrain from interfering in the exercise or enjoyment of my right if it is a negative duty, or to provide me with certain goods or services if it is a positive duty. In the former case, my right is said to be a positive one, and in the latter case it is said to be negative. The difficulty with Pogge's statements is that he merely asserts that certain egalitarian human rights exist, and that certain corresponding duties of others exist. Instead of taking his statements as a *reductio ad absurdum* of his own theory of international justice, he reasserts his own theory as if it is the only viable one. But if what Pogge argues is correct, then a global order of justice cannot exist in the way he envisions it. So it is false to claim as he does that the argumentative burden is on those who would deny cosmopolitan egalitarian justice.

To understand this point more clearly, consider the nature of a right—in particular, a human right. If it is true, as Pogge claims, that all persons have a right "to be able to meet their most basic needs," then there would correlate with that right a negative duty of others to not interfere with the exercise or enjoyment of that right. *That* is clearly what the human right in question, if it does exist, implies in the way of others' duties to the right holder. But what Pogge and other cosmopolitan liberals need to demonstrate is their much stronger claim that the positive duty of assistance is required by the human right in question. But why would such a positive duty of assistance hold? Perhaps it might hold in cases of famine or other poverty caused by natural disasters. But what about famine or poverty caused by human greed, selfishness, or fraud? Pogge has a partially plausible answer to this question. He states that "the primary moral responsibility for the realization of human rights must rest with those who shape and impose" the existing political and economic institutions,

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[82] Pogge, "Human Rights and Human Responsibilities," p. 26. Slightly less vague is the description of human rights found in Thomas Pogge, "The International Significance of Human Rights," *The Journal of Ethics*, 4 (2000), p. 46.

[83] Larry Alexander, *Is There a Right of Freedom of Expression*? (Cambridge: Cambridge University Press, 2005), p. 4.

whether it be the International Monetary Fund, the World Bank, or other such global institutions.[84] This is an insightful claim. But it either draws its plausibility from some right of compensatory justice, as I have been advocating throughout this chapter, or it needs to explain why "the most powerful and affluent countries" are necessarily the ones who possess this positive duty. Again, if the relevant duty here is the negative one of non-interference, or of assisting an endangered stranger, few, if any, problems arise. But what if famine is eradicated, and a person is content to live the "simple life" and not one of equality of opportunity construed in terms of Western ideals? Again, we are faced with Boxill's objection from cultural diversity that cosmopolitan liberals seem not to be able to escape or answer adequately.

Perhaps this problem can be at least partially averted if the cosmopolitan liberal states that the positive duty of assistance is an imperfect one, only holding in cases where those in poverty communicate their desire to claim their right to or interest in equality of opportunity. But then how does this differ from arguing that the human right in question imposes only a negative duty of noninterference, in conjunction with the duty to assist endangered strangers so long as the fulfillment of that duty does not endanger oneself? As Miller writes, "The issue is how to identify one particular agent, or a group of agents, as having a particular responsibility to remedy the situation."[85] Unless and until cosmopolitan liberals can accomplish this, then in light of the general correlation of rights and duties, it would appear that they, in their incessant insistence on human rights, might well be indulgent in what Onora O'Neill refers to as the "free-floating rhetoric of rights,"[86] or what has been referred to as the "proliferation of rights" talk.[87]

Indeed, some egalitarians who are not cosmopolitan liberals have argued that a plausible notion of equality need not, or ought not, to invoke the notion of rights at all. Temkin reasons accordingly:

> Telic egalitarians believe that equality, or inequality, is a feature that is relevant to the *goodness* of outcomes, such that, *ceteris paribus*, the worse a situation is regarding equality the worse the situation is. But it does not follow from this that "all persons have a general right, as against all other persons, *to be supplied with . . . some . . . good*, at the expense of all who have more of this good." Indeed, *rights* do not have to enter into the egalitarian's picture at all, and my understanding and characterization of equality does not invoke, or in any way rely on, the notion that

[84] Pogge, "Human Rights and Human Responsibilities," p. 31.

[85] David Miller, "Distributing Responsibilities," in Andrew Kuper, Editor, *Global Responsibilities* (London: Routledge, 2005), p. 95.

[86] Onora O'Neill, "Agents of Justice," in Andrew Kuper, Editor, *Global Responsibilities* (London: Routledge, 2005), p. 42.

[87] Carl Wellman, *The Proliferation of Rights* (Boulder: Westview Press, 1999).

> the worse off have a *right* to equality, or a *right* against the better off to be made as well off as they.
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> . . . The worse off may be improved through sheer good fortune, or the better off may be worsened—or leveled down"—through sheer bad luck. *Either* event may bring about a *perfect* situation regarding equality. But, then, it obviously is not central to the egalitarian's view that the worse off should be made better off *at the expense* of those who are initially better off. . . . But then, *a fortiori*, it is not part of the egalitarian's view that the worse off must "be supplied with . . . some variable and some commensurable good," much less that the worse off have a *right* to be supplied with such a good.
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> . . . Basically, egalitarians favor promoting equality between equally deserving people *whoever those people are*, regardless of race, gender, religion, nationality, sexual orientation, or any other characteristics or relationships of the people in question.[88]

Thus it is highly questionable whether cosmopolitan liberals are working with a conception of global equality that is not in need of independent argumentative support in light of the fact that what they regard as equality is quite stronger than what others who consider themselves egalitarians think it ought to be.

Furthermore, this problem of cosmopolitan liberals not being seriously interested in compensatory justice is found in other cosmopolitan liberal writers. In fact, cosmopolitan liberals seem to have conflated compensatory justice with distributive justice. To see this, consider the following:

> If the remedy for imperialism were reparations for past injustices, the duty to correct the injustice would be fulfilled once the compensation for past injustices had been paid. There would be no guarantee that future economic relations would be to the maximum benefit of the least advantaged. Hence, on this account of remedying the injustice of imperialism may provide one-time relief for millions of disadvantaged people, but it would not secure long-term prospects for them in the way that institutions governed by democratic equality would.[89]

But these claims contain numerous problems. First, there seems to be an assumption and implication that reparative justice would take the form of cash payments to beneficiaries. Yet it is clear that reparations can and would[90] be institutionalized for efficiency and long-term value for the beneficiaries. And let us not forget that reparations, properly construed and institutionalized, exert expressive functions[91] that are vital to the kind of ethnic integration that cosmopolitan liberals desire. Moreover, the conflation of compensatory justice with distributive justice is found in the further presumption that there

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[88] Temkin, "Thinking About the Needy: A Reprise," pp. 431–433.

[89] Moellendorf, *Cosmopolitan Justice*, p. 91.

[90] In the U.S., there seems to be insufficient toleration for cash payouts for those who, by their lights, should not even be accorded affirmative action of any kind.

[91] Corlett, *Race, Racism, and Reparations*, Chapters 8–9.

is something wrong with even adequate and fair compensation for harmful wrongdoings. But this view can only make sense according to an ethic that in effect subsumes rights under social utility considerations. But to take rights seriously is to disallow social utility to trump them. Otherwise, there are not rights at all, but in effect privileges at the whims of social utility. What is so wrong with a world of adequately compensated harmful wrongdoings that cosmopolitan liberals seem to eschew them? The key to the presumption in question is found in the locution "There would be no guarantee that future economic relations. . . ." But why ought compensatory justice be sacrificed for the sake of "future economic relations"? Even if we want to admit the unproven anticompensatory rights stance concerning the importance of economic equality of opportunity, why should compensatory justice rights be jettisoned in favor of something that, contrary to the author's point, can very well make the victims some of the wealthiest people? To take my previous example, if adequate reparations were paid to American Indians and blacks, there simply would not in the foreseeable future be any serious worry that they would even require distributive economic justice, thus making dubious the unsupported claim that democratic institutions would better ensure their long-term prospects.

Moreover, if someone becomes poor after becoming wealthy through reparations (not by direct cash disbursement, but indirectly by institutional compensatory measures), it would be folly to have any sympathy for them, and surely no moral duty to assist accrues to anyone on their behalf, that is, unless their poverty results from fraud or some other form of injustice beyond their control and for which they are not responsible. To not believe this would seem to imply that "There are very good reasons to believe that after a one-time compensatory payment, inequalities would continue to grow in the *lassiez faire* global market."[92] But how is this an argument against the compensatory or remedial *right* to reparations? And how is reparations some kind of injustice? Reparations constitute a compensatory *right* that each wrongfully harmed person possesses and that correlates with a duty of compensatory justice of her harmful wrongdoer, alienable only by the person wrongfully harmed. Even if the person harmed wants to destroy all the monetary assets that compensation would grant her by law, it is her right and hers alone to do so. And it is a kind of morally presumptuous paternalism that would even imply something one way or another about what might happen as a result of *her* realizing *her* compensatory benefits. It is the kind of view that subsumes rights under utility and compensatory justice under distributive justice as it conflates justice with equality without rights to compensation

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[92] Moellendorf, *Cosmopolitan Justice*, p. 91.

(where compensation is justified). From the standpoint of American Indian and black experiences, furthermore, it is nothing short of morally insulting to desire a policy or system that would grant forced integration and equality of opportunity to become, in essence, culturally Westernized, and deny what justice truly requires in terms of compensatory justice.

If compensated according to just principles of proportionality, each American Indian and black would become economically wealthy several times over, and very rapidly. Why would there be a need for future distributive justice in their cases? And what about, say, survivors of the Nazi genocide in the mid-20th century? Would they have been happier under cosmopolitan "justice" to receive equality of opportunity instead of the millions of dollars in reparations that Israel (but not other survivors or families of other persecuted victims) has received over the years? Is the implication here that they would have been better off if those survivors simply accepted whatever "equality" they could receive back in Germany, their "homeland," the very same society where they were oppressed? There is simply no need for distributive justice that effectively brings forced integration of peoples that compensatory justice does not. It is a kind of Western liberal paternalism that seeks to replace the generations (in many cases) of calls for reparative justice with a Westernized notion of making everyone as equal as possible to some middle-class notion of what cosmopolitan liberals desire for their seemingly unrealistic utopia. It is unrealistic in that cosmopolitan liberals do not seem to understand that the world is replete with injustices that not only require compensation, but often create enemies between the harmful wrongdoers and their victims.[93]

Again, a Westernized notion of equality of opportunity is highly dubious in the world of harmful wrongdoers who deserve to be punished and forced to adequately compensate their victims' heirs as groups. Nor should any form of reconciliation be required in such cases. Many cosmopolitan liberals claim that they seek justice in the world. But as Martha Nussbaum argues: ". . . we must ask the questions, and we must know enough and imagine enough to give sensible answers."[94] But how "just" and "sensible" is it to spin theories of utopias where victims of harmful wrongdoings are uncompensated and then expected to integrate (reconcile) with those who harmed them? Is that justice and sensibility, cosmopolitan style? If so, then cosmopolitanism must

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[93] This is ironically interesting in light of the fact that some cosmopolitan liberals fancy themselves as propounding theories of "real world justice" (Pogge, "Real World Justice").

[94] Martha Nussbaum, "Replies," in Joshua Cohen, Editor, *For Love of Country* (Boston: Beacon Press, 1996), p. 137.

be exposed for the unjust utopia that it is, ignoring the wrongfully harmed underclasses who have sought compensation from those who have wrongfully harmed them, only to be given equality of opportunity to live in ways of which the more economically privileged approve. To say that cosmopolitan liberals are in favor of human rights is somewhat of a misnomer in that they tend to misunderstand the nature of rights to imply duties for which they have not proven exist for the wealthy. And one cannot really be in favor of that of which one lacks sufficient knowledge.

In the end, verbiage about building egalitarian justice faces the same fact that all other systems of international law confront: Boxill's objection from national autonomy. At bottom, such issues must come to terms with the fact that questions of global justice are related quite directly to questions of the meaning of life, a question that is unnoticeable in the philosophical literature on global justice. And if this question is not adequately addressed, then paternalism is the likely result in that a certain standard of living is imposed on peoples, which implies an acceptable meaning of life. For example, if the Diné nation found its cultural lifestyle quite fulfilling as it is, who is to say that it ought to partake of globally egalitarian lifestyles so its members can have an equal opportunity in life? The cosmopolitan liberal might argue that her theory does not force any nation to become equal to others and that it merely seeks a system of (distributive) justice that would provide individuals in the Diné nation an opportunity to have a certain kind of life. But precisely what is meant here by "kind of life"? In the many cases where compensatory justice retains that autonomy of ethnic groups and the individuals in them, cosmopolitan justice effectively coerces the Diné nation (or any member of it) to risk perverting its (or her) lifestyle that it (she) so cherishes. Thus the meaningfulness of life changes, and in many cases it is, on balance, for the worse.

In short, cosmopolitan liberals must explain how their imperialism provides a more meaningful life for those in non-Western nations and their respective cultures than they would have if they did not receive adequate compensation from those who wrongfully harmed them, or it must explain how cosmopolitan justice is, all things considered (including the depth of one's culture), better than the baseline quality of life that the targets of cosmopolitan justice seek to assist, quite apart from compensatory justice considerations. It is one thing to relieve global poverty. That can be justified by way of the duty of assistance not only in Rawls' principles of international justice, but in obedience to anti-bad Samaritan statutes. But it is quite another to deny the legitimacy and importance of compensatory justice, especially when in so many cases the global poor are also the victims of historic and contemporary oppression that many existing countries simply fail to take responsibility for and compensate. These are two quite distinct moral and

legal issues. I have argued for compensatory justice without denying the significance of the duty of assistance. But I have done so without embracing paternalism or in effect a crude kind of ethic that would deny the importance of rights, including the right to compensation.

In the end, cosmopolitan liberals, in their myopic concentration on global equality of opportunity, confuse poverty with need, and confuse justice with a rather narrow conception of equality and make no significant room for compensatory justice that would best ensure the freedom and autonomy, and in many cases sovereignty, of peoples. They do not comprehend, it seems, the profound truth of the saying: "justice cannot grow on injustice." Distributive justice is no justice at all if it is meant to replace or ignore the importance of compensatory justice. Because cosmopolitan liberalism denigrates compensatory justice considerations, I believe that Rawls' statist[95] theory of international justice is more plausible than cosmopolitan liberalism on matters of justice. As I have argued above, Rawls' Law of Peoples can accommodate rights to compensation, while cosmopolitan liberalism is actually hostile toward anything that runs afoul of its Westernized version of equality of opportunity. These points are missed by Samuel Scheffler's assessment of cosmopolitan liberalisms:

> . . . moderate cosmopolitanism about justice will be a compelling position only if it proves possible to devise human institutions, practices, and ways of life that take seriously the equal worth of persons without undermining people's capacity to sustain their special loyalties and attachments. And moderate cosmopolitanism about culture will be compelling only if two things turn out to be true. The first is that some people succeed in developing recognizably cosmopolitan ways of living that incorporate the sort of stable infrastructure of responsibility that more traditional ways of life have always made available to their adherents. The second is that other people succeed in preserving the integrity of their traditions without succumbing to the temptation to engage in the doomed and deadly pursuit of cultural purity.[96]

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[95] By "statist," I mean no disrespect to Rawls' theory. Rather, I mean to convey what many cosmopolitan liberal critics of Rawls refer to his theory as. Indeed, no theorist today would dare be a statist in some strong sense of thinking that the only legitimate subjects of international law and global justice are and ought to be states. For this would imply that it would be wrong for international law to place on trial individual war criminals or such, which would be absurd. So the old legal positivist doctrine that only states can be the legitimate subjects of international law must be discarded as a view no one holds. As one legal commentator puts it: "Like various other tenets of the positivist creed, the doctrine that only states are subjects of international law is unable to stand the test of actual practice" [H. Lauterpacht, *International Law and Human Rights* (Archon Books, 1968), p. 9].

[96] Scheffler, *Boundaries and Allegiances*, pp. 129–130.

Unless by "responsibility" Scheffler means considerations of compensatory justice and the rights that must accrue therein, Scheffler's assessment of cosmopolitan liberalisms, though insightful in its own right, makes no mention of rights to compensatory justice for, say, crimes against humanity. Thus his assessment of cosmopolitan liberalism, though nuanced, is insufficiently complex to account for the hostility cosmopolitan liberalism seems to display—at least according to some of its leading adherents—toward rights to compensatory justice, rights that are often, I might add, affixed to the rights of ethnic groups and cultures to preserve their own ways of life.[97]

Finally, Allen Buchanan provides a cosmopolitan critique of Rawls' Law of Peoples in that it is overly minimalist in its list of human rights, and too tolerant of nonliberal societies that are not representative in their forms of government that, by Buchanan's lights, result in "extreme inequalities:" "... regardless of what Rawls thinks it implies, his standard for what counts as a decent society allows extreme inequalities and indeed extreme inequalities that are morally arbitrary and indefensible."[98] Now this is a serious charge, as it indicts Rawls on the charge of allowing what is morally indefensible and arbitrary, despite Rawls' explicit attempts to avoid such problems. Buchanan continues,

> The fundamental flaw in Rawls' account of toleration can also be put this way: Rawls collapses respect for reason into an over-expansive conception of humility based on a subjectivistic view of what counts as a reasonable conception of public order, thereby sacrificing a commitment to equal consideration of persons to that flawed conception of reasonableness....
>
> Unless Rawls is willing to abandon the whole project of developing what he calls a political conception of justice—unless he is willing to rely on a comprehensive conception of the good that elevates respect for reason to the highest moral principle, higher even than respect for persons themselves or equal consideration for their well-being—he must recognize that respect for persons' reasons is not the be all and end all of morality. He must recognize that respect for persons' reasons may sometimes have to be subordinated to the demands of a more comprehensive principle of equal consideration of persons, whether this is spelled out as equal respect for persons or equal concern for their well-being.[99]

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[97] Furthermore, if one philosopher has it right, then cosmopolitan liberalism, in its focus on radical equality, seems also to ignore totally the rights that nonhumans might possess that would imply duties we have toward them. If sound, this criticism reveals the deeply speciesist nature of cosmopolitanism, and I would add, of Rawls' theory of international justice as well [James P. Sterba, "Global Justice for Humans or for All Living Beings and What Difference it Makes," *The Journal of Ethics*, 9 (2005), pp. 283–300].

[98] Buchanan, *Justice, Legitimacy, and Self-Determination*, 165f.

[99] Buchanan, *Justice, Legitimacy, and Self-Determination*, pp. 173–174.

There are several things that might be said in reply to this complex critique of Rawls. The first is that it is a bit like a straw person, as it is unclear that Rawls holds to a "subjectivistic view of what counts as a reasonable conception of public order." And it is highly questionable whether Rawls thinks that respect for persons' reasons is the "be all and end all of morality." This is the case precisely because Rawls believes that "respect for persons' reasons may sometimes have to be subordinated to the demands of a more comprehensive principle of equal consideration of persons."

On a more generous reading of Rawls than Buchanan provides, Rawls is not subjectivistic along these lines, but rather remains consistent with the liberal pluralism articulated and defended in *Political Liberalism*.[100] In that book, Rawls is hardly guilty of a kind of subjectivism, but rather of a reasonable tolerance of those whose views and lifestyles fall under a broad conception of "comprehensive" doctrines, though whose views or lifestyles are not liberal in content. It is, Rawls insists, a liberally decent society that inculcates and nurtures this kind of toleration. And in *The Law of Peoples*, Rawls elevates liberal tolerance to the global level. There is no subjectivism here. Just as Rawls does not ground liberal tolerance in *Political Liberalism* in some subjectivistic idea of what counts as reasonable within a liberal state, nor does he adopt a subjectivist notion of what is reasonable and tolerable in the Society of Peoples. It is not subjectivism that Rawls is engaged in as Buchanan asserts, it is, on a more careful consideration of Rawls' work, a deeper sense of liberal tolerance for legitimate differences between peoples and a genuine respect for differential decency between various peoples.

Repeatedly accusing Rawls' list of human rights as being "truncated,"[101] Buchanan charges Rawls with excessive minimalism along these lines. At issue here is which societies count as decent and which do not, the latter being the ones where, under certain conditions, humanitarian intervention is permitted, if not required. But here we would do well to study the important sources in contemporary rights theory. On Joel Feinberg's account,[102] a right is something that is a valid claim or interest, and there is a difference between one's having a right, one's claiming that right, and one's exercising it.[103] This distinction is important for Buchanan's criticism of Rawls' view of liberal tolerance and the possible duty of humanitarian intervention because

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[100] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

[101] Buchanan, *Justice, Legitimacy, and Self-Determination*, 164f.

[102] Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press, 1980); *Freedom and Fulfillment* (Princeton: Princeton University Press, 1992), Chapters 8–10.

[103] See Chapters 5–6 of this book for discussions of rights.

Buchanan seems to distort what counts as a society that is not decent and in need of external reform.

Suppose that there is a people in "Traditionsville" that imbeds in its democratic constitution all of the same rights that would make it a liberal democracy, but wherein women of that society by and large do not choose to live what Westerners would deem a "liberated" life. Instead, citing the comforts of tradition, religious or otherwise, the women of this society by and large choose to bear children, raise their children, and not engage themselves in professional affairs outside their homes. They also choose to not bother themselves with the administration of their society, as they genuinely do not want to "waste" their lives with such "troublesome nonsense." These women, by and large, seek their own happiness and meaning in life in the nuclear family, rather than in politics and a career of hustle and bustle. They care about who represents them, demonstrated by the fact that they study candidates and vote conscientiously for who they want to represent them in governmental affairs of their state.

The point of the example of Traditionsville is that Rawls' Law of Peoples can accommodate it as a decent society in that the women of Traditionsville have rights and can exercise them at will should they want to, but Buchanan seems not to be able, or willing, to. Yet precisely what is it about Traditionsville that places it outside the realm of decency? For Buchanan, it might be that it fails to *conduct* itself as a liberal society. But is this true? Each woman in Traditionsville has every right that each man has, and each can claim that right at any time, without fear of reprisals of any kind. In fact, anybody—man or woman—in Traditionsville can even freely exercise his or her rights to this or that and the social structure is set up to accommodate this possibility. But Traditionsville is where women choose traditional women's roles over those of Westernized "liberated" ones. They simply choose to not exercise their rights to be the equals of men outside of the home. Buchanan might complain that the "folkways" of Traditionsville brainwash women to accept rather than freely select their roles, and that no self-respecting woman would ever freely choose what subordinates them to men as Traditionsville does. But this seems to be an answer based on Western bias as to what constitutes the "rightful" place of a man or a woman in a decent society. It appears to assume that the ways of Traditionsville are flawed at the outset, with no consideration of the possibility that someone might really want to live in this or that role within it.

Consider what Buchanan writes in criticism of Rawls' notion of a "consultation hierarchy" in certain hierarchical societies that are to be tolerated as being reasonably just: "... rights to basic education, to freedom of association and expression, and rights regarding employment and property ownership that provide opportunities for women to have some degree of economic

independence if they do not conform to traditional roles—all of these rights may be necessary if women's basic interests are to be effectively represented in the consultation hierarchy."[104] But one question for Buchanan is what constitutes a context in which these necessary conditions for societal justice accrue? Is it that women *possess* these as constitutional rights? If so, then the women of Traditionsville have such rights and thereby live in a decent society. They can even *claim* their rights openly and with confidence! But the fact that the women of Traditionsville by and large do not *exercise* their rights to equal participation with men poses a particular epistemic challenge to a position such as Buchanan's. How is it to be understood exactly what separates Traditionsville from a society that is truly unjust toward women? Rawls' minimalist list of human rights in principle provides an easier way to answer the question, as there are fewer standards of justice to satisfy. But does this not pose a particular problem for Buchanan's less minimalist view insofar as it contains a more robust list of human rights? Is it the freedom to choose to exercise one's human rights that serves as the means by which to discern decent societies from those that are not decent? Yet how is this standard of assessment to be known within the confines of a nonideal world in which Buchanan insists that we operate? It would appear that Buchanan owes us a theory of how the influences of traditions can be separated from citizens' free choices to live their lives in one way or another. Otherwise, Buchanan's version of cosmopolitanism seems to verge on, if not exemplify, a rather blatant form of strong paternalism, a view that he seems to not address or refute in his criticism of Rawls' theory of international justice.

I have argued that, for all its attention to details of distributive justice, cosmopolitan liberalism lacks an essential ingredient in the construction of a globally just legal order. It neglects substantially rights to compensatory justice, an oversight that, unless repaired, renders it impotent to qualify both as a realistic utopia and as one that can handle not only rights violations of the past, but those of the present and future. Some cosmopolitan liberals, however, have failed to make an adequate case for the global duty of providing equality of opportunity for all individual persons. Insofar as global poverty caused by human affairs and various other forms of injustice are duties to be fulfilled, it remains to be seen as to precisely whom has such duties.

Collective responsibility is far too complex to simply assign the duties generally to all citizens of wealthy countries. For in most countries the power to effect change is had only by a relative few. And so long as the citizens of some country did not approve of the actions of a few of their governmental

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[104] Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 170.

leaders who enacted policies that eventuated in the injustices in question, why ought the citizens of that country to bear the brunt of what a few were causally responsible for, say, in another country? This is not to argue that a country's citizens bear no collective responsibility for what their elected leaders do in their name. Rather, it is to argue that the arguments in favor of such collective responsibility or duties of assistance must be made much stronger than cosmopolitan liberals have provided thus far. For this is an argument that cosmopolitan liberals have not bridged. Until they do, their theory of global justice remains as an instance of holding responsible for many forms of injustice many of those whose responsibility for it is unclear.

Cosmopolitan liberalism, then, faces several problems leveled against it from Boxill,[105] and myself. Until a version of it can plausibly answer these difficulties, it will continue to suffer from impoverished conceptions of rights and justice. And this holds true despite the fact, as Rousseau notes, those "few great cosmopolitan souls . . . overcome the imaginary barriers that separate peoples . . . and embrace the entire human race in their benevolence" seek to unite peoples of the world "in order to protect the weak from oppression, restrain the ambitious . . . " and "gather them into one supreme power that governs us according to wise laws . . . and maintains us in an eternal concord."[106] For no matter how much cosmopolitan liberals aspire to, among other things, base putatively effective responses to terrorism on their aspirations for a just and democratic global order,[107] such a scheme often only exacerbates such problems when it defiantly disrespects the unrectified injustices that surely form the bases of so much of terrorism in the first place. Furthermore, rights-disrespecting claims like "The world will not be able to move toward fair, inclusive, and effective global governance without major reallocation of economic, technological, and organizational capacities to reduce existing global disparities in the quality of life and institutional

[105] One embarrassing fact about cosmopolitan theories is that many, if not all, of them continue to propagate and commit many of the same errors articulated by Boxill in 1987, as this section indicates.

[106] J. -J. Rousseau, *Discourse on the Origin of Inequality*, David A. Cress (Trans.) (Indianapolis: Hackett Publishing Company, 1992), pp. 56–57.

[107] Daniele Archibugi and Iris Marion Young, "Envisioning a Global Rule of Law," in James Sterba, Editor, *Terrorism and International Justice* (Oxford: Oxford University Press, 2003), p. 158. However, for analyses of the causes of terrorism that construe terrorism as a possible means to justice for the oppressed, see J. Angelo Corlett, *Terrorism: A Philosophical Analysis* (Dordrecht: Kluwer Academic Publishers, 2003); Ted Honderich, *After the Terror* (Edinburgh: Edinburgh University Press, 2004); and Burleigh Wilkins, *Terrorism and Collective Responsibility* (London: Routledge, 1991).

order"[108] are indeed naïve, if not also part and parcel what sustains such injustices, as they continue to deny the compensatory rights for those suffering from historical injustices.

Where both Rawlsian and cosmopolitan liberal theories are weakest, it seems, is in their providing theories of international distributive justice as if they were full-fledged theories of international justice. But just as domestic law concerns itself with compensatory justice as well as distributive justice, so too must any plausible theory of international justice concern itself with duties of and rights to compensatory justice. Assuming, then, that rectificatory justice can be written into an otherwise plausible (Rawlsian) theory of international justice, I shall now turn attention to considerations of the nature and value of rights—both individual and collective—and then to an assessment of a particular global problem that integrates the ideas of international law, justice, and rights.

[108] Archibugi and Young, "Envisioning a Global Rule of Law," p. 168.

Part III
Rights

Chapter 5
Individual Rights

For however hard we may try to awaken feelings of love in ourselves, we cannot avoid hating that which is and always will be evil, especially if it involves deliberate and general violation of the most sacred rights of man.—Immanuel Kant[1]

By every civilized and peaceful method we must strive for the rights which the world accords to men, clinging unwaveringly to those great words which the sons of the Fathers would fain forget: "We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness."—W. E. B. DuBois[2]

... A right is something a man can stand *on, something that can be demanded or insisted upon without embarrassment or shame. When that to which one has a right is not forthcoming, the appropriate reaction is indignation; when it is duly given there is no reason for gratitude, since it is simply one's own or one's due that one received. A world with claim-rights is one in which all persons, as actual or potential claimants, are dignified objects of respect, both in their own eyes and in the view of others. No amount of love and compassion, or obedience to higher authority, or noblesse oblige, can substitute for those values.—Joel Feinberg*[3]

The rights of each of us in a democracy can be no stronger than the rights of our weakest minority.—Felix S. Cohen[4]

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[1] Immanuel Kant, "On the Common Saying: 'This May Be True in Theory, But It Does Not Apply in Practice'," in Hans Reiss, Editor, *Kant: Political Writings* (Cambridge: Cambridge University Press, 1991), p. 87.

[2] W. E. B. DuBois, *The Souls of Black Folk* (Greenwich: Fawcett Publications, Inc., 1961), p. 54.

[3] Joel Feinberg, *Social Philosophy* (Englewood Cliffs: Prentice-Hall, 1973), pp. 58–59.

[4] Felix S. Cohen, *The Legal Conscience* (New Haven: Yale University Press, 1960), p. 257.

J.A. Corlett, *Race, Rights, and Justice*, Law and Philosophy Library 88, DOI 10.1007/978-1-4020-9652-5_6,

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Imbedded in the content of law is a cluster of claims and interests the most powerful of which amount to rights (valid claims or interests). Part I examined theories of legal interpretation as the importance of a viable theory of legal interpretation determines which claims or interests are valid ones. Hence the connection between legal interpretation and the rights found within the content of the law.

One of the most significant and controversial cluster of topics in moral, social, political, and legal philosophy during the past few decades has been the nature, grounding, and value of rights. Among other things, rights are fundamental to a liberal political order. Indeed, they are among the foundational principles of our moral lives. And it is often assumed or argued that political liberalism respects rights, while Marxism does not. In fact, many believe that it is the putative omission of rights in communism that counts decisively against the viability of Karl Marx's moral, social, and political philosophy.[5] But what exactly *did* Marx argue about rights, and what did he *not* argue about them? Does Marx respect rights, or does he condemn them as many believe? What are rights? Why are they important? Is there room for rights in Marx's philosophy? Answers to these and related questions serve as an important way by which to decipher some of the differences between liberal and nonliberal political philosophies.

This chapter examines the traditional interpretation of Marx's critique of rights. Contrary to this view, I shall argue that Marx's critique of rights is limited rather than comprehensive in scope. I shall also set forth part of a foundation of a Marxian theory of rights. The result is that what many philosophers believe separates liberal from nonliberal political philosophies is not, contrary to popular belief, that the former respect rights, while the latter reject them. For both Marxism and liberalism respect certain rights. This means that political philosophies such as these must be further analyzed in order to figure out precisely which rights are respected by each philosophy, and why. By engaging in this kind of analysis, philosophers will be in a better position to properly distinguish these political philosophies from one another.

Prior to describing and assessing the plausibility of the traditional interpretation of Marx and rights, it is important to come to terms with the nature and value of rights in general.[6] If Joel Feinberg is correct about the nature of rights, then to have a right is to have a valid claim against another called for

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[5] These claims are found in Allen Buchanan, *Marx and Justice* (Totowa: Rowman & Littlefield Publishers, 1982).

[6] The following explication of the nature and value of rights is a Feinbergian one, borrowed from Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton:

by some set of governing rules (in the case of legal rights) or moral principles (in the case of moral rights). To have a claim is to have a case meriting consideration. And the act of claiming makes for self-respect and respect for others. It provides a rights-respecting society with a partial, though crucial, foundation for human dignity.

A right is a valid claim to something that in most cases implies a duty of others to refrain from interfering in the exercise or enjoyment of one's right. If I have a right to life, for instance, then others have a duty to not threaten or otherwise take away my life. The valid claim in question is institutional in nature if it is a legal right, and noninstitutional if it is a moral right. Generally speaking, legal rights fall under one of either two broad categories. Primary rights (what Wesley Hohfeld[7] called "substantive rights") are those that control human behavior, as the ones just exemplified. But remedial rights are procedural and arise only subsequent to infringement of a valid claim or interest. In any case, "If people have a right to something, then someone does wrong who denies it to them."[8] Or, as Kent Greenawalt states, "The claim to have a right is the claim that outside interference would be morally wrong."[9]

Moral rights are noninstitutional.[10] Moral rights discourse clearly makes sense, and "any theory of the nature of rights that cannot account for it is radically defective."[11] Feinberg argues that human rights are a subset of moral rights and are "generically moral rights of a fundamentally important kind held equally by all human beings, unconditionally and unalterably."[12] But are there any human rights? Or, is this category a null set? The first thing to notice about Feinberg's definition of "human rights" is that it evades the charge of speciesism, as it does not say that only humans can possess them, "so that a human right held by an animal is not excluded by definition."[13]

Princeton University Press, 1980). A careful study of Feinberg's theory of rights suggests that, for him, rights are valid claims or valid interests.

[7] Wesley Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1919). For commentaries on Hohfeld's analysis of legal rights, see George Rainbolt, *The Concept of Rights* (Dordrecht: Springer, 2006), Chapter 1; Carl Wellman, *A Theory of Rights* (Totowa: Rowman & Littlefield Publishers, 1985).

[8] Bernard Williams, *In the Beginning Was the Deed* (Princeton: Princeton University Press, 2005), p. 64.

[9] Kent Greenawalt, *Conflicts of Law and Morality* (Oxford: Oxford University Press, 1987), p. 30.

[10] Joel Feinberg, *Freedom and Fulfillment* (Princeton: Princeton University Press, 1992), Chapters 8–10.

[11] Joel Feinberg, *Social Philosophy* (Englewood Cliffs: Prentice-Hall, 1973), p. 84.

[12] Feinberg, *Social Philosophy*, p. 85.

[13] Feinberg, *Social Philosophy*, p. 85.

This point is apparently not heeded by the likes of some who define "human rights" in speciesist terms, and with not even a slight recognition that their definition is controversial.[14]

A second issue here is whether or not, if there are any human rights, they are absolute in the sense that "no conflicts with other human rights, either of the same or another type, would be possible."[15] Although there is, Feinberg argues, no principled objection to construing the nature of human rights as absolutely exceptionless, it is quite another question as to whether or not there are any such rights. And it is at this point that a search for the philosophical grounding for such rights must be conducted. For if there are no such rights, then the discourse of human rights becomes nonsense, a rather counter-intuitive result for most working in the fields of international law and justice, such as cosmopolitan liberals as discussed in the previous chapter. To attempt to ground equal human rights on the notion of human worth is dubious, unless it can be explained plausibly how it is that the worth of humans is equal. Nor is it unproblematic to try to ground equal human rights on some other intrinsic moral property:

> The intrinsic moral qualities invoked to explain equal human worth must rest, as moral qualities, on some common nonvalue characteristics which are *their bases* or determinants; the question about the nature of the common characteristic arises all over again about them. If human beings have human worth *because* of their "intrinsic pricelessness" or "infinite value," asks the skeptic, where do those extravagantly dimensioned endowments come from?[16]

Rationality cannot serve as the grounding for equal human rights, as not all humans are rational. To be sure, sometimes it seems as though few are. The qualities of personhood and sacredness fall prey to the problem of why those qualities are sufficient bases for equal human rights. Moreover, not all humans, it might be argued, are sacred, at least not the evil ones. And similarly for their personhood, assuming that there are non-question-begging grounds for personhood. And as Feinberg continues: "... it will not do, for similar reasons, to rest the case for equal and universal human worth on 'our common humanity,' for we wish to know precisely what it is about our common humanity that makes it so worthy of our respect."[17] "It may be that

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[14] Consider, for instance: "... human rights must (at the risk of banality) be *humanistic*—they must focus on human interests, upon what contributes to human well-being and freedom" [Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford: Oxford University Press, 2005), p. 130].

[15] Feinberg, *Social Philosophy*, p. 86.

[16] Feinberg, *Social Philosophy*, p. 91.

[17] Feinberg, *Social Philosophy*, p. 92.

universal 'respect' for human beings is, in a sense, 'groundless'—a kind of ultimate attitude not itself justifiable in more ultimate terms."[18] This implies that in ascribing human worth to everyone, we may well in effect be showing them respect. And if this is true, then we can say of human rights, insofar as they are based on human worth, that:

> It can be argued further against skeptics that a world with equal human rights is a *more just* world, a way of organizing society for which we would all opt if we were designing our institutions afresh in ignorance of the roles we might one day have to play in them. It is also a *less dangerous* world generally, and one with a *more elevated and civilized* tone. If none of this convinces the skeptic, we should turn our backs on him to examine more important matters.[19]

So much for a plausible grounding of moral and human rights in equal human worth. But exactly which such rights are there, if any?

In recognizing that the United Nations Declaration of Human Rights endorses numerous basic positive rights to receive benefits and to provide with the means to satisfy basic human needs, Feinberg notes that these cannot be absolute rights, strictly speaking because they are not necessarily correlated with the duties of any particular individuals. The reason for this, argues Feinberg, is because natural disasters can make it such that no person or group of them could possibly have had a moral duty to prevent such harms, a similar point to the one I raised against cosmopolitan liberalism in the previous chapter. Such "manifesto rights," as he calls them, actually boil down to claims that compete, all things considered, with other claims. So it is implausible to think that there are absolute human rights that are positive in content. However, Feinberg continues, "The most plausible candidates for absoluteness are (some) *negative rights*; since they require no positive actions or contributions from others."[20] Examples of absolute and nonconflictable human rights seem to be positive rights to "goods" that cannot ever be in scarce supply, a right to a fair trial, the right to equal protection under the law, and the right to equal consideration.[21] Added to these might be the negative right not to be treated inhumanely, and the right to not be exploited: "That is a right to a higher kind of respect, an inviolate dignity, which as a broad category includes the negative rights not to be brainwashed, not to be made into a docile instrument for the purposes of others, and not to be converted into a domestic animal." "Rights in this category," states Feinberg, "are probably the only ones that are human rights in the strongest sense:

[18] Feinberg, *Social Philosophy*, p. 93.
[19] Feinberg, *Social Philosophy*, p. 94.
[20] Feinberg, *Social Philosophy*, p. 95.
[21] Feinberg, *Social Philosophy*, p. 96.

unalterable, 'absolute,' (exceptionless and nonconflictable), and universally and *peculiarly* human."[22] It is an interesting fact about the philosophy of human rights that while few if any of the contemporary writers seems to acknowledge Feinberg's analysis, neither have they done anything to reach its eloquence nor improve upon it in any significant way.[23]

But why are rights generally important? Rights have been violated by governments and individuals since the beginning of human social life, it seems. Even in the U.S., the self-proclaimed bastion of democracy and rights, various constitutionally guaranteed rights have been suspended (i.e., violated) by the government on account of various scenarios of "clear and present danger" or for reasons of "national security" or in times of war. Within a couple of decades or so, the "founding fathers" of the U.S. rescinded nearly every right that they had declared as inalienable: from freedom of the press and of expression more generally, to the enforcement of the Alien and Sedition Acts against political opponents of John Adams, to the holding of American Indian and black slaves even though Jefferson and many others declared all humans were created by God as "equals." Those U.S. citizens who give pride of place to the special rights they have, such as freedom of expression, might find it difficult to know that particularly (though inexclusively) from 1870 to 1920 the U.S. Supreme Court continually placed tremendous restrictions on freedom of expression, using various judicial former Justice Oliver Wendall Holmes' "clear and present danger" standard, among others. There simply is no unbroken chain of respect for the First Amendment of the U.S. Constitution by either of the three branches of government. And this demonstrated itself in the various "free speech fights" involving the government and the Free Speech League during the period noted, wherein the government via the Comstock Act sought to restrict what Anthony Comstock deemed obscene and where both the Free Speech League led by Theodore Schroeder and the ACLU established by Roger Baldwin challenged such violations of freedom of expression.[24] One would have thought that the words so carefully articulated in the Constitution would have been taken more seriously by those who swore to uphold it.

Furthermore, legal scholars note that in times of war or other national crisis, various rights have been suspended or violated in the name of the greater good. Indeed, the current U.S. president G. W. Bush suspends some

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[22] Feinberg, *Social Philosophy*, p. 97.

[23] For discussions of John Rawls' and James W. Nickel's respective conceptions of human rights and whether or not reparations as a compensatory right can qualify as a human right, see J. Angelo Corlett, *Heirs of Oppression*, forthcoming.

[24] David M. Rabban, *Free Speech in Its Forgotten Years* (Cambridge: Cambridge University Press, 1997).

rights to due process, rights guaranteed by the Fifth Amendment to the U.S. Constitution—ironically in the name of national security in the "war against terrorism and extremism." And while the previous presidential administrations' suspension of certain rights lasted for relatively brief periods of time, there seems to be no end in sight for the current abuses of civil liberties by the U.S. government. Or so it seems, as a war against terrorism can last forever as it is highly unlikely that the perceived enemies will surrender, and equally unlikely that the U.S. government will give up its pursuit of what it construes—and has persuaded most of its citizens to believe—a just war against the terrorists. So if national security threatened by terrorism is what, according to the U.S. government, justifies suspensions of various constitutional rights, those rights stand to be suspended for the indefinite future.[25] But "national security will be better assured," argued William O. Douglas, "through political freedom, than through repression. Once we start restraining that political freedom, we evince a lack of faith in the boldest political principle the world has known."[26] After all, the "acceptance by government of a dissident press is a measure of the maturity of a nation."[27] The same is true of the acceptance of dissidence more broadly.

So what is the value of rights if they can and are so frequently violated—even by those who have sworn to protect them? The basic value of rights is that they accord to parties certain legal or moral claims that in turn provide a degree of dignity and respect to the rightholder that would not be true if the parties had no rights at all. Moreover, if you have a right to something, then the fact that social utility would be maximized if your right is violated or disrespected is no good reason to do so. For the possession of a right as a valid claim means precisely that your right trumps social utility when the two are in conflict. This was part of the basis of my criticism in the previous chapter of cosmopolitan liberalism's claims about rights to compensation. Of course, it is not simply the possession of rights that is important, but knowing when it is good to claim and exercise rights. And it goes without saying that a government that continually violates the basic rights of its citizens serves as the grounds for its own replacement by any means necessary, according to the Declaration of Independence: "whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, . . . it is their right, it is their duty, to throw off such government, and to provide new guards for their future security."

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[25] Alan Dershowitz, *Rights From Wrongs* (New York: Basic Books, 2004), p. 3.

[26] William O. Douglas, *An Almanac of Liberty* (Garden City: Doubleday and Company, Inc., 1954), p. 125.

[27] Douglas, *An Almanac of Liberty*, p. 163.

There seems to be little doubt that rights, especially publicly recognized ones, serve as precedents and trumps against those who would seek to violate them. Indeed, it has been noted that rights are shorthand expressions, clues to predictions of what the courts are likely to respect in the future. Rights are assertions of what courts have done and are predictive of what they will uphold under relevantly similar circumstances. They are "present aids for the guidance of future action."[28] And of the 1948 Universal Declaration of Human Rights, Douglas states, "This *Declaration* may in legal effect have no binding consequences in any land; it may be only a reaching for the stars. But it lifts the hearts of men the world around. For it states in solemn and dignified terms the aspirations of men and women of good will of every race."[29] And those who violate basic rights continually may have the most powerful military in the world to ensure the continuation of such rights violations. Even so, rights provide the grounds for the bringing down of tyrants and others who would disrespect the rights and lives of citizens, both domestic and foreign.

Kimberle Crenshaw, a critical race theorist, cautions leftists in their critiques of rights talk that discounting the value of rights may "have the unintended consequence of disempowering the radically oppressed while leaving white supremacy basically untouched" in the U.S.[30] For example, Derrick Bell states, "Slaves did not have rising expectations, and no one told them they had rights."[31] And Patricia Williams reminds us, after the U.S. Civil War, newly freed Africans were not only unowned but disowned, "outside the marketplace of rights" and "placed beyond the bounds of valuation."[32] Also, "Although rights may not be ends in themselves, rights rhetoric has been and continues to be an effective form of discourse for blacks. . . . The subtlety of rights' real instability thus does not render unusable their persona of stability."[33] Thus Williams and Crenshaw each disapprove of some critical legal studies scholars' abandonment of the discourse of rights. Williams argues:

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[28] Edwin N. Garlan, *Legal Realism and Justice* (New York: Columbia University Press, 1941), p. 42.

[29] Douglas, *An Almanac of Liberty*, p. 120.

[30] Kimberle Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," in Robert L. Hayman, Nancy Levit and Richard Delgado, Editors, *Jurisprudence Classical and Contemporary*, 2nd Edition (St. Paul: West Group, 2002), p. 633.

[31] Derrick Bell, *And We Are Not Saved* (New York: Basic Books, Inc., 1987), p. 39.

[32] Patricia Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991), p. 21.

[33] Williams, *The Alchemy of Race and Rights*, p. 149.

> For blacks, then, the battle is not deconstructing rights, in a world of no rights; nor of constructing statements of need, in a world of abundantly apparent need. Rather the goal is to find a political mechanism that can confront the *denial* of need. The argument that rights are disutile, even harmful, trivializes this aspect of black experience specifically, as well as that of any person or group whose vulnerability has been truly protected by rights.[34]

Perhaps critical legal studies scholars by and large enjoy a position of white privilege such that they can afford to jettison rights talk in favor of some abstract notion of deconstructing rights. But for those of us persons "of color" who enjoy little or nothing of white privilege, Williams' words speak loudly to the fact that rights discourse is valuable, and one reason it is valuable is because it signals failures of those who disrespect or violate rights.

I concur with these points by Crenshaw and Williams, and I believe that this is part and parcel of the Feinbergian account of rights from which I draw my account of rights. As I shall demonstrate below in refuting a fundamental and widespread misunderstanding of Marx's view of rights, it is not rights *per se* that serve the aims of oppression and hegemonic racism, for example, it is the misuse of rights for those kinds of wrongful and harmful purposes. The solution to this rights abuse is not the discarding of rights, but rather the very strong assertion of them in the face of their procurement for wrongful and harmful ends. This is precisely what happened in the case of Martin Luther King, Jr., and others in their constant assertion and reassertion of the basic rights guaranteed to all by the U.S. Constitution. And I submit that it is that sort of rights claiming—even in the face of some of the harshest forms of racist oppression—that won great victories against racist hegemony in the U.S. And Crenshaw insightfully adds, lest some not realize that racism is still a major part of U.S. society, that

> When segregation was eradicated from the American lexicon, its omission led many to actually believe that racism therefore no longer existed. Race-neutrality in law was the presumed antidote for race bias in real life. With the entrenchment of the notion of race, neutrality came attacks on the concept of affirmative action and the rise of reverse discrimination suits. Blacks, for so many generations deprived of jobs based on the color of our skin, are now told that we ought to find it demeaning to be *hired* based on the color of our skin.
>
> ... It is demeaning not to be promoted because we're judged "too weak," then putting in a lot of energy the next time and getting fired because we're too strong.[35]

Some of Crenshaw's words are reminiscent of those of Williams as she describes her feeling of being demarcated racially by the dominant racial

[34] Williams, *The Alchemy of Race and Rights*, p. 152.

[35] Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," p. 636.

out-group in U.S. society, which very much lies at the underbelly of the issue of affirmative action in the U.S.: "I felt myself slip in and out of shadow, as I became nonblack for purposes of inclusion and black for purposes of exclusion; I felt the boundaries of my very body manipulated, causally inscribed by definitional demarcations that did not refer to me."[36]

The nature and value of rights have an epistemic dimension. Rights possession is not contingent on knowing that one has a right, though exercising rights implies such knowledge.[37] This is a fact about rights that is often overlooked in discussions of them, leading to confusion.

Consider the case of privacy. In addition to Feinberg's analysis of the nature and value of rights, I submit that *persons must, for purposes of their having human dignity and having it respected normally, know that they can claim privacy rights and know how to do so effectively*. For even if one knows that one has a moral right to privacy, one might not know that the legal system permits one to claim it. Furthermore, even if one knows that the system permits, or even encourages, one to claim a certain right under a given circumstance, one might not know *how* to claim the right effectively, that is, so that one's right stands a good chance of being respected. But even this is insufficient for human dignity in a full sense. For *one must also have the ability to claim one's right* over those who are setting back one's interest, or against those who are about to do so.

Feinberg is correct, then, in arguing that the value of rights in general is that they provide a context for self-respect, respect for others, and human dignity. And this general value that rights possess seems to be true of the putative right to privacy also. But whereas Feinberg's imagined society of those who possess no rights ("Nowheresville") shows us of what a society without rights deprives its citizens, a society whose citizens possess no right to privacy lacks something even more significant.

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[36] Williams, *The Alchemy of Race and Rights*, p. 10.

[37] This is a distinctively Feinbergian conception of rights, one found in Feinberg, *Social Philosophy*; *Rights, Justice, and the Bounds of Liberty*; *Freedom and Fulfillment*, Chapters 8–10; *Problems at the Roots of Law* (Oxford: Oxford University Press, 2003), Chapter 2. For more on rights, see Loren Lomasky, *Persons, Rights, and the Moral Community* (Oxford: Oxford University Press, 1987); David Lyons, Editor, *Rights* (Belmont: Wadsworth Publishing Company, 1979); A. I. Melden, Editor, *Human Rights* (Belmont: Wadsworth Publishing Company, 1970); James Nickel, *Making Sense of Human Rights* (Berkeley: University of California Press, 1987); L. W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987); Judith J. Thomson, *The Realm of Rights* (Cambridge: Harvard University Press, 1990); Carl Wellman, *The Proliferation of Rights* (Boulder: Westview Press, 1999); *A Theory of Rights* (Totowa: Rowman and Littlefield Publishers, 1985); Morton E. Winston, *The Philosophy of Human Rights* (Belmont: Wadsworth Publishing Company, 1989).

Consider a society, not unlike Feinberg's Nowheresville, call it "Publicsville." In Publicsville, every citizen has an array of rights to possess property, raise a family, to certain medical benefits, etc. But what Publicsvillians lack is a right to *privacy*. Thus whatever one does, there is no safeguard against the public's intrusion into one's life at any level. This implies that to whatever one has a claim (say, to property, medical benefits, etc.), one has no claim against another for their disrespecting any information or act that one desires to keep private. In fact, Publicsville is so privacy-rejecting that it demands of its citizens to, say, reveal information about themselves upon either the request of other citizens or the government itself! A rather intrusive society, Publicsville frowns on attempts of citizens even to *seek* to keep private anything about themselves.

It would seem that what the citizens of Publicsville lack is a certain degree of control over their own lives, actions, and how others perceive them. It is certainly true that as a general principle, "the more one knows about a person, the greater one's power to damage him."[38] Moreover, it is arguable that the reason why such citizens cannot become true selves is that each is likely to exist under a fear of being "found out" for expressing or holding certain unpopular views, or for being intimate with others in ways that are deemed by others as being inappropriate, etc. In short, Publicsvillians lack a tremendous amount of personal freedom to determine their own destinies in terms of love, friendships, and the like. For it would appear that a certain level of privacy, and a right to it being respected, is necessary for one to even attempt to become an authentic (project-pursuing) self in society.

So if Feinberg is correct in arguing that rights are valuable for self-respect, respect for others, and human dignity, it also seems that a right to privacy is necessary for there to even be a self to respect! And if there is no self to respect, the concept of human dignity seems nonsensical. Thus if rights in general are necessary for self-respect, respect for others and human dignity, the right to privacy is needed to protect a citizen's interest in becoming or maintaining a *self to respect*. And this in turn is necessary for human dignity. As Charles Fried argues, "a threat to privacy seems to threaten our very integrity as persons."[39]

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[38] Stanley I. Benn, "Privacy, Freedom, and Respect for Persons," in Ferdinand Schoeman, Editor, *Philosophical Dimensions of Privacy* (Cambridge: Cambridge University Press, 1984), p. 226.

[39] Charles Fried, "Privacy [a moral analysis]," in Ferdinand Schoeman, Editor, *Philosophical Dimensions of Privacy* (Cambridge: Cambridge University Press, 1984), p. 205.

It would seem that the right to privacy, contrary to J. J. Thomson's claim that it is derivative,[40] is often part of a cluster of rights that is so fundamental that it might properly be termed a moral right, one to which each is entitled equally with others by virtue of one's status as a person. For it is necessary both for self-respect and respect for others, *and* for a citizen's attempt to become or maintain a self to respect.[41] And if moral rights are those which seek to protect human dignity, then rights in general and the right to privacy in particular are crucial to the extent that they seek to protect from harm those who respect persons.[42]

However, *just as it was insufficient for human dignity that one possess rights, or for one to even know that one has them, it must also be true that in order for human dignity to obtain, one must know that one can claim one's right to privacy, know how to do that effectively, and actually be able to claim one's privacy right*. For it is difficult to imagine a self that has no knowledge that the right to privacy can be claimed, or how it might be claimed effectively. Moreover, a self must be able to claim a right to privacy. Thus there may be laws about privacy, yet social circumstances (for instance, racism, sexism, etc.) might not permit such claims, even though they are morally valid.

With these basic ideas of rights in mind, we can now approach a longstanding problem in political philosophy concerning rights, political liberalism, and Marxism. It is a problem in how best to conceptualize the political marketplace of theories about how we ought to structure our legal and political institutions, and why. These are, by the way, fundamental questions that must be addressed in light of the ongoing attempts to construct a viable international legal system as substantial numbers of people in the world live under regimes that are, in one way or another, liberal or Marxist. If it can be shown that the traditional view of what separates liberal societies from Marxist ones is facile and problematic, then it can be replaced with a more plausible way to construe rights from these different perspectives, one that might guide international lawmakers in reaching consensus on the content of rules to govern the international order.

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[40] J. J. Thomson, "The Right to Privacy," *Philosophy and Public Affairs*, 4 (1975), pp. 295–314.

[41] This analysis of the moral value of privacy is not inconsistent with Rachels' claim that privacy is important in that it enables persons to control or regulate their own relationships with others [See James Rachels, "Why Privacy is Important," in Ferdinand Schoeman, Editor, *Philosophical Dimensions of Privacy* (Cambridge: Cambridge University Press, 1984), pp. 290–299. It is also congruent with the functional notion of the value of privacy found in Jeffrey L. Johnson, "A Theory of the Nature and Value of Privacy," *Public Affairs Quarterly*, 6 (1992)].

[42] A similar point is made in Jeffrey Reiman, "Privacy, Intimacy, and Personhood," in Ferdinand Schoeman, Editor, *Philosophical Dimensions of Privacy* (Cambridge: Cambridge University Press, 1984), pp. 310–311.

The Traditional Interpretation of Karl Marx's Critique of Rights[43]

It has been argued[44] by Allen Buchanan that in Marx's essays "On the Jewish Question" and "Critique of the Gotha Program," we find both an "internal" and an "external" critique of rights.[45] By "internal critique," Buchanan means a criticism that is provided from *within* the general framework of the belief system being appraised. An external critique, on the other hand, is one that is given from outside some or all of the fundamental beliefs of the targeted position.

The "Internal Critique"

Buchanan's version of Marx's *internal critique* of rights is as follows. According to Marx, the so-called "rights of man" are legal rights[46] and are regarded as a species of human rights.[47] Marx claims, "the rights of man

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[43] For a condensed version of this section of this chapter, see J. Angelo Corlett, "The Marxist Critique of Human Rights," in Rhonda K. M. Smith and Christian van den Anker, Editors, *The Essentials of... Human Rights* (London: Hodder Arnold, 2005), pp. 247–249.

[44] Allen E. Buchanan, *Marx and Justice* (Totowa: Rowman and Littlefield Publishers, 1982), pp. 50–85.

[45] R. G. Peffer [*Marxism, Morality, and Social Justice* (Princeton: Princeton University Press, 1990), pp. 324–28] holds the view, considered and rejected by Buchanan, that Marx rejects rights as such in "On the Jewish Question" (1843), but condemns only "bourgeois" rights in "Critique of the Gotha Program" (1875). The implication here seems to be that Marx may have toned down his critique of rights over the years.

Note that Peffer's interpretation of Marx on rights is similar to Buchanan's in insisting that Marx criticizes rights as such in "On the Jewish Question." However, their respective views differ when it comes to the matter of whether or not Marx criticizes only bourgeois rights. For Buchanan denies what Peffer affirms, namely, that Marx criticizes only bourgeois rights in his later work.

Others who agree that what Marx writes about rights is essentially negative and that he sets forth a general critique of rights include Feinberg, "In Defense of Moral Rights," and John Tomasi, who attributes to Marx the claims that "Rights are conflict notions. . . . rights are no more essential to healthy human groupings than band-aids are to healthy human bodies" [John Tomasi, "Individual Rights and Community Virtues," *Ethics*, 101 (1991), p. 521]. Also see James W. Nickel, *Making Sense of Human Rights* (Berkeley: University of California Press, 1987), pp. 116–117 for a view of Marx and rights similar to Buchanan's.

[46] Buchanan, *Marx and Justice*, p. 60.

[47] Buchanan, *Marx and Justice*, p. 61.

are valuable only for egoistic, isolated man."[48] Marx nowhere advocates the replacement of the defective capitalist right to private property with a superior communist right to property.[49] Marx calls talk about rights "absolute rubbish" and "ideological nonsense."[50] In communism, Marx believes, the sources of conflict will be so diminished that there will be no need for a system of rights claims to *guarantee* the individual's freedom to enjoy his share of the social product or to *guarantee* him a share of control over the means of production.[51] The right to equality is not in fact egoistic, contrary to Marx.[52] Marx assumes that any society where there is potential for interpersonal conflict warranting a system of rights, the purpose of which is to limit such conflict, is defective.[53] Only this assumption is adequate to explain Marx's "scorn for rights in general, his attack on *all* the rights of man, . . . and his deliberate refusal to characterize communism as a society in which an appropriate conception of rights is effectively implemented."[54]

There is, according to Buchanan, a degree to which Marx's critique of the rights of man carries over to the "rights of the citizen."[55] Marx avers that the rights of the citizen give free reign in private life to differences in wealth, education,. . . .[56] Advocates of the rights of the citizen, Marx argues, help perpetuate the illusion that the state is above clashes of class interests in society.[57] These last claims in Marx together imply that in communism the rights of the citizen will no longer be needed.[58] For Marx, the rights of the citizen exist only in opposition to the rights of man, and the rights of the citizen are needed only where the rights of man are needed and valued.[59]

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[48] Buchanan, *Marx and Justice*, p. 62. Nickel argues that Marx claims that the "rights of man" are egoistic in three ways. First, they perpetuate an egoistic mentality. Second, they encourage right holders to decide issues that affect others purely on the basis of their private interests. Third, they divide people so that the development of community is thwarted. See James W. Nickel, "Marxism and Human Rights," *42nd Annual Northwest Conference on Philosophy*, University of Oregon, Eugene, 1990.

[49] Buchanan, *Marx and Justice*, p. 63.

[50] Buchanan, *Marx and Justice*, p. 64.

[51] Buchanan, *Marx and Justice*, p. 64.

[52] Buchanan, *Marx and Justice*, p. 64.

[53] Buchanan, *Marx and Justice*, p. 64.

[54] Buchanan, *Marx and Justice*, p. 64.

[55] Buchanan, *Marx and Justice*, pp. 64–65.

[56] Buchanan, *Marx and Justice*, p. 64.

[57] Buchanan, *Marx and Justice*, pp. 64–65.

[58] Buchanan, *Marx and Justice*, p. 65.

[59] Buchanan, *Marx and Justice*, p. 65.

According to Buchanan, then, Marx holds that the rights of man are valuable only for egoistic persons in a capitalistic society. I shall refer to this as Marx's (alleged) "Rights Egoism Thesis." Marx also holds, according to Buchanan, that both the rights of man and the rights of the citizen have no value and place in communism.[60] I shall refer to this as Marx's (alleged) "Rights Nihilism Thesis." Marx's supposed argument for these two theses about rights, as presented by Buchanan, may be summarized as follows:

(1) Rights are legal guarantees for such freedoms as those specified by the rights of the citizen and the rights of man, and they are needed only where there is a potential for serious infringements of freedoms.
(2) Such infringements of freedoms can arise *only* from clashes of class interests and the egoism to which class conflict gives rise.
(3) There will be no classes in communism, hence no clashes of class interests, and no egoism as a result.
(4) Thus, there will be no need in communism for the rights of man (or those of the citizen) as legal guarantees.[61]

The "External Critique"

Marx's *external critique* of rights, argues Buchanan, takes the form of a series of replies to the question, "Does Marx reject only certain bourgeois rights, but not rights *per se*?" Buchanan's answer to this query is negative.

First, says Buchanan, Marx nowhere says bourgeois rights will be replaced by other rights in communism.[62] Second, Marx heaps scorn on equal rights and other rights as well.[63] Finally, in his "Critique of the Gotha Program," Marx says the *very concept of a right* implies equality, but when an equal standard is applied to individuals, they are treated unsatisfactorily. This, argues Buchanan, is Marx's critique of rights *as such*.[64] Buchanan cites as his textual support for this claim the following passage from Marx:

> But one man is superior to another physically and mentally and so supplied more labour in the same time, or can labour for a longer time; and labour, to serve as a measure, must be defined by its duration or intensity, otherwise it ceases to be a standard of measurement. This equal right is an unequal right for unequal labour. It recognizes no class differences, because everyone is only a worker like everyone

[60] Buchanan, *Marx and Justice*, p. 65.
[61] Buchanan, *Marx and Justice*, pp. 66–67.
[62] Buchanan, *Marx and Justice*, p. 68.
[63] Buchanan, *Marx and Justice*, p. 68.
[64] Buchanan, *Marx and Justice*, p. 68.

> else; but it tacitly recognizes unequal individual endowment and thus productive capacity as natural privileges. It is, therefore, a right of inequality, in its content, like every right. Right by its very nature can consist only in the application of an equal standard insofar as they are brought under an equal point of view, are taken from one definite side only, for instance, in the present case, are regarded only as workers and nothing more is seen in them, everything else being ignored. Further, one worker is married, another not, one has more children than another, and so on and so forth. Thus, with an equal performance of labour, and hence an equal share in the social consumption fund, one will in fact receive more then another, one will be richer than another, and so on. To avoid these defects, right instead of being equal would have to be unequal.[65]

Foundations of an Alternative Interpretation of Marx on Rights

Prior to assessing Buchanan's arguments, it is important to be mindful of some crucial distinctions concerning Marx and rights possession. First, one might contend that Marx failed to acknowledge that persons have rights. Second, one might hold that Marx held a position one of whose unacknowledged (and possibly unrecognized) implications is that persons have no rights. Third, one might aver that Marx acknowledged that none of the rights of persons should be enforced by institutional structures of law. Fourth, one might argue that Marx held a position one of whose unacknowledged (and possibly unrecognized) implications is that none of the rights of persons should be enforced by institutional structures of law. And with each of these views, one must ask whether or not Marx is thinking about rights *per se*, rights in capitalism, or rights in communism. This complicates matters considerably beyond the rather simplistic analysis set forth by Buchanan that asks in general and, it turns out, bifurcated terms whether or not Marx condemns rights *per se* or whether or not there is room for rights in a genuinely Marxist regime.

Now Buchanan does not clarify precisely what he himself means when he claims that Marx rejects rights *per se*. Yet it is clear that he interprets Marx as rejecting rights *per se*, i.e., both in capitalism, communism, and in any other social order. In contrast to Buchanan, I argue that Marx rejects only *some* rights-claims *in capitalism*, and that Marx holds a position one of whose unacknowledged (and perhaps unrecognized) implications is that persons do have some rights. I shall further argue that it is not inconsistent with Marx's

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[65] See *Karl Marx: Selected Writings*, Edited by D. McLellan (Oxford: Oxford University Press, 1977), pp. 568–569.

philosophy to add that at least some such rights ought to be protected by legal rules. Later on it will become clear why I attribute this view of rights to Marx.

Difficulties with Attributing the "Internal Critique" to Marx

Let us consider the plausibility of Marx's alleged internal critique of rights. Are the Rights Egoism Thesis and the Rights Nihilism Thesis plausible? The best way to decide this is to consider the soundness of (1)–(4) above, an argument which is supposed to support them.

Even if (1) is true, (2) is false. Marx does believe that infringements of freedoms do arise out of clashes of class interests (and the egoism to which such clashes give rise), but it is tenuous to ascribe to Marx the unfounded belief that clashes of class interests are the *sole* source of such infringements. Why must Marx believe that clashes of class interests are the "*only*" source of egoism? Cannot clashes of *individual* interests also give rise to egoism? Cannot infringement of freedoms result from a weakness of the will, quite apart from egoism? Cannot such infringements result from a miscalculation of the consequences of one's own actions, without such actions being egoistic in any meaningful sense? How can Marx be saddled with (2) in light of these obvious possibilities? Buchanan gives no citation from Marx to support his attribution of (2) to Marx. Taking all these considerations together, Buchanan's attributing (2) to Marx is a violation of the principle of interpretive charity. Thus (1)–(4) fail as a plausible ascription to Marx.

But (1)–(4) are also not properly attributable to Marx because from the supposition that there will be no classes in communism, and hence no clashes of class interests, it fails to follow that egoism will be eliminated. Again, egoism might result from the illegitimate pursuit of *individual* interests in communism. To assert that Marx holds (3) is uncharitable in that it is an invalid inference,[66] not to mention the fact that Buchanan fails to inform readers as to the basis of this attribution to Marx.

Buchanan might reply that Marx *does* state that there are different individual interests in communism, but that there will be such harmony of interests that rights conceptions are not needed to maximize the common good.[67] However, there are problems with this reply. First, it assumes that Marx is a utilitarian (or somewhat of one) in that the purpose of communism is to "maximize the common good." But Marx does not give us a sufficiently de-

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[66] Unless, of course, it can be *shown* that Marx holds such a position.

[67] Buchanan, *Marx and Justice*, pp. 166–167.

tailed picture of a communist regime such that this utilitarian description of it is justified. Moreover, it is unclear that a communist society, in Marx's sense, would undermine the separateness of persons and self-respect in the way that utilitarianism does.[68] Second, Buchanan's use of "such harmony of interests" implies a utopian view of communist society, something Marx goes to great lengths to denounce in the *Communist Manifesto*. Third, Buchanan wrongly assumes that Marx thinks there is "no need" for rights where there is no clash of (class) interests and egoism. But this confuses the need to exercise a right with the need to respect rights. One can do more than exercise a right. One may simply enjoy having one's right respected, something which does not require a clash of interests or egoism. In fact, even if (contrary to fact) Marx did claim that communism will be a utopian society, the claim that a communist society needs no rights is false. For such a society, just is one in which the rights of everyone are perfectly respected. Furthermore, rights have significance even when no claim is asserted. Voluntary decisions not to assert claims to rights can provide meaning to certain virtues.[69]

Thus Buchanan does not succeed in showing that Marx holds (3) [or that Marx has to hold (3) to avoid contradiction]. Moreover, (3) is not an unproblematic claim quite apart from whether or not Marx holds it. This makes the argument consisting of (1)–(4) unsound. It follows that, for all Buchanan claims, neither the Rights Egoism Thesis nor the Rights Nihilism Thesis have been shown to be held by Marx.[70]

It also follows that each is unsupported, since while *(1)–(4) serve as Buchanan's reasons why Marx holds the Rights Egoism Thesis and the Rights Nihilism Thesis, respectively*, Buchanan gives no citation from Marx to show Marx holds (1)–(4). Thus one has insufficient reason to think, based on the unsoundness of (1)–(4), that Marx believes either the Rights Egoism Thesis or the Rights Nihilism Thesis.

But consider some of the remaining claims of Marx's alleged internal critique of rights. Buchanan's claim that Marx nowhere advocates the replacement of defective capitalist *rights to property* with superior *communist rights to the same* is an *ignorantio elenchi* insofar as it is intended to support either Marx's alleged Rights Egoism Thesis or the Rights Nihilism Thesis. From the supposition that Marx is silent on an issue, it hardly follows that Marx cannot have anything to say, affirmative or not, about that matter. Speaking

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[68] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), pp. 183–192.

[69] Feinberg, *Rights, Justice, and the Bounds of Liberty*, p. 156.

[70] It does not follow, however, that there may be no other reasons why Marx might hold either the Rights Egoism Thesis or the Rights Nihilism Thesis, or both!

about the right to liberty, for example, just because Marx does not say that such a right has a place in communist society does not mean that it *cannot* have a place there. For Marx did not provide a blueprint description of communism. Marx can be charged with incompleteness in describing the communist society, but he has not precluded the possibility and importance of some rights in communism.

Furthermore, simply because Marx had harsh words to say about some rights, this does not entail that Marx believes that no rights may have a place in a communist society, or that they are valuable only for egoistic persons in capitalism. For Marx is simply responding to certain claims about rights and manifestoes of capitalist societies, societies where there is, he would hold, an illusion of liberty, equality, etc. Recall that when Marx sits down to write "On the Jewish Question" and "Critique of the Gotha Program" he is not writing philosophical treatises on the nature, value, and function of rights as such. Rather, he is discussing certain problems that arise for a capitalist way of making sense of rights. The very style of Marx's writings alerts the reader to at least this much, warning her to remain aware that Marx's words are rarely aimed at systematic theory construction, though they are often the result of careful and insightful criticism of capitalist society. To interpret Marx's negative words on rights as Buchanan does is to construe them as all Marx could have or would want to say about rights, which seems to be another violation of the principle of interpretive charity.

Moreover, even if it is true that in communism "the sources of conflict will be so diminished," it does not follow, nor does Buchanan give us reason to think Marx believes, that "there will be no need for rights" as legal guarantees of individual freedom. A system of legal rights can exist in communism even if there is no conflict present there. The absence of conflict may be a sign that rights are consistently respected and enjoyed. There is more to the importance of rights than one's claiming them.

Furthermore, Buchanan offers no textual support for his claim that Marx "assumes that any society in which the potential for interpersonal conflict is serious enough to warrant the establishment of rights to serve as limits on conflict is a deeply defective society,"[71] yet this claim is so absurd that to ascribe it to Marx is yet another violation of the principle of interpretive charity. Even if it is true that Marx holds that any society where the potential for interpersonal conflict warrants a system of rights to limit such conflict is defective, it hardly follows from this that communism has no place for the enjoyment of moral or human rights, which are respected by all. Moreover, Buchanan argues that only such a belief is adequate to explain Marx's "scorn

[71] Buchanan, *Marx and Justice*, p. 64.

of rights in general, his attack on *all* the rights of man. . . ."[72] Thus this latter claim of Buchanan's too is inadequate as a support of his own argument in regards to Marx's alleged internal critique of rights.

In short, Buchanan fails to provide adequate reasons in support of his claim that Marx's internal critique says there is no place for rights in communism.

Difficulties with Attributing the "External Critique" to Marx

Now consider the putative Marxian external critique of rights as such. Does Buchanan's threefold reply to the question, "Does Marx reject only certain bourgeois rights?" defeat the argument that Marx's critique of rights concerns only certain "bourgeois" rights, rather than rights as such?

In reply to Buchanan's first point, it does not follow from the fact that "Marx nowhere states that bourgeois rights will be replaced by other rights in communism" that either Marx criticizes rights *per se* or that Marx does not criticize certain "bourgeois" rights only. Buchanan's first point amounts to an *ignoratio elenchi* and does nothing to defeat the more charitable interpretation that Marx criticizes only certain kinds of rights as those which protect the bourgeois class.

In reply to Buchanan's second point, the fact that Marx scorns various rights (even "equal rights") is not enough to show that he successfully criticizes rights as such or that he criticizes rights other than those which protect the bourgeois class. As I argue below, there are certain rights that seem to be affirmed by implication in Marx's critique of capitalism (though Marx himself does not seem to acknowledge this fact). Furthermore, it must be pointed out that Marx, in the passages Buchanan cites from "Critique of the Gotha Program," does *not* obviously scorn rights as such, not even "equal right" as such. Instead, it is arguable that Marx laments such "ideas which in a certain period had some meaning but have now become obsolete verbal rubbish, . . . ideological nonsense about right and other trash. . . ."[73] These are not necessarily the words of someone who criticizes the notion of rights as such, or even of equal right as such, but are compatible with recognizing that there is a proliferation of rights talk which threatens the very meaningfulness of rights attributions and claims themselves. Marx argues that only in communist society "can the narrow horizon of bourgeois right be crossed

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[72] Buchanan, *Marx and Justice*, p. 64.

[73] Karl Marx, "Critique of the Gotha Program," in R. C. Tucker, Editor, *The Marx-Engels Reader*, Second Edition (New York: W. W. Norton & Company, 1978), p. 531.

in its entirety and society inscribe on its banner: From each according to his ability, to each according to his needs!"[74] Thus Buchanan's second argument, not unlike his first one, is problematic. Neither argument defeats the interpretation that Marx's critique of rights is limited in scope, rather than being general.

Furthermore, even if there is, as Buchanan argues, a total absence in Marx's writings of any indication that there will be a place for rights in communism, perhaps the reason for this is his general dissatisfaction with rights talk and rights theories that flourished during his time. That Marx does not specify the role of rights in communism (or even socialism)[75] does not prove that Marx criticizes other than bourgeois rights. Marx refers to the rights of man or bourgeois rights in such pejorative terms because such rights-claims separate people from one another and serve to divide members of society.

In reply to Buchanan's final point, it should be noted that Marx does *not*, in the passage from the "Critique of the Gotha Program" cited by Buchanan, criticize "the very concept of a right," as Buchanan avers. Instead, the passage explains how the alleged right to equality does not accord to humans' authentic equality, contrary to the claims often made in a capitalist regime. In the passage Marx is providing a criticism of rights *in capitalism*, of how the alleged right to equality is in certain crucial respects unequal in capitalism. This hardly amounts to a criticism of rights as such.

That Marx heaps scorn on certain rights, especially those respected under capitalism, that he has nothing positive to say about rights (in a direct fashion), and that he says nothing about the possible role of rights in communism, seem to be the features of Marx's writings that drive Buchanan's interpretation. But these are insufficient reasons to conclude that Marx thereby criticizes *all* rights. That Marx does not tell us the role of rights in communism does not entail that there can be no such role for rights in communism, according to Marx, nor that there can be no role, in fact, for rights in communism. Furthermore, Marx's slogan "from each according to his ability, to each according to his needs" appears to imply a positive (welfare) right of each individual *in a communist regime* to the provision of certain basic needs.[76] And there seems to be no reason why such needs could not include

[74] Marx, "Critique of the Gotha Program," p. 531.

[75] "Conceptions of rights will not play a major motivational role in the revolutionary transition from capitalism to communism" (Buchanan, *Marx and Justice*, p. 162).

[76] However, not every right is respected by Marx. Implied in Marx's condemnation of the private ownership of the means of production is that such a right is condemned by Marx. Further consideration might reveal other rights, which are implicitly condemned by Marx.

some property. Surely Marx would hold that persons in either capitalism or communism have a legitimate moral interest in securing the satisfaction of their basic needs. It is precisely this interest, Marx might argue, which grounds the moral (and perhaps legal) right to such needs.

Foundations of a Marxian Theory of Rights

Buchanan's arguments aside, my own interpretation of Marx on rights is that Marx does not criticize rights *per se*. Instead, Marx holds a position on rights one of whose unacknowledged (and possibly unrecognized) implications is that persons do and should have some rights. Recall that Marx singles out only certain specified rights ("the rights of man" and, perhaps, the "rights of the citizen") as targets for criticism: the rights to liberty, property, equality, security, and certain other political rights. *These* are the sorts of rights Marx criticizes as promoting egoism among persons in capitalist societies. But Marx does *not* criticize the right to resist oppression in Article 2 of the Declaration of the Rights of Man and of the Citizen (1789). That Marx does not criticize the right to resist oppression does not logically imply that he accepts it. However, it does mean that Marx does not criticize one of the rights of the Declaration, a right with which Marx is surely familiar. This fact alone casts some doubt on the view that Marx rejects rights *per se*.

What *does* Marx mean when he criticizes certain rights as being "egoistic"? Perhaps, like Bentham, Marx believes that the idea that the rights of man could be a starting point for political morality is "pernicious nonsense." Perhaps Marx holds that certain rights are a celebration of the primacy of individualism, and he opposes individualism (over, say, the recognition and pursuit of collective goods) because it asserts an individual's own interests against those of the collective good, which nurtures him or her and makes individual autonomy possible and worthwhile.[77] Rights separate individuals from the communities their very membership in which is vital for human growth. Since the rights of man are essentially social, this criticism goes on to say, there cannot be moral rights of this type independent of any or all social institutions, as the political atomist or individualist would have it.[78]

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[77] Jeremy Waldron, "Introduction," in Jeremy Waldron, Editor, *Theories of Rights* (Oxford: Oxford University Press, 1984), pp. 1–2.

[78] "Political atomism" is defined as the view that society is "in some sense constituted by individuals for the fulfillment of ends which were primarily individual," and includes the notion that rights play a central part in the justification of political structures and action [See Charles Taylor, *Philosophical Papers*, Volume 2 (Cambridge: Cambridge University Press, 1985), p. 187].

Similarly, Marx seems to be criticizing the rights of man because he sees them as serving a foundational function in the justification of other moral, social, and political principles (in certain, if not all, capitalist regimes), while such rights themselves are alleged to be self-justified or not justified on the basis of any such principle(s). Why should *rights* be *basic* to any social or political morality?

Jeremy Waldron recognizes this as a plausible interpretation of the "socialist" critique of rights when he writes, "if rights had any relevance at all in society, it was not on account of their being the terms of its foundation."[79] Perhaps Marx is also arguing that a rights-based society is problematic in that it does not recognize any intrinsic value in any collective good. If collective goods such as membership in society are intrinsically valuable, then it is to be expected that they provide the source both of personal goals and of obligations to others.[80] Perhaps Marx is criticizing the rights of man as being an underdeveloped notion of rights that fails to correlate individual rights with collective goods and obligations to society.

Marx could argue that in communism, the working class would possess a (collective) right to ownership of the means of production, a notion that would certainly ring consistent with Marx's general critique of capitalism. Moreover, he could argue that the working class both as a collective and as individuals possess rights against their exploitation and alienation.

Furthermore, that Marx calls capitalist exploitation "robbery"[81] and an injustice[82] seems to *imply* that Marx does not condemn rights *per se*, but rather affirms the moral right (based on the valid moral claim) of each person to be free from exploitation. More specifically, Marx's concept of capitalist exploitation implies the right of individuals not to be exploited, a right which is correlated with the duty of others not to exploit the right

[79] Waldron, "Introduction," p. 152.

[80] Joseph Raz, "Right-Based Moralities," in R. G. Frey, Ed., *Utility and Rights* (Minneapolis: University of Minnesota Press, 1984), pp. 46, 59.

[81] Karl Marx, *Grundrisse: Foundations of the Critique of Political Economy* (Rough Draft), Martin Nicolas, Translator (London: Allen Lane with New Left Review, 1973), p. 705.

[82] Ziyad I. Husami, "Marx on Distributive Justice," *Philosophy and Public Affairs*, 8 (1978), pp. 27–64. Husami argues that two principles of justice may plausibly be extracted from Marx's writings. The first is a principle of equal treatment. The second is one of rewards according to labor. Since capitalism violates the labor exchange between capitalists and workers, it thereby violates the principle of rewards according to labor. Since capitalism violates a principle of justice, it is unjust. For a critique of Husami's argument, see Allen W. Wood, "Marx on Right and Justice: A Reply to Husami," *Philosophy and Public Affairs*, 8 (1979), pp. 267–295.

holder, not to use the right holder as a mere means to individual or collective socioeconomic or political advantage.[83] Even if Marx's moral condemnation of capitalist exploitation is itself an insufficient ground to derive the conclusion that workers' rights are violated, it is an important evidence for such a conclusion. Also implied in Marx's critique of capitalism seems to be an individual's right not to be alienated from creative, self-conscious, and productive activity by robbing one of control over his or her actions.[84] This right implies a duty of others not to cause one to be alienated in such a way. This implied right, in turn, seems to further imply that individuals should have a choice to do certain things in a socialist regime. Thus there is reason to think Marx implies that some individual rights ought to be respected in a socialist regime. That is, Marx appears to provide a critique of capitalism one of whose unacknowledged (and possibly unrecognized) implications is that persons have moral rights at least some of which ought to be protected by institutional structures of law. Or, at least, it is not inconsistent with anything Marx argues about rights to attribute to him such a position on rights.

Marx's critique of capitalism also seems to imply that there are some individual and some collective (group) rights that are basic to a communist society. One such right is the collective and individual right to self-determination. This right is implied in Buchanan's own characterization of Marx's view of communist society: "Collectively they would freely choose to produce the bounty of communist society and individually they would freely choose which particular productive activity to engage in."[85] This, it might be plausibly argued, implies that Marx thinks that both collectives and individuals have what might be called a "right of self-determination," based on a group's legitimate interest (moral or legal) in collective freedom. Furthermore, Marx's critique of capitalism also seems to imply an individual's right to free productive activity in a communist regime. For in communism, Buchanan himself writes, "productive activity will be free, rather than compulsory, and mutually beneficial, rather than harmful, when and only when individuals choose to engage in particular activities on the basis of undistorted preferences and when the collective result of these choices is a social order in which all persons' undistorted preferences can be fully satisfied."[86]

Thus, even though Marx writes critically about certain rights in capitalism, his critique of capitalism seems to imply that some rights should not

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[83] This Marxian notion of exploitation is borrowed from Buchanan, *Marx and Justice*, p. 39.

[84] I borrow this Marxian notion of alienation from Buchanan, *Marx and Justice*, p. 43.

[85] Buchanan, *Marx and Justice*, p. 48.

[86] Buchanan, *Marx and Justice*, p. 49.

be condemned either in a capitalist society or in a communist one. Even if it is true that Marx both fails to provide conceptual resources to serve as weapons against combating rights violations during and after a communist revolution, and actively discourages his readers from trying to revise old ways of thinking about rights along communist modes of thinking, it does not follow that Marx criticizes rights *per se*, as Buchanan's alleged Marxian external critique of rights suggests.

But perhaps most telling of all is a fact that is not even alluded to by implication in Buchanan's, nor any other philosopher's treatment of Marx. The right to freedom of expression, thought by most in the Western world to gain its initial expression in the writings of John Stuart Mill, was in fact articulated in rather clear terms by none other than Marx himself. Historically and philosophically speaking, many philosophers and legal scholars believe that Mill, in *On Liberty* (1859), articulated an account of freedom of speech and expression that has served as the foundation of the predominant U.S. attitude toward the First Amendment and the right to freedom of expression.[87] But in 1842, Karl Marx argued that "[a]s soon as one facet of freedom is repudiated, freedom itself is repudiated, and it can lead only a mere semblance of life, since afterwards it is pure chance which object unfreedom takes over as the dominant power. Unfreedom is the rule and freedom the exception of chance and caprice."[88] Of freedom of the press in particular, Marx writes, "The essence of a free press is the characterful, reasonable, ethical essence of freedom. The character of a censored press is the characterless ogre of unfreedom; it is a civilized monster, a perfumed abortion."[89] Not only, then, does Marx express his unambiguous support of freedom of expression in publication, he condemns any attempt of a government to suppress it or limit it in any way. And Marx's words are not the rantings of an opinionist with merely emotive content. For as a philosopher, he wants to consider rationally the putative justifications for censorship: "we must above all examine whether censorship is in its essence a *good* means."[90] His conclusion is that censorship of the press is but a police measure that

[87] For example, in articulating some of the "arch-defenders of free speech," one author makes no mention at all of Karl Marx [See Daniel Jacobson, "Freedom of Speech Acts? A Response to Langton," *Philosophy & Public Affairs*, 24 (1995), pp. 67–68. Moreover, in his discussion of freedom of expression, Frederick Schauer makes reference to Mill, but never to Marx: Frederick Schauer, "The First Amendment as Ideology," *William and Mary Law Review*, 33 (1992), 853f.].

[88] Karl Marx, *On Freedom of the Press and Censorship*, Saul K. Padover, Editor and Translator (New York: McGraw-Hill, 1974), p. 46.

[89] Marx, *On Freedom of the Press and Censorship*, p. 26.

[90] Marx, *On Freedom of the Press and Censorship*, p. 28.

does not even achieve what it wants to achieve: "The censorship is thus no law but a police measure, but it is itself a *bad police measure*, because it does not achieve what it wants and it does not want what it achieves."[91] This is because "censorship is a constant attack on the rights of private persons and even more so on ideas."[92] Marx derives this inference from the premise that freedom in general is a good thing, and a good thing to protect: "If freedom in general is justified, it goes without saying that a facet of freedom is the more justified the greater the splendor and the development of essence that freedom has won in it."[93] Although Mill's defense of freedom of expression differs from Marx's in certain respects, it would be incorrect to suppose that it is Mill who first argued in favor of the right to freedom of expression. And most important of all, for our purposes, is Marx's own use of "rights of private persons" in the content of his support of freedom of expression, perhaps a most neglected facet of his attack on capitalism.

Buchanan, then, has not given us sufficiently good reason to conclude that either the internal or external criticism of rights, which Buchanan identifies, is properly ascribable to Marx. Marx criticizes certain rights because they tend to separate individuals from each other and minimize the pursuit of collective goods. There is room for some rights in Marx's position, ones that he discusses by implication in his overall critique of capitalism. The rights-respecting Marxist need not be embarrassed by Marx's scathing indictment of certain rights. Instead, the Marxist should understand that some of the richest human rights appear to be respected or affirmed (by implication) in Marx's writings.[94]

It is no longer obvious that a distinguishing mark between liberalism and Marxism is that liberalism makes room for rights, while Marxism does not. A deeper taxonomy of political theories is needed in order to differentiate more plausibly the genuine differences between these two important kinds

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[91] Marx, *On Freedom of the Press and Censorship*, p. 31.

[92] Marx, *On Freedom of the Press and Censorship*, p. 34.

[93] Marx, *On Freedom of the Press and Censorship*, p. 39.

[94] There is room for a fuller treatment as to how certain rights have a place in Marxism. One might strive toward creating and developing a Marxian theory of rights, one that is not logically excluded from the core of Marx's philosophy. A Marxian theory of rights would need to do at least the following: (i) explicate the nature and value of rights in communism (and explain how rights might differ in scope, content, etc. in a capitalist regime); (ii) provide a moral, social, and political grounding for rights of various sorts; (iii) set forth the conditions under which a right holder has a right in communism; (iv) give an account of the conditions under which rights "trump" others when rights conflict in communism.

of societies. In better understanding the differences between such political perspectives, those engaged in attempting to shape a system of international law might better appreciate what truly unifies and what genuinely distinguishes them in order to try to reach sufficient consensus on what each such political viewpoint can accept as binding on it in the Society of Peoples.

Chapter 6
Collective Rights

> *This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it—Abraham Lincoln.*[1]

Despite the neglect by political liberals in the distant and recent past to take collective rights seriously, the problem of collective rights is beginning to capture the attention of an increasing number of philosophers.[2] This new

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[1] Quoted in William O. Douglas, *An Almanac of Liberty* (Garden City: Doubleday and Company, Inc., 1954), p. 107.

[2] See Peter Benson, "The Priority of Abstract Right, Constructivism, and the Possibility of Collective Rights in Hegel's Legal Philosophy," *Canadian Journal of Law & Jurisprudence*, 4 (1991), pp. 257–291; Moshe Berent, "Collective Rights and the Ancient Community," *Canadian Journal of Law & Jurisprudence*, 4 (1991), pp. 387–399; Nathan Brett, "Language Laws and Collective Rights," *Canadian Journal of Law & Jurisprudence*, 4 (1991), pp. 347–360; Allen E. Buchanan, *Secession* (Boulder: Westview Press, 1991); A. Carter, "On Individualism, Collectivism, and Interrelationism," *Heythrop Journal*, 31 (1990), pp. 23–38; David Copp, "International Law and Morality in the Theory of Secession," *The Journal of Ethics*, 2 (1998), pp. 219–245; J. Angelo Corlett, "The Problem of Collective Moral Rights," *Canadian Journal of Law & Jurisprudence*, (1994), pp. 237–259; "The Right to Civil Disobedience and the Right to Secede," *The Southern Journal of Philosophy*, 30 (1992), pp. 19–28; *Terrorism: A Philosophical Analysis* (Corcrecht: Kluwer Academic Publishers, 2003), Chapter 4; R. P. George, "Individual Rights, Collective Interests, Public Law, and American Politics," *Law and Philosophy*, 8 (1989), pp. 245–261; Mary Gibson, *Workers' Rights* (Totowa: Rowman and Allanheld, 1983); Leslie Green, "Two Views of Collective Rights," *Canadian Journal of Law & Jurisprudence*, 4 (1991), pp. 315–327; Michael Hartney, "Some Confusions Concerning Collective Rights," *Canadian Journal of Law & Jurisprudence*, 4 (1991), pp. 293–314; Lesley A. Jacobs, "Bridging the Gap Between Individual and Collective Rights With the Idea of Integrity," *Canadian Journal of Law & Jurisprudence*, 4 (1991), pp. 375–386; A. Kernohan, "Rawls and the Collective Ownership of Natural Abilities," *The Canadian Journal of Law & Jurisprudence*, 20 (1990), pp. 19–28; Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Oxford University Press,

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concern for collective rights seems to be "the result of a recent interest in the value of communities."[3] Having in the previous chapter discussed some political dimensions of rights in general, I shall now clarify and assess some of the chief categories of *collective moral* rights talk and proffer some criteria of adequacy for a philosophical analysis of collective moral rights. Is it reasonable to ascribe to collectives moral rights, rights at least some of which ought to be protected by law? If so, then precisely which collectives ought to be attributed such rights, and under what conditions?

At the outset it is important to clarify, however tentatively, a working definition of "collective." On my view, a *collective* is a collection of individuals who are members of the same collective type.[4] A collective type is a category

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1989); "Liberalism and the Politicization of Ethnicity," *Canadian Journal of Law & Jurisprudence*, 4 (1991), pp. 239–256; *Multicultural Citizenship* (Oxford: Oxford University Press, 1995); Will Kymlicka, Editor, *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995); I. Macdonald, "Group Rights," *Philosophical Papers*, 18 (1989), pp. 117–136; Michael McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism," *Canadian Journal of Law & Jurisprudence*, 4 (1991), pp. 217–237; Avishai Margalit and Joseph Raz, "National Self-Determination," *The Journal of Philosophy*, 87 (1990), pp. 439–461; L. May, "Corporate Property Rights," *Journal of Business Ethics*, 5 (1986), pp. 225–232; Jan Narveson, "Collective Rights," *Canadian Journal of Law & Jurisprudence*, 4 (1991), pp. 329–345; Joseph Pestieau, "Minority Rights: Caught Between Individual Rights and People's Rights," *Canadian Journal of Law & Jurisprudence*, 4 (1991), pp. 361–373; Robert J. Rafalko, "Corporate Punishment: A Proposal," *Journal of Business Ethics*, 8 (1989), pp. 917–928; Leslie R. Shapard, "Group Rights," *Public Affairs Quarterly*, 4 (1990), pp. 299–308; R. L. Simon, "Rights, Groups and Discrimination: A Reply to Ketchum," *Analysis*, 40 (1980), pp. 109–112.

[3] Hartney, "Some Confusions Concerning Collective Rights," p. 294.

[4] This definition of "collective" is not inconsistent with David Copp's definition of "collective." David Copp, "What Collectives Are: Agency, Individualism and Legal Theory," *Dialogue*, 23 (1984), p. 249. In contrast, Peter A. French construes collectives as being of two general sorts: aggregates and conglomerates. Borrowing his use of these terms from geology, French defines an "aggregate" (or an "aggregate collectivity") as a collection of people whose membership is fixed, not subject to change over time. Peter A. French, *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984), p. 5. A conglomerate (or a "conglomerate collectivity"), on the other hand, is "an organization of individuals such that its identity is not exhausted by the conjunction of the identities of the persons in the organization. The existence of a conglomerate is compatible with a varying membership" (French, *Collective and Corporate Responsibility*, p. 13). What is predictable of an aggregate according to French is predictable of each member of the aggregate, while what is predictable of a conglomerate is not necessarily predictable of all or any of its members. What separates aggregates from conglomerates are three features: (a) conglomerates have internal decision and/or organizational procedures by which courses of action can be chosen, whereas aggregates do not; (b) generally, the enforced standards of conduct for individuals of a conglomerate are more stringent than

to which collections of individuals belong. For instance, the category "corporation" is a collective type of which the Exxon Corporation is a token or member. Similarly, the category "organization" is a collective type, a token of which include corporations such as Exxon, associations such as the American Philosophical Association, etc. Membership in a collective is different contingent on the sort of collective it is. I shall define an "aggregate" as a collection of persons loosely associated with each other. Implied in "loosely associated" is the idea that there are no recognized or formal membership conditions required of aggregates. A *conglomerate*, on the other hand, is a collection of persons into a diversified whole. On this construal, what separates aggregates from conglomerates is that the latter have wholeness or shared common interest among members (typically related to a specific goal or set of goals), which the former lack. A shared common interest is an interest held in common by each individual member of a collective. For example, institutions such as the University of Arizona are not referred to as "aggregates" because they have a complex structure of rules, offices, and a collective function that generates a collective interest connected to or directed at a common goal: education. Nor are corporations such as Exxon or The Journal of Philosophy, Inc. plausibly understood as aggregates.[5]

Prior to proceeding to an analysis of the nature of collective moral rights, it is important to understand the nature of moral rights in general. What *is* a moral right? As noted in the previous chapter, I concur with Joel Feinberg that a moral right is a valid moral claim, which is conferred on someone or something by the principles of an enlightened conscience.[6] If it is an absolute and nonconflicting moral right, then there is never a time when it can be legitimately infringed or violated. If it is a *prima facie* moral right, then its

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those usually thought to apply to the larger community of individuals; and (c) members of a conglomerate fill different defined roles by virtue of which they exercise certain powers over other members, where a change in the identity of some such member does not necessarily involve a change in the conglomerate's identity (French, *Collective and Corporate Responsibility*, pp. 13–14). See Narveson, "Collective Rights," 340f, for yet another categorization of collectives.

[5] This is not to say, though, that every corporation is or has an organizational structure. If I, as an author, am incorporated for legal purposes, this hardly necessitates that all corporations have such a structure. For the most part, however, multipersonal corporations possess such organizational structures. It is the numerically large conglomerate, which is the primary concern of this project.

[6] I assume that such principles exist and that, in principle, moral agents are able to know them. I also assume a moral rights realist stance for purposes of this book. For my primary aim is *not* to address the concerns of the moral rights skeptic. I do not, for instance, concern myself with refuting the Benthamite claim that moral or natural rights are "nonsense upon stilts."

strength is determined by the strength of the moral principles, which confer it on the right holder.[7]

Furthermore, a moral right is a moral guarantee against the setting back of the right holder's interest and/or claim.[8] Like any other right, a moral right has both a subject (the right holder) and an object (an agent against whom the right holds). A collective moral right always has as its subject some collective, though its object may or may not be a collective. For example, a corporate-collective may have a right to sue either a competing corporation or an individual. A collective moral right is distinct from a collective

[7] This notion of a moral right is largely taken from various statements made in Joel Feinberg, *Social Philosophy* (Englewood Cliffs: Prentice-Hall, 1973); Joel Feinberg, *Rights, Justice and the Bounds of Liberty* (Princeton: Princeton University Press, 1980); Joel Feinberg, "In Defense of Moral Rights," drawing upon the Romanell Phi Beta Kappa Lectures, 1990, in Joel Feinberg, *Freedom and Fulfillment* (Princeton: Princeton University Press, 1992), Chapters 8–10; Joel Feinberg, *Problems at the Roots of Law* (Oxford: Oxford University Press, 2003), Chapter 2.

[8] These are Feinbergian senses of legal and moral rights applied to collectives. By this I mean that there is textual evidence in Feinberg that supports each view of the grounding of rights. However, I combine the respective "interest" and "claim" views of rights, seeing no logical problem in my holding that a right may be possessed to the extent that, other factors obtaining, the subject of the right has a valid interest and/or a valid claim, either or both of which justify protection from infringement or violation. A similar sort of hybrid view of rights is recognized in Hartney, "Some Confusions Concerning Collective Rights," p. 303. But there are those, like Hartney and L. W. Sumner, respectively, who suppose that collective rights are possessed only by collective and choosing agents. Hartney, "Some Confusions Concerning Collective Rights," p. 309: L. W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987), p. 209. The difficulty with Sumner's position is the difficulty with the claim position on rights in general. That is, the claim position seems to deny rights status to individuals such as infants, in that they are not choosing or project-pursuing beings. However, most find it counter-intuitive that infants not be afforded rights, especially moral rights. The same kind of argument might be made in favor of collective moral rights. There is perhaps less of a problem in ascribing certain moral rights to highly organized conglomerates than there would be in the cases of, say, groups lacking such organizational and decision-making structures. But this would not preclude out of hand the ascription of certain moral rights to groups lacking a highly organized decision-making structure. For such rights might be grounded in the groups' having valid moral *interests*, which are sufficient to impose a moral duty on others to not interfere with the collective's exercise or enjoyment of the right.

Lesley Jacobs argues for a notion of collective moral rights in which collective rights are derived from more basic individual rights, and where individual rights serve to protect individual *integrity*, rather than their protecting interests and/or claims (Jacobs, "Bridging the Gap Between Individual Rights With the Idea of Integrity," pp. 377–381). On Jacobs' view, individual rights are "abstract" and more basic than collective rights, which are "derivative" of individual rights. I take this to be a version of Moral Rights Individualism, as I note below.

legal right. A collective *legal* right is one conferred by legal rules on some collective as a legal guarantee against the infringement of that collective's interest/claim, as the case may be. Like a collective moral right, a collective legal right has a subject and an object.[9] A right is typically a right to *X*, or a right to *do X*.

Prior to turning my attention to an analysis of collective moral rights, it is essential to clarify what it means to say one is *justified* in making certain moral rights ascriptions to collectives. Briefly, to be *morally justified* in doing something means that the weight of moral reasons in favor of *what one does* (or believes) at a given time and in a given circumstance outweighs the moral reasons against what one does (or what one believes). This is an objectivist and noniterative notion of moral justification.

I am concerned with the question of whether or not it is justified to ascribe to certain collective moral rights, making such collectives the subjects of rights.[10] As Michael McDonald puts it, "With collective rights, a group is a rights-holder: hence, the group has standing in some larger moral contexts in which the group acts as a right-holder in relation to various duty bearers or obligants."[11] This does not necessitate that such collectives are the exercisers of their rights, as McDonald goes on to mistakenly aver: "In a liberal state, right-holders must be more than merely passive beneficiaries of rights; rights-holders must be active exercisers of their rights."[12] However, a right holder is not the same as a right claimer. Whether or not I am in a utopian rights-respecting regime, I may possess some rights, which are never *de facto* disrespected. Hence I have no *need* to exercise or claim them. Yet I surely do not cease to *possess* such rights. One must take care not to conflate rights possession with rights claiming. My concern is not so much with how collective moral rights are exercised, but my argument pertains

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[9] It is worth noting that a collective right may be conferred by both moral and legal rules, such as when a corporation has a right to have its contractees honor that to which they agree.

[10] Leslie Green distinguishes two senses of collectivism about rights. There are "the rights of collective agents and rights to collective goods." My argument concerns the plausibility of collective rights where certain collectives are right holders. This corresponds roughly to Green's category that only collective *agents* are plausible candidates for rights ascriptions. Green states, "only the second can fulfill the political function generally assigned to collective rights and that even it can do so only partially" (Green, "Two Views of Collective Rights," p. 315).

[11] McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism," p. 220.

[12] McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism," p. 225.

(for the most part) to the issue of whether or not some collective possesses a moral right (a conceptual problem). The aim of collective moral rights is to protect *collective* moral interests and/or claims, even though it might be true that in the process of respecting such interests and/or claims, individual ones are protected. Are collective moral rights attributions justified?

Competing Models of Collective Moral Rights

Imagine the United States of America and the Congress of American Indian Nations (CAIN: a federation of ethnic groups/nations that includes the Diné, Zuni, Hopi, Apache, Seneca, and other American Indian ethnic groups/nations) noncoercively entering (i.e., as secondary agents: those who act on behalf of others) into a nonfraudulent agreement and signing a treaty whereby for one century a certain corporation is to be allowed to mine gold from the mountains of an already designated (by the U.S. government) tribal reservation. So for the century that the corporation mines the gold, having from the outset of the agreement "secured permission" from the CAIN to build a small town to house its employees, making it easier to attract and retain qualified personnel a few generations of miners have come and gone, and everyone—except for the CAIN—has forgotten about the treaty. The century in question is nearing its end, and the CAIN (the legal "landlords" of the said territory) reminds the corporation, its employees, and the U.S. that they will have to relinquish the land.

The current employees and the corporation, including the government of the U.S., are taken by surprise. *They*, as individuals, never made such an agreement with the CAIN! They do not even remember any such agreement being made. The Anglos in the territory have developed the land "in their own image," unaware of the treaty. How could "their" property and jobs be stripped from them by these nations, the CAIN? Nevertheless, when the treaty is produced, it is clear that the U.S. and the CAIN signed it both knowingly and without coercion. In fact, each year the government of the U.S. sent the nations a "treaty cloth" in order to demonstrate the validity of the agreement, which was one stipulation of CAIN. The American Indians, it seems, are now collectively laying claim to their legal and moral right to the property in question. The corporation, by way of the U.S. signing the treaty, shared with the CAIN a certain set of temporary legal and moral property rights to the land. These rights were possessed by the American Indians (as established by the U.S.'s relocation of the American Indians) to among other places, the piece of land in question. Moreover, the U.S. possessed the right to protect the corporation's temporary property right to use the land.

Thus it seems *on the face of things* justified to speak of collectives such as corporations, nations, and ethnic groups having rights such as property rights—rights conferred, moreover, by legal and moral rules.

Moral Rights Individualism

One might argue, however, that collective moral rights attributions are unjustified. Just as there are competing models of more general matters attributing moral properties to collectives, there are more specific instances of these views concerning the justifiability of collective "Moral Rights Individualism." Moral Rights Individualism is a species of a more general Moral Individualism. It is the view that it is not justified to attribute moral rights to collectives as individuals are the sole basis for such moral attributions because individuals are the sole basis of moral personhood. It seeks to reject collective moral rights ascriptions because there is insufficient moral reason to ground them. That is, there are no valid moral rules which would confer moral rights on *collectives*, though such moral rules do exist and confer rights on *individuals*. John Ladd holds a variant of the individualist position when he writes of formal organizations that "They have no moral rights. In particular, they have no *moral* right to freedom or autonomy. There can be nothing morally wrong in exercising coercion against a formal organization as there would be in exercising it against an individual . . . it would be irrational for us, as moral persons, to feel any moral scruples about what we do to organizations."[13] Similarly, Moral Rights Individualism is captured in what Hartney refers to as "value-individualism:" "only the lives of individual human beings have ultimate value, and collective entities derive their value from their contribution to the lives of individual human beings."[14]

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[13] John Ladd, "Morality and the Ideal of Rationality in Formal Organizations," *The Monist*, 54 (1970), p. 508.

[14] Hartney, "Some Confusions Concerning Collective Rights," p. 297. Hartney states:

> Value-individualism is not a thesis about the ontology of groups, but about the ground of value. Value-individualism does not imply ontological individualism, i.e., the view that groups are reducible to their members. Even if ontological individualism is false, it does not follow that the value of the group has any foundation other than the well-being of individuals, just as the fact that most entities in the universe are not identical with individual human beings does not entail that their value (if any) has some other ground than their contribution to the lives of individual human beings (Hartney, "Some Confusions Concerning Collective Rights," p. 299).

The challenge of Moral Rights Individualism may be put in the following way. Moral rights accrue to those who have certain capacities. Those who have such capacities will be members of certain collectives. Moreover, of any collective whose constituents have moral rights, it should not be said that that collective has moral rights. For the reason why such collectives are not believed to have moral rights is either that collectives fail to satisfy the necessary and sufficient conditions of justified collective moral rights ascriptions (an eliminativist position), or that collective moral rights talk is analyzable into, or reducible to, individualist terms without loss of meaning (a reductionist view). The value-individualism found in Hartney seems quite similar to the reductionist one when he argues that "There does not appear to be any category of right, which cannot, in principle, be held by individuals. And so, the conclusion is that, conceptually, there are no moral rights which inhere in collective entities."[15] Of course, there are other variants of this view.[16]

Moral Rights Collectivism

Moral Rights Collectivism, on the other hand, holds that it *is* justified to attribute some moral rights to certain collectives. It is a view about what makes an ascription of moral rights to a collective justifiable. It is clear to adherents of both Moral Rights Collectivism and Moral Rights Individualism that *individual* moral rights ascriptions are sometimes justified. But are collective (nondistributive) moral rights attributions justifiable? To be sure, there are other sorts of rights a collective might be said to have (such as political, legal, and human rights), but I will limit my discussion to whether or not it is justified to believe that certain collectives such as nations, corporations, and ethnic groups are the legitimate subjects of *moral* rights.

Toward an Analysis of Collective Moral Rights

In the remainder of this chapter, I will set forth an analysis of collective moral rights. While neither Moral Rights Collectivism nor Moral Rights Individualism disputes whether it is ever justified to ascribe moral rights to

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[15] Hartney, "Some Confusions Concerning Collective Rights," p. 310.

[16] Fernando Tesón, *A Philosophy of International Law* (Boulder: Westview Press, 1998), 132f.

individuals, a plausible defense of Moral Rights Collectivism is essential because it asserts what Moral Rights Individualism denies. It is necessary to provide a rationale for the claim that it is justified to attribute some moral rights to certain collectives. Solving the problem of collective moral rights is one of the preliminary and vital concerns of a more general and full-blown theory of moral rights.

Is one justified in arguing that the CAIN[17] has a moral right to some lands? What one needs to answer this query is an analysis of justified collective moral rights ascriptions. Consider the following Principle of Collective Moral Rights: *A collective, C, possesses a moral right, r, to do or have something (respecting an interest or claim, as the case may be) at a given time*, t_n, *to the extent that*:

(a) The balance of human reason confers on *C* a valid moral interest or claim at t_n;
(b) that interest or claim justifies holding some (other) party subject to a moral duty at t_n; and,
(c) *C* is a *conglomerate*, where its members see themselves as normatively bound to each other such that each does not act simply for herself, and that there is a shared understanding among members of the collective regarding its membership and secession-making.[18]

Now it is more reasonable for me to believe that the CAIN has a legitimate moral interest or choice than the negation of that claim. Why? Because this helps to explain why we think it is morally unjust for the U.S. to violate its treaty with the CAIN. If such a violation is morally wrong, it is because (among other things) the CAIN has a legitimate moral interest that it not be cheated concerning the terms of a valid treaty it has with the U.S. That is, the belief that genuine and legitimate (uncoerced) treaties between peoples should be honored in full neutralizes the belief that the CAIN has no legitimate moral interest or claim in regaining land taken from it by the government of the U.S. during the Jacksonian era (and perhaps beyond that period of U.S. history).

The moral rights individualist might argue, however, that this reasoning shows that there is a legitimate moral interest by some party in regards to the above U.S.-CAIN example. But it does not show that the subject of the moral interest is a *collective*, namely, the CAIN. For all we know, the subject

[17] The CAIN is a federation of nations, as well as a federation of ethnic groups.

[18] This point is borrowed from McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism," pp. 218–219.

of such an interest may be each and every member of the CAIN (but not the collective itself, nondistributively). Thus the above example fails to illustrate a collective moral right in the requisite sense. It is concluded, argues the moral rights individualist, that all the legitimate collective rights that exist are derivable from individual rights, making collective rights talk superfluous or otiose.[19] Is this reasoning sound? Are collective rights just a manner of speaking that is shorthand for more complicated language concerning a set of individual rights?

The following, I argue, *is* an example of a collective (nondistributive) moral right. It is not necessarily a right that is exercised jointly with the other members of the collective. Nor is it a collective moral right because it serves the interests of the individual members of the collective. Consider the moral right of the CAIN to secede from the U.S. (say, because of constant and severe injustices perpetrated against the CAIN by the latter). This is a moral right because the balance of human reason confers on the CAIN (collectively) a valid moral interest that *it* be treated fairly, for usurpation (based on the Doctrine of Discovery and Manifest Destiny) and other significant injustices are morally odious.[20] Now what makes this a *collective* moral right is that it is difficult, if not impossible, to make sense of the moral right to secede on distributivist grounds in that the right to secede, where it does accrue, entails having a morally valid claim to or interest in a certain territory.[21] If there is a moral right to secede, then it is a collectively held right (though, as I explain below, a collectively held right need not be exercised collectively). But then it is not an individual right, which each American Indian claims for herself or himself, but a collective moral right, which certain individuals claim in order to protect the interests of the collective to which they belong.[22] Thus it appears that Moral Rights Collectivism is sound; if secession

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[19] Narveson, "Collective Rights," p. 329. Jacobs affirms certain collective moral rights, though the status of such rights is always derivative from more fundamental individual moral rights. "[M]oral rights are valuable because they are capable of protecting the integrity of individuals" (Jacobs, "Bridging the Gap Between Individual and Collective Rights With the Idea of Integrity," p. 376). This makes collective rights contingent on or reducible to the rights of the individual, for collective rights then function solely to protect individual integrity, according to Jacobs.

[20] Furthermore, it seems plausible to hold that the Diné Nation (collectively) has the moral right to secede from the U.S., say, for purposes of self-preservation and where its self-preservation is truly threatened.

[21] This is commonly referred to as the "Territoriality Thesis" [Allen Buchanan, *Secession* (Boulder: Westview Press, 1990)].

[22] For a more detailed discussion of the moral right to secede, see J. Angelo Corlett, *Terrorism: A Philosophical Analysis* (Dordrecht: Kluwer Academic Publishers, 2003): Philosophical Studies Series, Volume 101, Chapter 4.

is a moral right at all, then it is a collective (not distributive) right. Similar reasoning may be adduced for collective rights to, say, reform a democratic constitution, or to impeach a corrupted official, or to political revolution of the kind described in the U.S. Declaration of Independence. So there seems to be good reason to think that there are not only collective legal rights, but collective moral rights also. For it seems to stretch the bounds of credulity to think that the natural and legal rights to secession, revolution, impeachment, etc. are adequately captured by the language of Moral Rights Individualism.

One, but certainly not the only, version of Moral Rights Collectivism is implied in Karl Marx's critique of capitalism. In the previous chapter, we saw that it is a grave error to misread Marx's critique of certain rights as a general critique of rights. Moreover, if we examine Marx's general critique of capitalism, we find that Marx seems to imply that there are some collective moral rights ascriptions that are justified when made in reference to a communist society. One such right is the citizens' (collective) moral right to self-determination.[23] This right is implied in Marx's own characterization of communist society: "Collectively they would freely choose to produce the bounty of communist society and individually they would freely choose which particular productive activity to engage in."[24] That such a right is a moral right follows insofar as this principle is grounded in the balance of human reason or the principles of an enlightened conscience (as Feinberg would put it in general rights terms), granting the communist citizens a valid claim to such free choice. Moreover, Marx's famous condemnation of the private ownership of the means of production seems to imply both that no individual is morally justified in owning the means of production, and that such ownership is prohibited in communism. In turn, however, this seems to imply that in communism there is a collective right to the "ownership" of the means of production. It is not ownership *per se* that Marx condemns, it is *private ownership* of the means of production, which, he argues, lies at the root of exploitation and alienation in capitalist society. Thus Marx stands as an example of one who seems to hold a version of Moral Rights Collectivism.[25]

Note that it is not a tenet of Moral Rights Collectivism that every right is a collective one, or perhaps with equal absurdity, that every collective right trumps individual rights (nor that every individual right trumps collective

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[23] For an argument in favor of this specific collective right, see Margalit and Raz, "National Self-Determination." The authors do not, however, discuss this as a Marxist right.

[24] Allen E. Buchanan, *Marx and Justice* (Totowa: Rowman and Littlefield Publishers, 1982), p. 48.

[25] Karl Marx and Frederick Engels, *Collected Works*, 52 Volumes (New York: International Publishers, 1975–1990).

ones, for that matter). Nothing about Moral Rights Collectivism states anything about the qualitative value of such rights in contradistinction to one another. Moral Rights Collectivism is a position that argues that Collective Moral Rights exist, and that some decision-making groups tend to possess them. Nor does Moral Rights Collectivism affirm the position that collective rights are always exercised with due care and diligence, morally speaking. It holds that there are individual rights and there are collective rights. But it says nothing about which rights trump others. The reason for this is that Moral Rights Collectivism recognizes that a rights context and all that it relevantly entails must determine which rights, if any, trump others and why.

However, not everything commonly referred to as a "collective moral right" is that which (like the right to secede) is collective (nondistributive). Some such rights, one might argue, are collective *and* distributive, such as the moral rights to both civil disobedience and to privacy. For just as both individual persons have a moral right to civil disobedience and to privacy, so do (one might argue) religious and political groups. For instance, Martin Luther King, Jr., claims the moral right to civil disobedience for blacks, Latino/a-Americans, etc., and it seems justified to ascribe such a right both to those groups and to their respective constituent members. That the right to civil disobedience is both a collective and individual right is echoed in the words of Rawls: "By engaging in civil disobedience a minority forces the majority to consider whether it wishes to have its actions construed in this way, or whether, in view of the common sense of justice, it wishes to acknowledge the legitimate claims of the minority."[26]

Surely it stretches credulity to hold that the use of "minority" by Rawls cannot refer to a group, but to individuals only. For what often makes civil disobedience a powerful weapon against oppression and injustice is that it is a moral right possessed by a collective (as well as by individuals). The possibility of collective and distributive rights is of some philosophical importance, but I shall not undertake an investigation of it here. I mention it as another possible category of moral rights. Still other moral rights are

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[26] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), p. 366. Just as, on Rawls' view, there is a collective right to civilly disobey the law, there are also collective duties, such as that of humanitarian assistance [John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), 106f.].

On the other hand, it is quite possible to think of collectives such as corporations that have certain privacy rights that are not shared by their constituent members. Indeed, one of the complaints today in U.S. constitutional studies is how corporations have appropriated the Fourteenth Amendment's protection of the right to equal protection under the law, an amendment the original intent of which was clearly to protect ethnic minorities, not corporate power.

distributive only: the moral right to bear offspring, if it does exist, seems to be just such an example insofar as it might be said that an ethnic group possesses this right. Nevertheless, I argue that Moral Rights Collectivism is sound to the extent that the moral right to secede, if it is a moral right at all, is a purely collective right. Thus some collectives can and do qualify as moral right holders, though their rights may be exercised distributively or by a recognized representative of the collective. The plausibility of this claim is sufficient to defeat the extremism of Moral Rights Individualism in denying the very *existence* of collective moral rights.

Often what the critic of collective rights confuses is the possession of a right with its exercise. Simply because corporate rights are often *exercised* by a duly acknowledged party within the corporation (or by proxy), this does nothing to discount the fact that collectives can and do *possess* certain rights that in some cases are exercised by individuals. Moral Rights Collectivism supports the claim that it makes sense to attribute moral and legal rights to certain collectives, regardless of who or what claims those rights. Furthermore, I am not arguing that a substantiated harm is a *sufficient* ground for a collective's claim to a right to something. For the interest that is set back (in the harming) might not be the sort of interest to which a collective has a legitimate claim! If an illegitimate interest is set back or denied (in one way or another), this does not mean a putative right to something is violated. For I have no legitimate right to act on my interest given that such an action would be unjustified.

Again, a collective moral right may be *exercised* by some subset of the collective, or by an official representative of the collective. In fact, one difference between a right the subject of which is an individual and one the subject of which is a collective is that a collective moral right, unlike an individual one, gives some member of the collective the power to claim that right *for* the collective. The chief manner in which a corporation exercises its moral right is by way of representation determined by a set of rules, organizational or institutional. For example, the rules of the corporation might state that its Chief Executive Officer or another high-ranking officer of the corporation share the "role responsibility"[27] of claiming or exercising: the corporation's moral right, if it has such a right, to due process when it is sued; its moral right that others keep promises made to it when it enters legal transactions such as renting a building (where the obligation to pay rent is incumbent upon the corporation, not its members), when it makes binding declarations

[27] H.L.A. Hart defines "role responsibility" as that duty or set of duties one has by virtue of the role one occupies. [Hart, *Punishment and Responsibility* (Oxford: Oxford University Press, 1968), pp. 212–214].

with the community, etc. Such rights, if they accrue to corporations, are created by the individual agents or representatives of the corporation.

Not only may corporations have their respective moral rights exercised in various ways, so too can nations. The U.S., it might be argued, exercises its moral right (and its perfect duty, according to Immanuel Kant[28]) to punish criminals whenever its representatives incarcerate a criminal.[29] As Hans Kelsen states, "[t]hough, in reality, it is always a definite individual who executes the punishment against a criminal, we say that the criminal is punished "by the state" because the punishment is stipulated in the legal order."[30] The imputation of a state official's action (of say, punishment) to the state is made on the basis of a complete or partial legal offender that is presupposed to be valid.[31] Similarly, the state is said to exercise a certain moral right when one who has the legitimate role responsibility (defined by the rules of the system)[32] to act on behalf of the state in fact acts for the state. Thus with nations and corporations, it is a rule-defined representative of that nation or corporation who, for example, claims the moral right for the nation or corporation. This is partly because nations and corporations are artificial collectives, created and sustained (when they are sustained) by humans for their own particular purposes and aims.

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[28] Immanuel Kant, *The Metaphysical Elements of Justice*, John Ladd, Translator, (London: Macmillan Publishing Company, 1965), pp. 23, 26, 29, 100, 107; also see J. Angelo Corlett, *Responsibility and Punishment*, 3rd Edition (Dordrecht: Springer, 2006), Library of Ethics and Applied Philosophy, Volume 9, Chapter 3.

[29] This claim is supported by Hans Kelsen, who writes:

> A right of the state exists when the execution of a sanction is dependent upon a law-suit brought by an individual in his capacity as organ of the state in the narrower sense of the term, as "official." Especially within the field of civil law, the state can possess rights in this sense to the same extent as private persons. The right of the state here has as its counterpart a duty of a private person. The relationship between the state and the subjects of the obligations created by criminal law allows for the same interpretation, insofar as the criminal sanction is applied only upon a suit by the public prosecutor. The act by which the judicial procedure leading to the sanction is put into motion is then to be considered an act of the state: and it is possible to speak of a legal right of the state to punish criminals, and to say that the criminal has violated a right of the state [Hans Kelsen, *General Theory of Law and State* (Cambridge: Harvard University Press, 1949), p. 200].

[30] Kelsen, *General Theory of Law and State*, p. 192.

[31] Kelsen, *General Theory of Law and State*, p. 194.

[32] Kelsen calls such an individual an "organ" of the state (Kelsen, *General Theory of Law and State*, p. 195).

In the case of an ethnic group (considered in terms of each one of its members, collectively), however, collective moral rights possession is different. While artificial collectives such as corporations and nations might possess certain moral rights based on their having specific legitimate moral claims, "natural" collectives such as ethnic groups might possess certain moral rights based on their having legitimate moral interests. Just as natural persons are said by many (save Benthamites) to possess certain natural or moral rights, so do ethnic groups possess certain moral rights. The difference, of course, is that individual rights are often (but not always) exercised by the subjects of the rights, whereas collective rights are exercised by representatives of the subjects of the rights. Thus there is reason to believe that moral rights may be justifiably ascribed to certain artificial and natural collectives.

But moral rights may be possessed, it seems, by subjects of an ethnic group based on the fact that such groups (as a collective) have legitimate moral claims. Take the example of an Orthodox Jewish Synagogue. Here there is an organized and decision-making group of Jewish persons that makes collective claims. To the extent that such claims are legitimate, such a collective possesses a moral right to do or to have something. Moreover, Jewish people as an ethnic group, it might be argued, have a putative moral right to become or form an artificial conglomerate, such as an Orthodox Jewish Synagogue. It would seem that Jews' putative moral right to form such a collective needs to be both respected and protected.

Thus in the example of the CAIN, it has a legitimate moral interest in self-preservation in the context of the CAIN's being significantly harmed by the U.S. Moreover, its legitimate moral interest *holds the U.S. to a moral duty* not to interfere with the exercise of CAIN's right to secede from the U.S. Thus we have an example of a collectively held moral right.[33]

But what does it mean to say that individuals in a collective share a common interest? Basically, it means that they share a common lot, and that the harming of one member of the collective constitutes (to some significant extent) a harm to each and every other member of that collective. Moreover, there are different ways in which members of a collective can share an interest together. First, they may do so by being born into an ethnic group,[34]

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[33] It might plausibly be argued that the moral right to secede might be extended to corporations that, for political reasons, wish to secede (taking property with them) from the country or nation to which they belong. Perhaps in such cases corporations seek to preserve themselves as autonomous agents from government that (they believe) seriously threatens their autonomy and legitimate moral interest in self-preservation.

[34] This is not to deny, however, that one may choose to become a member of a certain ethnic group if indeed such a group permits membership status by such means. My normative point is that, for purposes of public policy administration, one's being a member

a religious group, a nation, etc. In such cases, the members in question have little or no choice in the matter of being a member of the collective to which they belong. In some cases, such as being born into a nation, a member can use his or her freedom to defect to another country. But in the case of ones being born into an ethnic group, one lacks the right of defection from that group. One is, say, Latino (or partially so), and no amount of choosing to become otherwise makes a difference. Thus, members of a collective may share a common interest by being born into that group, and in some cases, members would have no freedom to leave that group.

In other sorts of cases, however, members of collectives, such as corporations (or the CAIN), voluntarily agree to become parts of a collective. They may do so by agreeing to assume certain responsibilities of collective members having a common interest. For instance, one may accept a position at the Exxon Corporation, assuming certain responsibilities, which promote the interests Exxon's constituents have in common. Or, one may voluntarily become a member of a religious sect, agreeing to carry out the religious plans and ideals of that group based on the shared interests of group members. In such cases, it seems reasonable to attribute to such a collective certain moral rights against its membership: namely, the rights against embezzlement, fraud, etc.

Must the members of a collective who share a common and legitimate interest do so *knowingly*? I think not, for the following reason. Although within some collectives, such as corporations, membership or sharing a common and legitimate interest is done knowingly, the case of ethnic groups is different. For instance, a visually impaired hermit may go through life never knowing that she is black (if her parents and family never informed her of her color while she was young). Yet, we would say she is still a member of the ethnic group: blacks. Thus, her inability to know the color of her skin and whatever else goes into making her a member of that ethnic group does not affect her membership status in that group.

Finally, the Principle of Collective Moral Rights mentions that a collective's moral interest[35] must be "legitimate." But what makes a moral interest legitimate? A moral interest is legitimate to the extent that it is supported by an objectively valid moral principle, which states that that interest is permissible, morally speaking. For instance, the moral principle, "innocent parties should not be unduly harmed" implies the moral interest parties have

of an ethnic group is a matter of genealogical heritage, not choice. For a philosophical analysis of ethnic identity, see J. Angelo Corlett, *Race, Racism, and Reparations* (Ithaca: Cornell University Press, 2003), Chapters 2–3.

[35] What makes an interest moral is that its content is moral.

in not being unduly harmed. Since this principle is plausible, the interest it implies is legitimate. And, since it is justified to say that collectives such as corporations and nations should not be unduly harmed, this implies an interest of that group not to be unduly harmed."[36]

If the Principle of Collective Moral Rights is plausible, then it is justified to ascribe some moral rights to certain collectives, given the plausibility of the claim that such collectives do at times have legitimate moral interests or claims. Moreover, it seems justified to say that some collectives, such as nations and corporations, have interests or make choices. And if it is justified to make some collective moral rights ascriptions, then there may be a *prima facie* case in favor of the claim that a liberal society ought to recognize such rights in its system of government.

Having set forth an analysis of collective moral rights attributions, it is important (for the sake of providing a plausible theory about their ascription) to provide a view of collective moral rights conflicts, to state which collectives can justifiably be ascribed moral rights, to delineate the varieties of collective moral rights, to say why collective moral rights ascriptions are valuable when they are, and briefly to explain the place of collective moral rights ascriptions in political philosophy.

A plausible theory of collective moral rights attributions ought to, it seems, explain how conflicts between collective moral rights claims are to be resolved. Consider the case of ascribing to a corporation the moral property right to strip mine a mountain versus a nation's putative moral right to preserve natural resources, such as mountains, from destruction. Clearly this is a conflict of collective moral rights ascriptions. How should it be resolved? In general, it is important to recognize that, given any two conflicting claims to a collective moral right,[37] one of the collective claims to that right is weaker than the other. This follows from the Principle of Rights Conflict: where claims to a right are in conflict, at least one of the claims must be invalid or less valid than other competing claims. Thus, either the corporation's claim to strip mine the property is invalid (at the time in question), or the nation's claim to use it for recreation or preservation is invalid (at the time in

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[36] This notion of collective moral interest is a distributive one. But there seems to be no obvious reason why a distributive conception of collective moral interests cannot support a nondistributivist notion of collective moral rights possession without embracing Moral Rights Individualism. After all, if there is a moral right to secede, it is a purely collectively *held* one. But even here it is not obvious that there is a purely collectively shared *and recognized* moral interest that grounds the moral right to secede.

[37] In this case, the right to use the mountain in a certain way, by preserving it, strip mining it or using it for recreation.

question). Both claims cannot both be equally valid at the same time and in the same respect.

How is this dispute to be settled? Conflicting collective moral claims to rights are to be settled by an appeal to deeper moral principles concerning the respective parties' claims. In this case, one might consider the plausibility of public goods over those of private gain and argue that a moral principle based on this notion would favor the nation's right to the mountain over the corporation's right to it. Such a utilitarian view would give greater weight to the nation's right to the property over the corporation's right to the same, assuming, of course, that the result of respecting the nation's right would maximize either average or overall satisfaction. On the other hand, it might be argued that a moral principle the content of which reveres personal integrity over utility considerations would trump the nation's right to the property in question. The point is that debates about collective moral rights claims conflicts will result in disagreements about deeper conflicts about moral theory. Thus, such conflicts must be resolved, ultimately, at the level of moral theory. No simple moral principle is able to inform one how to resolve conflicts of collective moral rights. A collective moral right claim is as valid as the overall moral theory supporting it, contextual factors being taken into account.

Another important criterion of a plausible theory of collective moral rights is that these explain which collectives can possess moral rights and why. What is it that makes certain collectives plausible subjects of moral rights? Which collectives are plausible candidates for moral rights ascriptions? The answer to this query is that *only* conglomerates, not aggregates, are the plausible candidates for moral rights ascriptions. The reason for this is a unity present in conglomerates, which is crucially lacking in aggregates, and it is this unity, which justifies one's referring to a collective as the subject of a moral right. It is this unity which indicates the legitimate moral interest that the members of the collective share, which in turn indicates the collective's moral right. This is why only conglomerates such as organizations, associations,[38] corporate-collectives, ethnic groups, federations, and coalitions are plausible candidates for collective moral rights ascriptions.

If collective moral rights do exist, then what are some of the moral rights that might be properly ascribed to collectives of the conglomerate type? First, there are moral rights that protect a collective's interest in existing or preserving itself from extinction or being extinguished. Such rights might be called "collective moral rights to life" and include a political or religious group's right to exist, a political group's right to self-preservation and development,

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[38] For an argument supporting the attribution of moral rights to associations, see L. W. Sumner, *The Moral Foundation of Rights* (Oxford: Oxford University Press, 1987), Chapter 3.

etc. Second, there are those moral rights which protect a collective's interest in freedom of expression, decision-making, etc., including, more specifically, a corporation's right to make its own decisions, a political group's right to express its own views without persecution, etc. Third, collectives have moral rights that promises made to them by other parties be kept, that their debtors repay debts, etc. A more complete theory of collective moral rights should also enumerate the varieties of collective moral rights, as well as showing how and why some moral rights are possessed by certain collectives, but not by others. It would also involve explaining how and why some moral rights are possessed by certain collectives, but not by individuals, and vice versa.

To this point, it might be objected that U.S. corporate law is replete with cases of corporations claiming corporate legal personhood status in order to have their interests in profiteering protected by the Fourteenth Amendment to the U.S. Constitution, an amendment devised specifically to protect the equal rights of blacks and other legally unprotected groups in the U.S. And many have succeeded in protecting their own interests over the protections of various public goods such as clean air, water, and the protection of various other elements of the environment, and over the claims and interests of the very groups that the amendment was designed to protect. While this is morally problematic and a misinterpretation or misapplication of the Fourteenth Amendment, there is no principled reason prohibiting the content of the Constitution from applying to natural, rather than artificial, persons only. Nothing in my argument is intended to support the corporate appropriation of the Fourteenth Amendment or any other part of the Constitution. But even if corporations do rightly qualify as moral and legal persons, as Peter A. French argues,[39] there is no good reason to think that corporate rights claims or interests ought to win out over claims to genuine public goods, or that they ought to override certain basic individual rights when a conflict of such claims arises.

Of some moral rights, it is not clear whether collectives—even conglomerates—actually possess them. Take the right to civilly disobey the law. Rawls construes civil disobedience as a "right,"[40] and defines it as "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government."[41] This definition of the right to civilly disobey the law states that the

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[39] French, *Collective and Corporate Responsibility*, Chapter 3.

[40] For an argument supporting the attribution of moral rights to associations, see Sumner, *The Moral Foundation of Rights*, Chapter 3.

[41] Rawls, *A Theory of Justice*, p. 364. When Rawls defines civil disobedience as a "conscientious act" he means that civil disobedience is a sincere appeal to the sense of justice of those in political power, of those whose views and practices need to be altered. Also

subject of this right is a "conscientious" agent. But it is far from clear whether or not conglomerates *are* conscientious agents (or *agents* in the true sense).[42] This does not mean that conglomerates *cannot* become conscientious moral agents. Rather, it suggests that they do not typically act conscientiously. To the extent that collectives do not act conscientiously, and assuming that the Rawlsian (traditionalist) definition of "civil disobedience" is sound, then such collectives are typically not the legitimate subjects of the moral right to civilly disobey the law. Thus it is not justified to attribute to a collective the moral right to civilly disobey the law (unless it is in turn justified to believe that that collective acts conscientiously).[43]

A plausible theory of collective moral rights should clarify why collective moral rights are valuable when they are. Of course, collective moral rights may be seen as valuable in at least some of the ways in which Feinberg argues that individual rights are valuable.[44] However, there might be ways in which collective moral rights carry with them a special or unique value for their possessors. This possibility needs exploration. *Why* are collective moral rights valuable? Individuals and collective can adversely affect the legitimate moral interest/claims of collectives. And since collectives (at least some of them) are important to human societies, their legitimate moral interests/cliams must be protected by a system of moral rights. Thus collective moral rights are valuable in that they protect from infringement a conglomerate's legitimate moral interests/claims, which, in turn, protect those conglomerates themselves. Collective moral rights are indicative of the moral importance of certain collectives. In turn, they demand that the moral considerations of such collective be taken seriously.

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see Hugo Adam Bedau, "On Civil Disobedience," *The Journal of Philosophy*, 58 (1961), 653f.; J. Angelo Corlett, *Terrorism: A Philosophical Analysis* (Dordrecht: Kluwer Academic Publishers, 2003), Chapter 2; Martin Luther King, Jr., *Why Can't We Wait* (New York: Harper and Row, 1964). For an insightful and critical discussion of the traditional view of the nature and moral justification of civil disobedience, see Paul Harris, Editor, *Civil Disobedience* (Lanham: University Press of America, 1989), "Introduction."

[42] See Corlett, *Responsibility and Punishment*, Chapter 7.

[43] This line of reasoning does not contradict my earlier claim about the possibility of some collectives qualifying as subjects of the moral right to civilly disobey the law. If a collective is structured such that it is justified to believe that it *is* a conscientious moral agent, then it seems to be a plausible candidate for its having a moral right to civil disobedience (other conditions obtaining). For a discussion of political, religious groups', and nations' rights to civil disobedience and to secede (respectively), see Corlett, *Terrorism: A Philosophical Analysis*, Chapters 2–4.

[44] Joel Feinberg, "The Nature and Value of Rights" in *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press, 1980), Chapter 7.

The Principle of Collective Moral Rights provides part of the basis for an explanation of the value of collective moral rights attributions. The formation and development of social, corporate, and other sorts of collectives is important to a society. In order to protect such collectives from wrongful harms and possible extinction, it might be argued, moral rights are ascribed to them so that they may protect themselves (or have a means of being protected). This, of course, is an argument from collective self-preservation.

Moreover, like any rights theory, *a plausible theory of collective moral rights should explain the place of collective moral rights in a moral/political philosophy, while avoiding the problems of political individualism, i.e., treating rights as solely fundamental to such a philosophy*. Joseph Raz makes a similar point about theories of individual rights.[45] Surely collective moral rights, though they have a central place in more general theories of rights, do not occupy the exclusively central role in a more general moral/political philosophy. Neither collective nor individual moral rights are the be-all or end-all of a promising moral or political philosophy.[46] Collective moral rights, though they are critical for moral rights and general rights theories insofar as such theories strive for completeness, are not *the* basic core of a moral and political philosophy. Nevertheless, the concept of collective moral rights plays a significant role in such a theory. But the concepts of moral duty, moral obligation, moral responsibility, etc. also play central roles. In a wider-reaching project than this one, it would be necessary to link the moral notions of rights, duties, responsibilities, etc. into an overall coherent philosophical framework.

Furthermore, *a plausible theory of collective moral rights ought to explain the basic relations between collective moral rights and the moral duties with which they are generally correlated.* Correlated with collective moral rights ascriptions to the subjects of rights are ascriptions of moral duties to the objects of rights. If a certain collective has a moral right to do or have *X* at a given time, then it has this right against either a collective or an individual (or both) at that time. This means that the right of one collective correlates with a duty of another collective or individual not to interfere with the exercise or enjoyment of that right. Moreover, such a right may at times correlate with more than one duty of one or more parties. For instance, if the CAIN has the moral property right to the land mentioned in the above story, then it is a right which correlates with (i) the moral duties of individual citizens,

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[45] Joseph Raz, "Right-Based Moralities" in R.G. Frey, Editor, *Utility and Rights* (Minneapolis: University of Minnesota Press, 1984), pp. 42–60.

[46] Loren E. Lomasky, *Persons, Rights, and the Moral Community* (Oxford: Oxford University Press, 1987), pp. 228–229.

the corporation, and the U.S. not to interfere with the exercise of its right, and (ii) the moral duty of others to honor all terms of the treaty. Thus, for every justified collective moral rights ascription there is some justified collective and/or individual moral duty ascription. To the extent that collective moral rights ascriptions are justified, so are attributions of moral duties to collectives and individuals.[47]

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[47] What are some additional criteria for a plausible theory of collective moral rights? By "criteria" I mean a list of independent desiderata for such a theory and a list of independent questions for the theorist to answer concerning collective moral rights ascriptions. One such criterion is *that it does not minimize the separateness of persons*. For an explanation of the separateness of persons objection to utilitarianism's treatment of individual rights, see Rawls, *A Theory of Justice*, Chapter 3; Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), Chapter 7; and J.L. Mackie, "Rights, Utility, and Universalization" in R.G. Frey, Editor, *Utility and Rights* (Minneapolis: University of Minnesota Press, 1985), 86f. That is, a theory of collective moral rights should recognize the significance of persons as autonomous individuals in that the life each lives is the only one each has. Moreover, *it ought not to emphasize the importance of collective moral rights at the expense of individual welfare*. For individual autonomy, concern for one's own welfare, and the like are essential to self-respect, the protection and promotion of which should be among the primary aims of any theory of moral rights.

However, just as a theory of collective moral rights ought not to minimize the separateness of persons, *it* ought not to inflate its importance either. *While preserving individual autonomy and individual welfare, such a theory must also place such concerns along side the crucial significance of collective goods and their realization*. For collectives, it might be argued, ought to be construed as having their *own* separateness, which requires protections and respect.

Another criterion for *a plausible theory of collective moral rights is that it does not view persons or collectives as mere means to the end of, say, social utility*. Rawls and Nozick each make this point against utilitarianism's not respecting individual rights (Rawls, *A Theory of Justice*, Chapter 3; Nozick, *Anarchy, State, and Utopia*, Chapter 7). This Kantian point stresses the importance of human dignity, individual and collective, in any theory of moral rights. It cautions against an act-utilitarian theory that would place such an emphasis on the value of collective goods or rights that individuals may be used as mere means, say, to the end of social stability by permitting a country's right to peace and security to always trump an individual's right to free speech.

Next, *a plausible theory of collective moral rights ought to safeguard against not differentiating between the distinct sorts of rights which might be possessed by a collective, and recognizing that justified attributions of collective legal rights and collective moral rights require separate analyses*. Much confusion results in failing to see that if a collective can have a right, it can have a moral right without having a legal one, and vice versa. This does not mean that a collective cannot possess a right that is both a legal and a moral right. For there is some overlap in the contents, subjects and objects of both moral and legal rights. The content of a right is what it is a right to. The subject of a right is the one (or collective) who (which) possesses the right. The object of a right is the one against whom the right holds to a duty. For more on the distinction between collective legal and moral rights, see Hartney, *supra* note 1 at 304.

In order to clarify further my defense of Moral Rights Collectivism, it is useful to compare it to the most developed philosophical treatments of collective rights: those of Raz and Larry May, respectively.

It is helpful to understand how the Principle of Collective Moral Rights is similar to Raz's analysis. "A collective right exists," argues Raz, "when the following three conditions are met:"

> First, it exists because the interests of human beings justify holding some person(s) to be subject to a duty. Secondly, the interests in question are the interests of individuals as members of a group in a public good and the right is a right to that public good because it serves their interest as members of the group. Thirdly, the interest of no single member of that group in that public good is sufficient by itself to justify holding another person to be subject to a duty.[48]

Raz's account concerns the *existence conditions* of collective rights, and the Principle of Collective Moral Rights concerns the conditions under which one is justified in attributing a moral right to a collective (a conglomerate). But the existence conditions, if valid and satisfied, just do inform one when it is justified to make a collective moral right ascription.

However, while Raz's analysis is a purely interest-based model of collective rights, the Principle of Collective Moral Rights is not. There is no logical inconsistency in holding both an interest and a choice model of rights in general, if by this one means simply that a collective's having a legitimate moral *interest* is not a necessary condition of its possessing a moral right.

A plausible theory of collective moral rights also evades the problem of political atomism. Atomism is the social contract theory that arose in the 17th century with Thomas Hobbes and John Locke. It holds that society consists of individuals for the fulfillment of individualistic ends. It asserts the priority of the individual agent and her rights over societal goods. It affirms an instrumentalist view of society, i.e., the society is valuable only to the extent that it serves individual welfare. Furthermore, it holds the "Primacy of Rights Thesis": it is fundamental to ascribe certain rights to individuals instead of their obligation to belong to society [Charles Taylor, "Atomism" in *Philosophy and the Human Sciences: Philosophical Papers*, Volume 2 (Cambridge: Cambridge University Press, 1985), pp. 187–210]. But this is a difficulty that is relatively easy for the collective moral rights theorist to evade since she is in part arguing that if rights are valuable, then collective (as well as individual) rights are valuable.

Moreover, *a plausible theory of collective moral rights should provide jointly necessary and sufficient conditions of plausible collective moral rights ascriptions*. At least, a full-blown theory of collective moral rights must succeed in doing this.

Although adequate answers to each of these problems is required of any plausible and full-blown theory of collective moral rights, I do not attempt to provide complete replies to each of these quandaries. Instead, I seek to give a foundation of a justified theory of collective moral rights, one which makes plausible the claim that collective moral rights ascriptions are sometimes justified.

[48] Joseph Raz, "Right-Based Moralities," p. 53.

Although the idea of collectives as claiming agents is a dubious one, this does not preclude a collective's being restructured to satisfy the conditions of collective agency and claiming. Nor does my argument here preclude the idea of subcollectives (albeit small ones) being claiming agents. Surely it does not stretch the imagination to say that university Boards of Directors and Regents claim and act both as individuals and as collectives. The question here, however, is whether *numerically large* collectives (nations, multinational conglomerate corporations, etc.) act as claiming agents. More specifically, there is no logical contradiction between the interest model's point that rights are protected interests and the claim model's idea that rights are protected claims.[49]

Nevertheless, while Raz sets forth *jointly sufficient* conditions for the existence of collective rights, the Principle of Collective Moral Rights uses "to the extent that" to connect its analysandum and its analysand. Although a collective either has a moral right or a valid moral claim or it does not, the conditions under which it may be justified to ascribe a moral right to it may vary and admit of degrees. "To the extent that" captures this idea. The Principle of Collective Moral Rights, while not a complete analysis of justified collective moral rights attributions, is a plausible propaedeutic for a full-blown analysis. There is, then, a considerably greater degree of completeness present in the Principle of Collective Moral Rights than in Raz's analysis. Nevertheless, it would be wrong to think that Raz's analysis, along with Feinberg's notion of individual rights, does not inspire the Principle of Collective Moral Rights. Finally, while on Raz's analysis of collective rights, a "right" is a right to a "public good" (i.e., safe roadways, clean air and water, etc.), the Principle of Collective Moral Rights realizes that not all rights (not even all moral rights) the subjects of which are collectives have as their contents public goods in Raz's sense of "public goods." Surely a corporation's moral right to be paid in full for goods provided and services rendered under legitimate contract or agreement is *not* a public good in Raz's sense. Neither is the content of the collective moral right to secede a public good in his sense. Thus my analysis of collective moral rights is somewhat broader in scope than Raz's. The content of a moral right is not restricted to a public good.

May's argument concerning collective rights may be plausibly reconstructed as follows:

[49] These notions of the interest and choice models are taken from Jeremy Waldron, "Introduction," Jeremy Waldron, Editor, *Theories of Rights* (Oxford: Oxford University Press, 1984).

(1) To have a moral interest is generally to be in a position justifiably to assert a claim to *X*.[50]
(2) Such claims are justified when the object of the claim is something which is a good for that person, and something which that person wants.[51]
(3) Interests are in common when the wants of all group members include or would include *X*.[52]
(4) If it is legitimate for group members to want *X*, then they, as a group or a group representative, may stand justified in claiming the group's right to *X*, over and above each individual's (of the group) claiming *X*.[53]
(5) A harm is the setting back of an interest.[54]
(6) "When harm can be substantiated, then the entity which is harmed is thought to have a basis for making claims upon society or individual human beings for the redress or suspension of the harmful practices."[55]
(7) Some groups (corporations, certain ethnic and "minority" groups) can be harmed (vicariously).[56]
(8) Therefore, some groups (corporations, certain ethnic and "minority" groups) at times have grounds for making claims against others. These claims constitute rights possessed vicariously by such groups.[57]

May goes on to argue that group solidarity and common external identification by others creates group members' interests, which serve as the basis of rights claims. These claims are made because of "group-based" harms, namely, harms to people because of their membership in a certain group.[58] Moreover, a harm is group-based or collective when the actual or perceived structure of a group makes all group members directly or indirectly (vicariously) harmed whenever one group member is harmed (or, I might add, when it is correctly *understood* by the group that one of its members is harmed).[59] A group has an interest, according to May, when adding up the individual

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[50] Larry May, *The Morality of Groups* (Notre Dame: University of Notre Dame Press, 1987), p. 114.

[51] May, *The Morality of Groups*, p. 114.

[52] May, *The Morality of Groups*, p. 114.

[53] May, *The Morality of Groups*, p. 114.

[54] May, *The Morality of Groups*, p. 112. May borrows this notion from Joel Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970), and *Rights, Justice, and the Bounds of Liberty*.

[55] May, *The Morality of Groups*, p. 112.

[56] May, *The Morality of Groups*, p. 113. See also Shapard, "Group Rights," p. 302.

[57] May, *The Morality of Groups*, p. 113.

[58] May, *The Morality of Groups*, p. 115.

[59] May, *The Morality of Groups*, p. 116.

interests of group members does not capture the common interest, and when reference to the group must be made in order to fully explain the interests of its members. It is not simply that a group member is treated in such and such a way on the basis of that member's possessing a certain property, but also that those who possess that property are treated by those external to the group as a coherent group. This latter fact justifies ascriptions of interests to groups.[60]

For May the sorts of collective that can have interests (and rights) are, prototypically, corporations and certain ethnic and "minority" groups, as stated or implied in (7) and (8), respectively. While ethnic groups have interests based on the strong feelings their members have for each other, corporations have interests vicariously because (i) they can be harmed, and (ii) they engage in joint action.[61] Indeed, "[t]he corporation is capable of decisions, actions, interests, and rights—but only *vicariously* so."[62] May avers that interests expressed in and consistent with the corporate charter, though individual interests (i.e., interests possessed by individuals in the corporation) are nevertheless corporate ones.[63]

May's way of handling the challenge of Moral Rights Individualism is by attempting to refute the reductionist thesis it employs. Focusing on property rights, May argues that corporate property rights cannot be fully explained by reference to the aggregate rights of both stockholders and managers of the corporation.[64] He writes: "As long as it is possible for the corporation to evade full liability because of the limited liability of its members, even taken collectively, then it is not possible to reduce corporate property rights to individual [property] rights."[65] In other words, because liability for corporate negligence is limited to the property of the corporation itself (instead of being extended to the property of its members), the corporation is seen as a legal or juristic person. In fact, it is the typical case of a juristic person.[66]

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[60] May, *The Morality of Groups*, p. 117. Compare Jeremy Waldron's claim that since there is no adequate account of a social good's desirability in terms of individual group members, there is no point in saying that the good is any single member's right to pursue [See Jeremy Waldron, Editor, *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (London: Methuen, 1987), pp. 186–187].

[61] May, *The Morality of Groups*, p. 120.

[62] May, *The Morality of Groups*, p. 124.

[63] May, *The Morality of Groups*, p. 124.

[64] May, *The Morality of Groups*, p. 125. Even so, he argues, corporate property rights should not be afforded the same moral or legal status as individual property rights (p. 132).

[65] May, *The Morality of Groups*, p. 132.

[66] Kelsen, *General Theory of Law and State*, p. 96.

But legal persons, as Kelsen reminds us, are the subjects of legal rights and duties:

> The legal person is the legal substance to which duties and rights belong as legal qualities. The idea that "the legal person has" duties and rights involves the relation of substance and quality.
>
> In reality, however, the legal person is not a separate entity besides "its" duties and rights, but only their personified unity or—since duties and rights are legal norms—the personified unity of a set of legal norms.[67]

This is a reconstruction of the basics of May's view of collective rights. But how does my position differ from May's? First, "something which is a good for that person" in (2) of May's argument smacks of paternalism, while paternalism is absent from the Principle of Collective Moral Rights. Second, while May's argument sets forth a sufficient condition for a collective's having a right: that a group has an interest (a valid one, presumably), the Principle of Collective Moral Rights proffers degree-laden conditions for justified collective moral rights ascriptions, ones which serve as a foundation of a more complete analysis. Third, May's position on collective rights speaks of rights in general, with some focus on corporate property rights. But my view emphasizes collective moral rights ascriptions and whether they are justified. In following Feinberg's model of a claim-right in the narrow sense, May does not tell us what sorts of rights, besides property rights, certain collectives can have.[68] Certainly corporations, if they do have rights, have more than simply property rights. They have, for example, due process rights, rights to goods and services provided under proper contract, rights to free expression, etc.

The importance of May's argument should not, however, be underestimated. It deserves credit for recognizing the importance of an argument for collective rights.

In sum, I have set forth an analysis of justified collective moral rights attributions. I then contrasted my view with those of Raz and May, respectively. Let us now consider and assess some crucial objections to Moral Rights Collectivism to determine its overall plausibility, as against the plausibility of Moral Rights Individualism.

Objections to Moral Rights Collectivism, and Replies

Even though it has been shown that the leading philosophical analyses of collective rights are ultimately inadequate, this is insufficient to show that my own version of Moral Rights Collectivism fares well. It is necessary,

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[67] Kelsen, *General Theory of Law and State*, p. 93.

[68] May, *The Morality of Groups*, p. 112.

then, to consider the most important challenges to my position in order to discern its plausibility.

One general critique of the notion of collective moral rights is that their existence and exercise undermine the importance of individual moral rights.[69] Just as the interests and rights of a totalitarian majority undermines the interests and "rights" of dissenting minorities, there is a worry that making room for collective moral rights will leave little or no room for the moral interests and rights of individuals.

To this objection, it may be replied that one of the reasons for respecting collective moral rights is precisely to protect the moral interests of minority groups from tyrannical majority leadership. Moreover, the mere potential for collective moral rights abuse is not in itself a conclusive reason against the reasonableness of certain collective moral rights attributions.[70] Moral Rights Collectivism does *not* hold that collective moral rights necessarily override individual moral rights, as this first objection implies. Rather, it claims simply that collective moral rights ascriptions are sometimes justified. Whether or not a given collective moral claim or interest outweighs a given individual moral claim or interest must be decided in light of a robust theory of rights conflict (or, according to a robust theory of claims and interests conflict, as the case may be). For instance, a community's moral claim to a right to safety need not outweigh a perceived criminal's moral claim to be treated as an equal and not harassed because he is a member of a group perceived to be a threat to the community. It appears, then, that this first concern with collective moral rights is misplaced.

A second concern about collective moral rights might be that respect for them in addition to individual moral rights proliferates the language of rights unnecessarily.[71] And with the proliferation of rights claims and attributions comes a confusion regarding the place of rights in both political and moral theory and in society. Collective moral rights attributions are unnecessary, if not downright confusing.

However, this worry about collective moral rights rests on the dubious assumption that an adequate theory of moral rights can admit of simplicity in regards to rights attributions. Moreover, this concern simply begs the question against collective moral rights. Why not argue that general views

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[69] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), p. 194.

[70] A similar point is made by Shapard, "Group Rights," p. 306.

[71] The caution against the proliferation of rights is registered in Sumner, *The Moral Foundation of Rights*, Chapter 1; Lomasky, *Persons, Rights, and the Moral Community*, pp. 4–7, 82, 224, and 229.

of individual rights, instead of collective rights, proliferate moral rights talk unnecessarily? These points tend to neutralize the force of this second objection to Moral Rights Collectivism. A *prima facie* case is made for the plausibility of Moral Rights Collectivism based upon the plausibility of a collectivist (nondistributivist) notion of the moral right to civil disobedience.

Furthermore, it might be argued that the real question about collective moral rights ascriptions is a metaphysical one that concerns the moral personhood and status of collectives. Some argue against the plausibility of the claim that moral rights may be attributed to a collective independently of the moral rights of the individuals it serves. Thus, unlike an individual's right to life, there is no collective and nondistributive moral right to life, or any other collective moral right, because collectives are not moral persons.[72]

In reply to this objection, the moral rights collectivist might plausibly argue the following. First, if being a moral person entails possessing moral properties, then it begs the question against Moral Rights Collectivism to argue that collectives do not have moral rights because they are not moral persons. Second, if one accepts the claim that nonhuman animals (nonpersons) can have moral rights without providing an adequate reason why collectives (nonpersons) cannot plausibly be ascribed moral rights, then this poses a problem for such a position. For the moral personhood of a putative right-holder, then, is not a necessary condition of justified moral rights ascriptions. Thus, that collectives are not moral persons (i.e., are artificial persons) in itself does not preclude them from plausibly being attributed moral rights on the assumption that nonhuman animals are correctly ascribed moral rights.

It might also be argued that my analysis of collective moral rights serves as an internal critique of a more general rights theory. By doing this, my view tries to incorporate collective moral concerns into a more general framework of rights. Perhaps, it might be argued, the very framework of rights is inadequate to capture moral concerns having true value. This implies that it might be more plausible to adopt an external critique of rights theories, one that does not construe rights as essential to human values and social living.

Given the complexities of a rights-skeptical standpoint, such a position is tempting. However, I remain unconvinced that rights are valueless. From what thesis would it follow that rights ought to be rejected in favor of some perspective which would omit rights from the central core of value in human

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[72] A similar position to this is argued by Rafalko in regards to corporations and rights (Rafalko, "Corporate Punishment: A Proposal," pp. 917–920). Contrast Rawls, who considers certain collectives such as nations, provinces, business firms, etc. to be "persons" [John Rawls, "Justice as Fairness" *The Philosophical Review*, 67 (1958), p. 166; *A Theory of Justice*, p. 521].

existence? Surely this result would not follow from the supposition that certain rights, when respected in specific circumstances, promote individualism or atomism. For these sorts of cases simply show that such "rights respecting" needs rethinking *in those circumstances*. But it does not follow that rights *per se* ought to be rejected. What external critiques of rights *do* tell us is that the very foundations of rights need rethinking, yet on grounds other than purely individualistic ones. My view of collective moral rights begins to take political and moral philosophy in this direction, suggesting that *if* rights (in particular, moral rights) are important, then so are collective moral rights. It is precisely such a proposition the plausibility of which forces us to restructure our conceptions of social and political life.

Finally, it might be argued with Jan Narveson and Jacobs (respectively) that collective moral interests and/or claims are derived from the aggregate interests or claims of the members of the collective. Moreover, this derivative status of moral collective interests or claims renders the notion of collective moral rights untenable.

But this objection seems to assume that individual moral interests and/or claims are in some way *basic* and are *themselves underived*. Even if collective moral interest or claims are derived from individual ones as stated in the objection, it does not follow straightaway that certain collectives have no valid moral interest or claims that require protection. Moreover, at least some individual moral interests and/or claims are derived from collective ones. Yet one would not argue that such interests or claims somehow lose significance because of their derived status. As a faculty member of a university, I have certain moral interests or claims I would not otherwise have if I was not serving in such a capacity: the interest in being treated fairly as a faculty member, academic freedom, etc. To this point, the moral rights individualist must be careful not to reply that the reason collectively derived individual moral rights *are* rights is because individuals are the basic unit of society and morality. For that begs the question against the moral status of collectives.

Moral Rights Collectivism seems to withstand these criticisms.[73] If the above arguments succeed, then Moral Rights Individualism is problematic and there is a *prima facie* case made out for Moral Rights Collectivism.[74]

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[73] If McDonald is correct, certain other individualist (liberal) challenges to Moral Rights Collectivism run afoul (McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism," 229f.).

[74] There are questions that would require adequate answers by a full-blown theory of collective rights, queries which I did not take on in these pages. First, there is the matter of justifying legal and other nonmoral collective rights ascriptions. Second, there is the question of whether or not Rights Realism (the view that rights are ontological con-

My primary target in this chapter is Moral Rights Individualism. As one author points out, it is strange that (moral) rights individualists have few problems in holding that rights possessed by individuals imply certain moral duties are imposed on certain collectives. He argues that collective rights are not endorsed by many rights individualists because they believe that the interests of individuals override competing interests of collectives.[75] However, if such collectives truly possess moral duties, then on what grounds should they be denied candidacy for possessing moral rights? Moreover, I have argued that the moral right to secede, if it does exist, is a collective (nondistributive) right, and I set forth and defended an interest/choice model of justified collective moral rights.

My arguments have significance for social and political philosophy. Insofar as liberals and communitarians argue about whether or not individual rights or community virtues exclude each other, Moral Rights Collectivism seems to carve out a hybrid position, which affirms both individual *and* collective rights. In arguing that some collectives have valid moral interest or claims, I am claiming that such interests or claims ought to be respected and protected by a system of legal rules. Thus I am arguing that collective moral rights serve to ground collective legal rights. Both individual and collective moral rights must be respected by any plausible social and political theory. Surely there is no logical contradiction in affirming both that certain individuals and certain collectives are the proper subjects of moral rights attributions. Political philosophy should make a place for both sorts of rights, without granting *a priori* primacy to either class of rights. I am attracted by the liberal concern for individual rights. However, to the extent that certain collectives have valid moral interests or claims, they *do* possess some moral rights. It is precisely these rights that should also form part of the foundation of a plausible moral and political philosophy, and a reasonably just domestic or global legal order.

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stituents of the universe) itself is plausible. A complete theory of rights, it seems, must answer these and other important queries.

[75] Green, "Two Views of Collective Rights," p. 315.

Chapter 7
Humanitarian Intervention and Indigenous Rights

A second guideline for thinking about how to carry out the duty of assistance is to realize that the political culture of a burdened society is all-important; and that, at the same time, there is no recipe, certainly no easy recipe, for well-ordered peoples to help a burdened society to change its political and social culture.—John Rawls.[1]

Having in the previous chapter analyzed the nature of collective moral rights, I shall now discuss the humanitarian intervention in terms of whether or not a certain country has a moral right to intervene into the affairs of another, and if so, under what conditions it would be justified for it to claim and exercise the right.

As discussed in Chapter 4, recent philosophical debates regarding global justice in part revolve around issues of global inequality and whether or not it is a requirement of global justice that societies be made "equal" in some substantive manner. By "equal" is meant whether societies ought to be made internally equal and externally equal, where "internal equality" refers either to the equal opportunity within each society (consistent with John Rawls' difference principle[2]) or *de facto* equality within them (some versions of cosmopolitanism subscribe to this view), and where "external equality" refers to societies themselves being made "equal" to one another in either of the requisite senses.

Whatever else international law requires for its moral underpinning, it must require global justice between societies. And this in turn amounts to,

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This chapter is dedicated to the people of Colombia in the hope that peace will reign there soon.

[1] John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), p. 108.

[2] John Rawls, *Collected Works*, Samuel Freeman, (ed.) (Cambridge: Harvard University Press, 1999); *Political Liberalism* (New York: Columbia University Press, 1993); *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

J.A. Corlett, *Race, Rights, and Justice*, Law and Philosophy Library 88, DOI 10.1007/978-1-4020-9652-5_8,
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at the very least, the absence of significant forms of injustice[3] between peoples or societies and the respect for "human rights."[4] This much is held by Rawls[5] and David Miller,[6] respectively, and perhaps most, if not all others,[7] concerned with global justice. And it is this common point of agreement concerning global justice, ambiguous and vague though it may be, that I seek to exploit in this chapter regarding a particular context of global conflict. Indeed, perhaps this chapter can provide a modicum of clarification to this notion as it was discussed in Chapter 4 in terms of the possibility and desirability of a system of international law.

More specifically, I seek a plausible solution via continuing humanitarian intervention into the complicated problems engulfing the people of Colombia concerning the Colombian civil war of about four decades. I attempt to do this not by delimiting its discussion to how "illicit" drugs effect adversely United States citizens and their government's alleged "war" on drugs, but by looking at the overall moral status of the problem beyond (but nonetheless including) the narrow confines of U.S. society. My analysis of the problem sees it as a complex one, and one which requires the respect of Colombian sovereignty, but only insofar as indigenous (U'wa) sovereignty is reestablished and protected. It raises important issues, then, for international law insofar as international legal institutions, whatever their practical and principled merits, must be concerned with the sovereignty of indigenous peoples globally.

The U.S. government has intensified its efforts in addressing the manufacturing and distribution of "illicit" drugs such as cocaine and heroin in Colombia. The U.S. has consistently provided substantial aid to the Colombian government in order to combat the drug cartels, which are protected

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[3] For philosophical discussions of matters related to the injustices of war crimes and whether or not and, if so, how they ought to be handled by way of international legal contexts, see A. Jokic, Editor, *War Crimes and Collective Wrongdoing* (London: Blackwell Publishers, 2001).

[4] Carol Gould, *Globalizing Democracy and Human Rights* (Cambridge: Cambridge University Press, 2004); James Nickel, *Making Sense of Human Rights* (Berkeley: University of California Press, 1987); Rhonda K. M. Smith and Christien van den Anker, Editors, *The Essentials of Human Rights* (London: Hodder Arnold, 2005).

[5] Rawls, *The Law of Peoples*.

[6] David Miller, "Against Global Egalitarianism," *The Journal of Ethics*, 9 (2005), pp. 55–79.

[7] A representative sampling of those engaged in discussions of global justice and its implications for international law are found in *The Journal of Ethics*, 9 (2005), pp. 1–300. Still others include Bernard Boxill, "Global Equality of Opportunity and National Integrity," *Social Philosophy & Policy*, 5 (1987), pp. 143–168. Also see, Ian Shapiro and Lea Brilmayer, Editors, *NOMOS: Global Justice* (New York: New York University Press, 1999); Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd Edition (Ithaca: Cornell University Press, 2003).

by a coalition of rebel forces (primarily the FARC and the ELN) that have taken hold of and controlled substantial amounts of Colombia's land mass. And this approval and delivery of substantial U.S. humanitarian aid (partly in the form of military aid) to Colombia is made despite Colombia's well-publicized record of human rights violations. Perhaps this reportage is what has alarmed the U.S. government into taking executive and congressional action, which provides the Colombian government with several military helicopters, other military equipment, as well as several more troops to fight what it officially refers to as the "war" against the cocaine cartels. Colombia's drug cartels, as many know, are collectively the world's greatest manufacturers and distributors of cocaine, and are the largest exporters of cocaine to the U.S. Yet the war against drugs in the Colombian case just is a war against the rebel forces, making the U.S.'s intensified assistance in the war on drugs in Colombia an act of taking sides in the civil war there, despite U.S. governmental declarations to the contrary.

Former Colombian president Andres Pastrana welcomed U.S. involvement along these lines as part of "Plan Colombia," as his many visits to lobby the U.S. government for military assistance indicate. And current Colombian president Alvaro Uribe seeks to continue basically along the same lines. Unsurprisingly, rebel leaders continue to threaten an increase in violence in Colombia whenever there is further U.S. military intervention. But is such U.S. intervention morally justified? If so, then an additional question with which to struggle is whether or not there is a moral duty to intervene. What are the conditions under which international law ought to recognize a *right* of third-party states to intervene militarily into the affairs of other countries, as in the case of Colombia? And under what conditions might there be a moral *duty* of third-party states to do so? Finally, whether or not there is a moral justification and/or a moral duty to intervene in Colombian affairs, is it the case that the *U.S.* ought to do so any more than, or even as much as, it already has?

The Morality of Humanitarian Intervention[8]

Rather than simply appealing to self-interest or working within the confines of overly biased politics, what is needed is a set of moral guidelines for the

[8] "Humanitarian intervention" is defined as third-party (typically state) intervention into the affairs of one or more states in order to provide assistance to a significantly politically oppressed group whose basic human rights are disrespected (consonant with John Rawls' sixth principle, below). Such intervention might take nonviolent or violent forms, depending on what is necessary to achieve the liberation of a violated people. For a historical account of the notion, see Terry Nardin, "The Moral Basis of Humanitarian Intervention," *Ethics and International Affairs*, 16 (2002), pp. 57–72.

justification, right, or duty of third-party states to intervene into the affairs of other states or groups within states. Such intervening parties are often, but need not be, third-party states. These guidelines should not be uninformed by empirical realities, though they can be expected to require us to think beyond the confines of what we normally believe to be possible or right (all things considered) in complicated matters such as we find in Colombia.

Following John Stuart Mill, Michael Walzer argues that, in light of rights to sovereignty and, more specifically, self-determination, humanitarian intervention is sometimes justified or permitted on moral grounds on the condition that "... intervening states must demonstrate that their own case is radically different from what we take to be the general run of cases, where the liberty or prospective liberty of citizens is best served if foreigners offer them only moral support."[9] Even when the moral case for humanitarian intervention or counterintervention can be made, the point of the former is to balance out the powers between the opposing parties, and the goal of the latter is not to win the conflict, but to rescue.[10] Moreover, humanitarian intervention is justified, avers Walzer, "when it is a response (with reasonable expectations of success) to acts 'that shock the moral conscience of mankind.'"[11] Furthermore, he argues:

> ... states can be invaded and wars justly begun to assist secessionist movements (once they have demonstrated their representative character), to balance the prior interventions of other powers, and to rescue peoples threatened with massacre. In each of these cases we permit or, after the fact, we praise or don't condemn these violations of the formal rules of sovereignty, because they uphold the values of individual life and communal liberty of which sovereignty itself is merely an expression.[12]

The basic "formula" here, according to Walzer, is one of a moral prerogative or permission, not a requirement or duty, but it is one with certain constraints.[13] Although it is true that having a moral justification or permission to do something is hardly the same as having a moral right to do so, moral justification can serve as a basis of moral rights.

Given Walzer's views on humanitarian intervention, it is clear that should the U.S. continue to intervene into the affairs of Colombia at this time, the

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[9] Michael Walzer, *Just and Unjust Wars*, 3rd Edition (New York: Basic Books, 2000), p. 91.

[10] Walzer, *Just and Unjust Wars*, p. 104.

[11] Walzer, *Just and Unjust Wars*, p. 107.

[12] Walzer, *Just and Unjust Wars*, p. 108.

[13] A critical discussion of Michael Walzer's ideas on these and related matters is found in *Ethics and International Affairs*, 11 (1997), pp. 1–104.

U.S. would be in violation of Walzer's notion of morally justified or rightful intervention. First, the U.S. military assistance in question is designed, not to balance out the powers of the Colombian government against rebel forces, but to win the conflict. Second, neither the revolution in progress nor the production and distribution of cocaine are acts that shock the conscience of humankind. Third, though violence in various forms has plagued Colombians for decades (thousands of Colombians have died due to the civil war), *widespread massacre* or the like is not threatened in the region. However, some of the massacres that have occurred seem to have been the responsibility of rightist paramilitaries (the AUC), sometimes in conjunction with Colombian armed forces. So if U.S. intervention is based on its responding to the massacres, it ought to be aimed, not merely at the drug cartels and the FARC, but also at the rightist-paramilitaries whom the Colombian government has refused or failed to bring to justice.

Perhaps there is a stronger case to be made for the moral justification or right of the *United Nations* to intervene, namely, in order *to establish and maintain the sovereignty of the indigenous U'wa nation* from which the Colombian government forcibly stole millions of acres of land. This land theft is surely a violation of human rights (if, indeed, there are human rights). And it is incorrect for Walzer to think that only massacres qualify as those justifying humanitarian intervention. After all, the coercive theft of millions of acres of lands from American Indian nations has long proven to be just as effective in wiping out American Indian populations, as the history of the Americas indicates. This fact, along with the additional fact that there have been murders by the FARC of some U.S. citizen advocates of the U'wa nation,[14] points toward *intervention on behalf of the U'was against both the Colombian government and the FARC*.[15]

This leads to a revision of Walzer's position on the moral justification of or right to humanitarian intervention. It would seem that unless we supplement Walzer's analysis, it would remain excessively conservative in that existing states such as the U.S. would be in moral positions to carry on their affairs as if they were not outlaw states. In light of this moral problem of "dirty hands," I argue that *humanitarian intervention is only morally justified to the extent that the party on behalf of whom the third-party intervener desires to intervene is not itself unjust in some significant way, and the intervener state is not guilty of significant and unrectified evil.* So the fact that massive acreage was usurped by the Colombian government from the U'was and that

[14] Ana Arana, "Murder in Colombia," salon.com (14 December 1999).

[15] At least, this would seem to hold true unless and until either of these groups distances itself from its perpetrated injustices of substantial natures.

such a human rights violation has gone unrectified stands in the way, morally speaking, of Colombia's hypocritically requesting intervention from the U.S. (a country which itself has committed some of the worst unrectified human rights violations in human history). It seems that the scenario is one akin to a small time carpetbagger asking the king of carpetbaggers for a helping hand in defending what land she has stolen but nonetheless deems to be "her own"! Thus the U.S. is not morally justified in continuing to intervene militarily (e.g., it does not have a right to intervene) in the affairs of Colombia because its hands are not only dirty, morally speaking, but filthy with the stains of unrectified genocide and race-based slavery. Perhaps another country (or coalitions of countries) not riddled with a history of oppressive violence and unrectified evils would qualify as a legitimate intervener into the complicated Colombian situation.

A significantly stronger position than Walzer's on humanitarian intervention is that articulated most recently by Rawls. As noted in Chapter 3, Rawls argues that there are eight principles of justice for free and democratic peoples:

1. Peoples are free and independent, and their freedom and independence are to be respected by other parties;
2. Peoples are to observe treaties and undertakings;
3. Peoples are equal and are parties to the agreements that bind them;
4. Peoples are to observe a duty of nonintervention;
5. Peoples have a right to self defense, but no right to instigate war for reasons other than self defense;
6. Peoples are to honor human rights;
7. Peoples are to observe certain specified restrictions in the conduct of war, and lastly;
8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political regime.[16]

Based on the eighth principle of international justice, Rawls proffers three "guidelines" for carrying out the "*duty* of [humanitarian] assistance," which I take to be what Rawls means to count as (or at least include) humanitarian intervention. First, "a well-ordered society need not be a wealthy society."[17] The aim of the duty of assistance in the Law of Peoples within an international community of states is to "realize and preserve just (decent) institutions.... "[18] Second, the political culture of the society is "all-important,"

[16] Rawls, *The Law of Peoples*, p. 37.

[17] Rawls, *The Law of Peoples*, p. 106.

[18] Rawls, *The Law of Peoples*, p. 107.

and the mere dispensing of funds in humanitarian intervention does not always suffice to rectify severe injustices ("though money is often essential").[19] Third, the aim of humanitarian intervention is to "help 'burdened' societies to be able to manage their own affairs reasonably and rationally and eventually to become members of the Society of Well-Ordered Peoples."[20] But it is also important to recognize that whether or not a state that is the subject of humanitarian intervention should depend in part on whether it is a legitimate state and whether the cause of intervention is just. For example, if there is intervention into the affairs of a state that has an illegitimate government, then special care must be taken to not adversely affect the innocent persons of that society insofar as that is possible. And in any case, a proportional intervention must be effected based on the facts of how bad the situation is for those innocent persons in the society targeted for intervention: "The general rule is that the coercion used in the operation and the consequent harm done by it have to be proportionate to the importance of the interest that is being served, both in terms of the intrinsic moral weight of the goal and in terms of the extent to which that goal is served."[21]

One thing to notice about the notion of humanitarian intervention embedded in Walzer's and Rawls' respective analyses is that, for all they say, humanitarian intervention can include military or nonmilitary intervention, violence or nonviolence.[22]

Furthermore, it seems that in order for a state to be justified in engaging in humanitarian intervention, it itself must be a legitimate state. At the very least, this means that unless it "meets certain minimal standards of justice, it ought not to be regarded as a primary member of international society."[23] It is rather unclear that the U.S. satisfies such conditions in light of its lengthy history of human rights violations and refusal to rectify them. While many in the U.S. would think this a radical claim, it is quite clear to millions of others

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[19] Rawls, *The Law of Peoples*, pp. 108–109.

[20] Rawls, *The Law of Peoples*, p. 111.

[21] Fernando Tesón, *A Philosophy of International Law* (Boulder: Westview Press, 1998), p. 64.

[22] For a critique of both Walzer's and Rawls' respective positions, see Richard W. Miller, "Respectable Oppressors, Hypocritical Liberators: Morality, Intervention, and Reality," in Deen Chatterlee and Don Scheid, Editors, *Ethics and Foreign Intervention* (Cambridge: Cambridge University Press, 2003), pp. 215–250. My general argument in this chapter runs counter to Miller's proposal for a real-world understanding of how even outlaw states can be morally justified in intervening in the affairs of other states to address serious forms of injustice.

[23] Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford: Oxford University Press, 2005), p. 6.

globally that the U.S. is hardly a morally legitimate state in that it fails basic standards of justice. And while it is true that the U.S. stands as somewhat of an example of democratic reform, it is the perpetrator of some of the most evil acts in human history, acts that remain to this day unrectified.[24] And if it is true that unrectified evil is still evil, then it is far from obvious that the U.S. is a morally legitimate state, despite the protests to the contrary that are likely to be forthcoming from its most ardent supporters.

So if it is true that a legitimate state is one that is a reasonably just state and not an outlaw one, and if it is true that a duty or right to humanitarian intervention accrues only to states that are legitimate in the requisite sense, then the U.S. has neither a duty nor a right to humanitarian intervention in general, and not into Colombian affairs in particular. And if the assumption "that all states must wield equal political power in the making, application, and enforcement of international law"[25] is dubious, then surely unjust states such as the U.S. ought not to be given the status of equality in the making and enforcement of international law in light of its repeated record of unrectified human rights violations. Among other things, this would seem to imply that the U.S. has no moral right to intervene into the affairs of other countries or nations because of its morally filthy hands.

While some might argue that this is too strong a judgment against the U.S. in that it would rule out, on moral grounds, its participation along side allied forces in the defeat of Nazi Germany in World War II without which the allied forces might not have defeated the Nazis, the best that can be said of the U.S. here is that it is only as morally justified in engaging in such affairs as it has rectified its own severe injustices. The U.S. may have done some good in defeating Nazi Germany, but it did so without having a right to such intervention. Perhaps the most that can be said of the U.S. in such cases is that it has a moral *privilege*, not a right, to engage in such behavior on the assumption that the other conditions of humanitarian intervention are satisfied. This would appear to suggest a moral duty of all societies in the Society of Peoples to keep their moral hands sufficiently clean so that they may duly qualify as those who have rights and perhaps even duties to intervene in world affairs for the sake of justice, much in the same way as a good Samaritan society would.

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[24] J. Angelo Corlett, *Race, Racism, and Reparations* (Ithaca: Cornell University Press, 2003), Chapters 8–9.

[25] Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 6. Like most Westernized thinkers, Buchanan assumes that the U.S. is a legitimate state, providing absolutely no argumentative support for such a bold assumption and in light of its, on balance, unrectified evils perpetrated on both its own citizens and the citizens of other states and societies.

The U.S., then, has no moral right to intervene into the affairs of other countries or nations at this time. I use the locution, "at this time," of course, because should the U.S. rectify its evils, it would then qualify as a candidate for legitimate intervention. If the U.S. has no moral right to intervene in Colombian affairs at this time, then it surely has no moral duty to do so. For generally there cannot be a moral duty where there is no moral right or justification. Thus it seems clear that the U.S. ought not to continue to intervene in Colombian affairs. Indeed, the U.S. ought to cease its military and economic support of Colombia. Thus given the above principle of humanitarian intervention I set forth, the U.S. is unqualified, morally speaking, to intervene in *any* country's affairs, much less Colombia's. It lacks sufficient moral standing to engage in humanitarian intervention of this sort.

However, even if the U.S. saw a way to rectify its evils, there is further reason why the U.S.'s further intervention into Colombian affairs is problematic, mostly speaking, as we shall see. But these points, and related ones, require substantial defense.

Even if the U.S. has no right to or *duty* of humanitarian intervention into Colombian affairs, should the U.S. engage in humanitarian intervention in Colombia, say, as a moral prerogative? No doubt the U.S. has a dual purpose in wanting to intervene: the official one is to win the "war on drugs," while another is the unstated cold war excuse for battling communism or any significant movement against U.S. capitalistic profiteering. For the drug cartels enjoy the protection of their coca crops by Marxist (FARC and ELN) guerillas, longtime rebels in the region against the Colombian government. But there is also the protection and proliferation of the substantial profits of Occidental Petroleum (a Los Angeles, CA-based oil company) at stake, which might be the most compelling interest of the U.S. in Colombia at this time when the oil company's major pipelines are being sabotaged by rebel forces, costing Occidental Petroleum millions of dollars in lost profits. This raises the issue of whether or not the U.S. ought to expend taxpayer's monies to support private enterprises without so much as even raising the issue with its citizenry. But let us set aside this more global philosophical concern in order to concentrate our attention on whether or not the U.S. is justified in intervening militarily in Colombia's affairs.

However tempting it might be for those who despise drug abuse, it is not obvious that the U.S. should continue to intervene militarily in the affairs of Colombia at this time. For if it is a further condition of humanitarian intervention (on my analysis) that the citizens of a country voluntarily, knowingly, and intentionally request[26] that a third-party country assists it in

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[26] Fernando Tesón, *Humanitarian Intervention* (Dobbs Ferry: Transnational Publishers, Inc., 1988), pp. 119f.

its battle against a foe, then it might be permissible for the third party to intervene, given that certain other conditions are satisfied. But simply because the Colombian government requests military assistance from the U.S. does not necessarily make the intervention justified, or dutiful for at least the following reasons. First, even though there is reportage that up to "70 percent of all Colombians approve of U.S. assistance,"[27] it is unclear that the citizenry of Colombia truly support the measure. For the Colombian government has for decades been suspected of turning its back on human rights violations against some of its own citizens perpetrated by rightist-paramilitary groups (often associated with the Colombian military): kidnapping and murdering thousands of Colombian and U'wa dissenters, acts of violent intimidation against the general populace, etc.[28] So it is far from obvious that the majority of Colombians truly support their government in a voluntary way. Moreover, that Colombian citizens are subject, like U.S. citizens, to tremendously large doses of propaganda from all sides makes it difficult to know whether or not the Colombians could knowingly or intentionally consent to third-party intervention of any kind. Furthermore, it is rather possible that Colombians are not univocal in their support of any particular political structure, and for whatever reasons. Unless the Colombians themselves as a people (and by a strong majority) support U.S. intervention, say, to protect their government, then the intervention amounts to little more than U.S. imperialism.

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[27] Ana Arana, "Dead, I Can't Do Anything," salon.com. Accessed in 2000.

[28] Such violence by rightist-paramilitary groups is not unknown to either the Colombian Government or its military wing, and it is perpetrated against thousands of citizens who are suspected of being in any way supportive of the leftist rebels (Benjamin R. Howe, "Out of the Jungle," *The Atlantic Monthly*, May 2000; also see "9 Killed in Paramilitary Attack," *Chicago Tribune*, 14 May 2000; "Nine Dead in Colombian Massacre," *Associated Press*, 12 May 2000. Moreover, "On the morning of June 24, the Colombian army entered the territory of the indigenous U'wa in northern Colombia and attacked members of the tribe that were protesting the oil exploration on their traditional lands by Los Angeles-Based Occidental Petroleum." Followed by a similar attack on 11 February 2000, the Colombian military continues to be used by its government to violate its own 1991 Constitution which makes it illegal to work in indigenous territory without permission of the indigenous people [Gary M. Leech, "The Case of the U'wa," *Colombia Report*, 9 July (2000)]. Thanks to the terrorist efforts of FARC and ELN on many innocent Colombian citizens, Colombia is one of the kidnapping capitals of the world. Perhaps it is understandable how a revolutionary group might kidnap certain political leaders or such in Colombian Government for strategic purposes. However, it is difficult to comprehend how it can justify the kidnapping of thousands of persons many of whom are innocent citizens (including children!) of the state it hopes to depose in order to raise funding for their war effort. Apparently, the FARC and ELN draw insufficiently accurate moral distinctions between combatants and noncombatants in their quest for a new regime. For a most eloquent account of some such kidnappings, see Gabriel Garcia Marquez, *News of a Kidnapping* (New York: Alfred Knopf, 1997).

For in such a case, the U.S. would intervene, "not to advance the forces of democracy or liberal government, but to assist the side that will favor their own political, military, or economic interests. In such cases, foreign intervention . . . is morally wrong."[29]

Furthermore, it is not clear that the U.S. citizens support such a measure either. Some question the degree of the proposed further intervention, others are concerned that further involvement of any degree would eventually lead the U.S. into "another Vietnam" situation. As widespread Colombian support for U.S. intervention would signal, other conditions obtaining, a permission or justification for U.S. intervention, it would not straightaway amount to a duty of the U.S. to do so. If this is so, then it is important that the U.S. citizenry support strongly such a measure, that is, if there is no *strong* duty of intervention in this case.

However, even if there were widespread *Colombian* support for humanitarian intervention into the quagmire there, it does not necessarily follow that such support would be for *U.S.* intervention. Perhaps *Colombians* would prefer to enjoy the support of alternative countries, the European Union, or the United Nations instead, realizing upon due reflection that U.S. support for foreign countries has often led to political, economic, and cultural consequences that are intolerable for Colombians and other South American countries.[30] For perhaps *Colombians* would support certain kinds of intervention, but not others. Perhaps, for instance, *Colombians* would want the kind of intervention that would eliminate or render rather manageable the cocaine cartels while leaving virtually untouched the rebel forces. This would be difficult, since, again, the rebels occupy, for all intents and purposes, the coca fields of the cartels. But perhaps there are ways in which "search and destroy" missions by Colombian special military forces can identify and dismantle the cartels without doing much damage to the rebel forces so that the political struggle in Colombia can take place without the tainting of cartel influences. So the matter of humanitarian intervention regarding the Colombian crisis is complicated, and it is wrong for the U.S. to simply assume the position of being the guardian of the Americas by imposing itself onto the Colombian situation as if it has a self-proclaimed right to do so. As I have argued, such a right might accrue, but only to the extent that U.S. intervention is the kind that a strong majority of Colombians want, not simply what can be struck as a deal between U.S. and Colombian politicians, even well-intentioned ones.

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[29] Gerald Doppelt, "Walzer's Theory of Morality in International Relations," *Philosophy and Public Affairs*, 8 (1978), pp. 12–13.

[30] Ingrid Betancourt, *Until Death Do Us Part* (New York: Ecco, 2002).

Thus my suggested mode of democratically principled humanitarian intervention determines both the *permissibility* of U.S. intervention into Colombian affairs, and the *kind* of humanitarian intervention as well. To violate this principled democratic consideration would be to curtail Colombian freedom and sovereignty in favor of egoistically based imperialism. It would be a straightforward violation of Rawls' first principle of justice (above), as the U.S. would disrespect the freedom and independence of Colombians. It would also violate Rawls' fourth principle of the *prima facie* moral duty of nonintervention. Finally, it would be a violation of Rawls' eighth principle of justice because it would not be a proper circumstance in which the U.S. has a moral duty of humanitarian intervention. It would amount essentially to the use and show of military might for the "sake of democratic freedom," where "democratic freedom" is construed by the U.S. in its own terms and for its own purposes.

My position, on the other hand, permits a show and use of force on behalf of others who request and require external assistance. But it *is* morally problematic for those parties (like the U.S.) who provide keen lip service to the principles of democratic freedom, while they wreak havoc for others' sovereignty by essentially invading their contexts without informed democratic consent as to both the extent and the kind of assistance desired and needed by that troubled majority. My suggested mode of principled democratically humanitarian intervention implies that, in at least most cases, *unless and until the majority of Colombians voluntarily, intentionally, and knowingly request unambiguously external intervention to relieve their poverty and violent oppression, then there is no moral justification or right, nor a moral duty of humanitarian intervention*. This is tantamount to making an oppressed party's voluntary, intentional, and knowing request for intervention virtually a necessary condition of a third party's being morally justified to intervene.[31] This is consistent with the first of Rawls' principles of justice for free and democratic peoples. The U.S. needs to come to the realization that one primary key to the solution of the "drug problem"

[31] Such a request is not, strictly speaking, a necessary condition in that there might be instances where an oppressed party cannot, given nonideal circumstances of injustice, request third-party assistance. Yet in such emergency cases, the lack of a request would not render humanitarian intervention impermissible. Yet the Colombian context does not seem to have reached the emergency stage at this point of time. The only parties perpetrating massacres against Colombians seem to be the rightist-paramilitaries who claim to support the Uribe regime. So if the U.S. did qualify as a good Samaritan state in rescuing Colombians from, say, massacre, it would only qualify as such if what it engaged in was a well-defined and narrow mission of waging a war on the Colombian rightist-paramilitaries responsible for the massacres.

lies within its own borders. For if the demand for cocaine and heroin is extirpated in the U.S., then cartels in Colombia will either have to export their goods to others in the world, or being unprofitable in those countries, move onto computer software fraud (which is what has already begun to happen).

U.S. approval of further armed support of Colombia's "war on drugs" is premature in that it is far from transparent that the strong majority of Colombians have requested U.S. support along the lines of its purposive aims. But as usual, U.S. imperialism seeks to wander the streets of Latin America, masquerading as "democratic reform" and "family values." But those who investigate beyond the mere surface of the headlines feast their eyes on yet another imperialistic and antidemocratic regime bent on battling for its own interests over those whose valid moral interests it ignores. No wonder the U.S. has so many enemies worldwide, and that the numbers of enemies increase steadily with the passage of time. No wonder that the U.S. is the target of so many terrorist acts! No wonder countries of the Americas are (and have been for generations) in such economic and political turmoil!

What is needed is *sovereignty for Colombian citizens*, who have for decades been oppressed largely by their own government's lack of sufficient concern in bringing to genuine justice the rightist-paramilitaries, several of its *own* military personnel,[32] and drug cartel kingpins such as the successors of the drug lord and terrorist Pablo Escobar who are responsible for the kidnappings and murders of thousands of Colombians. Why, then, ought the U.S. citizenry fund millions *more* in taxes in support of Colombia when it has promised but done little to punish all of those of its own military who are responsible for their war against Colombians who do not support the Colombian government? Where sovereignty rights are infringed by the U.S. is bred resentment, moral indignation, and violence. If the U.S. truly respects the democratic interests of Colombians, it will not continue to intervene into its affairs unless requested to do so by a Colombian party in good moral standing.[33] Until that time, the U.S. should attempt to employ creativity in solving the "drug problem" by waging the "war on drugs" against its own citizens' use and abuse of drugs in its own backyard. For the drug problem is not only created and sustained by the manufacturers and distributors in terms of supplies of drugs, but by the millions of U.S. citizens (including promi-

[32] That the Colombian military itself is responsible for several unwarranted Colombian deaths is common knowledge.

[33] Indeed, the U.S. ought to withdraw its support in Colombia altogether, as it is supporting a regime that is responsible for numerous human rights violations.

nent politicians and business leaders) who sustain the increasing demand for them.

But even in the unlikely event that Colombian sovereignty is respected by the U.S., Colombians seem to be faced with a circumstance in which they are currently governed by something less than a rights-respecting regime, fending-off a complex array of rebel forces which are not necessarily on the same page with one another insofar as politics is concerned, a coalition of rebels which is funded largely by the cocaine and heroin cartels responsible for the deaths and kidnappings of thousands of Colombians. Unless one of the rebel forces emerges as a genuine defender of human rights and is sufficiently powerful to overcome both the Colombian government and all counter revolutionary forces (including those of the U.S.), Colombian citizens have little hope for sovereignty as things currently stand. This is especially true given that no matter who wins the civil war—the Colombian government or one or more of the rebel forces—everyone will lose to the powerful drug cartels so long as they survive. Unfortunately, they seem to be at least one of the primary threats to Colombian freedom and democracy at this time. And those U.S. citizens who glibly use and abuse the products they manufacture and sell remain complicitors to Colombian oppression. Without the use of cocaine products by U.S. citizens of all kinds, Colombian drug cartels would find it significantly more difficult to remain viable and support the rebel forces that protect them and their fields. Kidnappings and violence in Colombia would be significantly reduced. Refusal to use Colombian cocaine and heroin products is a genuine way by which to contribute to a more peaceful Colombia.

The Right Thing to Do in Colombia

What has been argued thus far is premised on the proposition that Colombian sovereignty (and its being respected) is only justified to the extent that *U'wa sovereignty* is respected and protected. So even if every Colombian favored U.S. intervention in Colombia, Colombian sovereignty should become of no more importance than U'wa sovereignty. The U'was are a nation of American Indians indigenous to Colombia who have threatened mass suicide if Occidental Petroleum continues to operate on what was once their land. The company's continual presence on U'wa land represents a transparent instance where U'wa sovereignty is disrespected. That U'wa sovereignty is established and protected must become the primary motive and moral justification of some third party to intervene into the affairs of that region. No doubt the amount of reparations and returned land owed the U'was by the U.S. and

Colombian governments would suffice for significant military protection of newly established U'wa borders in order to protect U'wa sovereignty from further violations once U'wa sovereignty is regained.

What this means is that there is no moral justification or right of the U.S. to intervene militarily in Colombian affairs at this time, and no other third-party state is morally justified to intervene militarily therein unless it is primarily on behalf of the U'wa nation and for U'wa sovereignty. But this hardly moves the U.S., given that certain economically and politically powerful individuals have serious business interests in what was once (and still is, morally speaking) by right U'wa territory. And certain manufacturers of military weaponry stand to gain billions in the further "intervention." And given that these businesses are significant contributors to U.S. political parties, it is unlikely that the U.S. would be moved to do what is *morally* right in the Colombian case. Nonetheless, should the U.S not heed what is right, it will continue to commit yet another moral atrocity of imperialist proportions so that a morally inept corporation can have its way.

Thus U.S. interests in Colombia are as impure as ever. More specifically, it is not simply an alleged "war on drugs" that bids the U.S. plan of intervention there, but a number of corporate interests. Once again, Occidental Petroleum has a strong interest in Colombian affairs, as it has a major (Cano Limon) oil pipeline on the land once belonging to but stolen from the U'wa nation by the Colombian government. The pipeline has been destroyed several times, but has still turned a profit for the company. Then there is another powerful lobbying company, Sikorsky Aircraft, a subsidiary of United Technologies, and Bell Helicopter Textron, companies that gave hundreds of thousands of dollars to the campaigns of U.S. democrats and republicans alike. Now these companies stand to gain almost half a billion dollars from U.S. military support of Colombia. So it is not at all clear that U.S. "humanitarian" aid is about human rights as much as it is about special corporate lobbying interests, ones which assist in the election and reelection campaigns of various U.S. presidents and other high-ranking officials in the U.S. government.

If the U.S. continues to engage in "humanitarian" intervention in Colombia, it seems that the only way such intervention would be morally justified, or perhaps even dutiful, is the extent to which the intervention assisted in the establishment of the genuine sovereignty of the U'was. This would mean driving (or pulling) out Occidental Petroleum and forcing it and the Colombian government to pay reparations to the U'wa nation and return at least most of the land stolen from the U'was.

Furthermore, what the U.S. ought to do is realize that the answer to what it construes as the drug problem lies largely within its own borders, with many of its own citizens. Let us assume for the sake of discussion, then, that the U.S. [in an unprecedented (for the U.S.) display of concern for what

is morally right] gains U.N. and U'wa approval to intervene on behalf of the U'was, fully establishing and engineering means of protection of U'wa sovereignty. Assume further that the U'was are satisfied with the action, and that Colombians desire and require intervention in light of the way things currently stand there. Would it follow that the U.S. has a moral right (or even a moral prerogative) to intervene? Not unless it could satisfy the conditions of morally justified humanitarian intervention outlined above. In the case of the U.S., matters are likely to concern the fact that the U.S. has already engaged in rather unjustified intervention in Colombia, and is thereby part of the complex array of worsening problems there.

The "Drug Problem" and U.S. Responsibility for It

The debate about whether or not substances such as cocaine and heroin ought to be made illegal has been taking place in the U.S. for decades. But for the most part, the discourse has rarely, if ever, considered issues of humanitarian intervention as crucially relevant to the discussion. In typical egoistic fashion, several of those in the U.S. simply assume that the entire issue revolves around their own welfare concerning matters of personal privacy and other perceived rights to individual freedom, ignoring or not taking sufficiently seriously the well-being of others such as those in the cocaine- and heroin-producing countries like Colombia. It is time that the U.S. debate about the legitimacy of drugs be expanded more widely to considerations of justice more globally.

Various proposed "solutions" to the problem at hand have been proffered, including U.S. military intervention in the forms of wars, invasions, and even "military search-and-find missions."[34] However, each of these proposals wreaks of unwarranted elements tantamount to decades of imperialist maneuvers by the U.S. over the past century or so which have, understandably, made enemies of many Latin Americans, and numerous others worldwide. What is needed now is a fresh new perspective that recognizes the severity of the problem of cocaine and heroin use, on the one hand, but does not undermine either U'wa or Colombian sovereignty, on the other.

Perhaps it is legitimate to dismiss the view that the use of cocaine, for example, is intrinsically bad. Coca leaves are ingested by indigenous peoples of Andean nations in religious and other rituals, and have been for centuries. Indeed, one might argue plausibly that such practices are part of the traditional

[34] This latter strategy is articulated and espoused by Vincent Bugliosi, *The Phoenix Solution* (Beverly Hills: Dove Books, 1996). It is even the subject of Tom Clancy, *Clear and Present Danger* (New York: G. P. Putnam's Sons, 1989).

Andean culture and are morally innocuous in that context. Few would argue that such use of coca leaves is intrinsically wrong, or wrong extrinsically in such contexts. For if something like the content of the First Amendment to the U.S. Constitution is remotely plausible (normatively, even beyond the U.S. borders), then the freedom of religion clause seems to protect the right of religious groups to such practices. Moreover, in U.S. society, coca leaf extracts are sometimes used for legal medicinal purposes. Few, I take it, would seek to prohibit the positive or medical use of such substances, especially when duly prescribed or utilized by a physician in order to assist patients.

The drug cartels in Colombia continue to produce and export inordinate amounts of cocaine (it is common knowledge that about 90% of cocaine in the U.S. originates from Colombia), far more than can be used for either traditional religious purposes or for prescribed medicinal ones. This has been a source of outrage for millions worldwide, and patience is wearing thin as millions of children and adults have either died from drugs, or drug-related crimes, or have had their lives and the lives of others around them ruined significantly by the use of such hard substances.

What is the most plausible answer to the drug problem? Precisely for *whom* is it a problem, and why? Is the answer to legalize the use of drugs in the U.S.? Why not do with drug use what was eventually done with alcohol use in the U.S.? The legalization of the use of currently "illicit" drugs in the U.S., it is argued, will likely resolve various difficulties we face currently. It would drastically reduce drug-related crime, as such drugs can be effectively regulated against the current underground market of drug manufacturing and distribution. Moreover, the cost of fighting drug trafficking would be greatly reduced to comparatively minimal costs of regulating it. The monies saved from fighting a "war on drugs" could be used to better educate people about drugs, and for education more generally. If drugs were regulated, they could be taxed, much as alcohol and cigarettes are taxed, raising millions annually for all sorts of positive causes. The U.S. legal system as a whole would experience significant reductions in caseloads, and the penal system in particular would experience some reduction in the numbers of those imprisoned for drug use, possession, manufacturing, or dealing. The safety of the drugs would be regulated to reduce the costs of healthcare-related problems associated with impure drug ingestion. These are some of the many reasons that have been articulated in favor of the legalization of "illicit" drugs in the U.S.

Perhaps another reason in favor of the legalization of drugs such as cocaine in the U.S. is that it would render otiose the problem of the Colombian cocaine cartels. It would do so by making such drugs manufacturable, either by a governmental agency or by private companies or parties, within U.S. borders without penalty, so long as the drugs are manufactured and

distributed according to certain Food and Drug Administration approved guidelines. This means that the Colombian cartels must compete with the U.S. manufacturers and distributors for customers, both in pricing of the cocaine and the quality of it. This would, furthermore, drastically reduce the prevalence of violence commonly associated with the drug trade, it is argued.

But this permissive attitude toward the legalization of drugs in the U.S. seems problematic for a number of reasons. Not unlike nicotine and alcohol, cocaine is a most addictive substance. Making it legal, and even proscribing the manufacturing of its contents, would hardly ensure against addictions on a widespread scale. This in turn would likely have morally unacceptable consequences for society, as the abuse of alcohol does. Just as millions of U.S. citizens are ruined by alcoholism, many in turn have indirect dysfunctionally adverse effects on those close to them. Thus millions in the U.S. are adversely effected by the abuse of alcohol, and it is more likely, given the addictive contents of cocaine, that things would be even more problematic if cocaine were legalized in the U.S. We would still have millions of persons ruined by the abuse of cocaine, costing taxpayers billions annually for healthcare for cocaine users and lost wages due to poor performances by them. No proposal for the legalization of cocaine of which I am aware would resolve these problems. Having legalized alcohol, we still face unresolved problems of drunk driving and alcoholism, which claim thousands of U.S. lives annually. The legalization of cocaine and other hard drugs would only encourage the use of such substances while driving, thereby increasing, even encouraging, such reckless endangerment to human and nonhuman life. It goes without saying that problems of addiction to such drugs would not be resolved by making them legal.

The arguments for the legalization of "illicit" drugs in the U.S. ignore the fact that actions of a person that unwarrantedly harm others are subject to legal regulation. Although harm to others is not a sufficient condition of legal regulation of action, it is certainly arguable that death to others by driving under the influence of mind-altering substances and harm to others by substandard employment productivity constitute sufficient reasons to regulate a substance the use of which cannot guarantee against DUIs, increased healthcare costs, increased economic costs more generally, and poor productivity that pose unreasonable risks of harm to others. If this argument, by parity of reasoning, poses a threat to the legalization of alcohol, then by parity of reasoning, alcohol use ought to be treated in the same way as cocaine use, assuming that alcohol testing is reliable.

However, the real issues of cocaine use in U.S. society are the deeper issues that millions of U.S. citizens rarely, if ever, contemplate. Rarely, if

ever, does the U.S. cocaine user even consider the ramifications of what she does *to others* when she ingests cocaine. One thing she is doing is supporting the cocaine cartels in Colombia. In so doing, she contributes to the death and destruction by cartels of many who reside in Colombia and surrounding countries, countries that bear the telltale scars of political and economic violence of sometimes tumultuous proportions.[35] The fact is that U.S. citizens who consume cocaine are willful (if not severely addicted), though unwitting, contributors to the exploitation and violence that racks Colombia and neighboring political economies—even the U'was. This is one reason why drug use is problematic in the current state of affairs. Unfortunately, this holds true whether or not the U.S. legalizes drugs. To think that the drug problem is primarily one for various U.S. families is short-sighted at best, and tremendously egoistic. For what cocaine use does to U.S. citizens hardly measures to what supporting drug cartels does to the U'was and Colombian citizens.

Note how this position concerning the "war on drugs" places a *special moral burden on U.S. citizens to not sustain the demand for the substances manufactured by the cocaine cartels in Colombia*. It places a moral burden on U.S. citizens to resolve the problem from within its own borders, rather than seeking, imperialistically, to intervene in the affairs of Colombia as if *Colombian drug cartels* were the reason for the U.S. substance abuse problem. No one is forcing U.S. cocaine users to ingest cocaine. It is the individual responsibility of cocaine users to refrain from doing so, and it is a parental responsibility to raise children to refrain from using such substances. Thus the primary moral reason for not ingesting cocaine-related drugs is the horrific impact that it has on the continual oppression of U'was and Colombians.

Objections and Replies

Several objections to my argument concerning U.S. intervention in Colombia might be raised. I will consider the most important of them. One is the empirical argument that as a matter of fact, it might be argued, the Colombian

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[35] Although it is true that the consumption of coffee contributes to the exploitation of those who harvest coffee beans—even in Colombia—the exploitation of workers is hardly akin to not only the exploitation, but the violent intimidation of governmental officials and citizens of Colombia. Perhaps if the cost of coffee beans equaled those of coca beans, then there would arise coffee cartels every bit as violent and intimidating as the cocaine cartels. But this is not the case, and so the analogy fails.

people are quite divided (or at least undecided) regarding whom they would choose to lead them in government. Between the corrupted and human-rights-violating government, the violent intimidation of the drug cartels, and rebel forces that are not clearly democratic in nature, the Colombian people might not have either a clear majority sense of what they want. However, even if they did, their options might not seem to them acceptable. As one Colombian professor puts it:

> People don't support the rebels, because people know the rebels only represent another private interest. People will always support any peace attempt of President Pastrana: at the end of 1999 more than 13 million people went to the streets to say "NO!" to guerrillas, to corrupted politicians, to kidnappers, to tax increasing, to poverty, to terror. Rebels (whether guerrillas or paramilitary) don't have any socio-political project and their war actions are deeply rejected by most Colombians. Colombians demand a democratic system where life is possible, where taxes have a real social impact, where terror is banished and law is applied with justice. Nonetheless, we also know we are too far from this kind of political system.[36]

Even if this argument is plausible, it does nothing to discount the veracity of mine. For my argument is that the U.S. ought not to intervene unless and until Colombians (and, of course, the U'was) by substantial majorities invite the U.S. to intervene, subject to Walzer's proviso that there is massacre or such which would call for immediate emergency intervention (though not necessarily by the U.S., of course). Thus this empirical objection does nothing to embarrass my argument.

Another objection to my position on U.S. intervention in Colombian affairs might be that the Colombian people *are* in a state of emergency, and require humanitarian intervention in order to gain sovereignty and self-determination. The U.S. is in a position to assist, so the U.S. ought to do so despite its morally filthy hands. A realistic morality of humanitarian intervention must take into account the myriad of factors that are part of the real world, allowing that sometimes it is morally justified for even oppressive states to assist others in need—especially when there seems to be no other state capable of offering assistance.[37] Much like the Good Samaritan, assisting the person in need, the U.S. sees itself as a Good Samaritan country intervening in the affairs of Colombia.[38]

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[36] The identity of this source is withheld for reasons of personal safety.

[37] See Miller, "Respectable Oppressors, Hypocritical Liberators: Morality, Intervention, and Reality," 231f.

[38] For a brilliant philosophical analysis of bad Samaritanism, see Joel Feinberg, *Freedom and Fulfillment* (Princeton: Princeton University Press, 1992), Chapter 7.

However, this objection requires argumentative support for the claim that the *U.S.* is morally justified in intervening in a context in which it has been rather harmful in its previous imperialist efforts. Furthermore, U.S. efforts along these lines seem especially hypocritical in light of its *own* most horrendous and *unrectified* human rights violations, e.g., against American Indians and blacks. How is it that the U.S. is in a moral position to engage on its own whims in humanitarian intervention when it itself remains guilty of perhaps the worst human rights violations in history?

One reply to this concern is that it is hasty to infer from the past that the U.S. will do the wrong things in this instance. This reply is naïve because it overlooks a lengthy history of U.S. interference with Latin American countries, which has been almost nothing but adverse for Latin Americans. This is especially true if the history of U.S. interference into Latin American affairs is a substantial contributory cause of the poverty that so adversely affects Latin America. For it is in such poor economic conditions that the drug cartels, poor government, and undemocratic rebel forces can and often do thrive.

Yet another concern might be that there are no viable political organizations that qualify as sufficiently just and human-rights-respecting to govern Colombia. On the one hand, there is the Colombian government that does little to punish injustice of the worst kinds found within the ranks of his own military. On the other hand, there is the FARC, which in December of 1999 admitted responsibility for the murders of three American Indian rights activists on the Venezuelan border. Although the FARC's highest commanders apologized for the murders and even suggested that those responsible for them ought to themselves be put to death, this harming of noncombatants says something about the rebels' sense of justice and respect for persons who are not even threats to their cause. Moreover, the thousands of kidnappings by the FARC and the ELN stand as examples of the fact that they do not have an adequate sense of justice in their use of innocent persons as pawns in a civil war that is, presumably, on behalf of the Colombian people. What if, the concern goes, the U.S. happens to be the only viable means of humanitarian intervention that can save innocent lives in Colombia, all things considered? What if states and organizations with much morally cleaner hands are simply unable, for whatever reasons, to effect positive change in Colombia?

In reply to this point, it must be noted that, though the FARC leadership denounced the murders, it is disappointing that they seem to not draw important distinctions between combatants and noncombatants in war. Failure to do this vitiates their having what it takes, morally speaking, to replace the Colombian regime with a morally plausible and viable regime. Moreover, the FARC and the ELN's willingness to work with and for the drug cartels

bespeaks volumes of its willingness to fund its own cause when the source of the funding comes at such severe pain and misery for millions worldwide. If it is morally wrong to patronize capitalist businesses because capitalism oppresses workers, then why do not the FARC and the ELN apply the same logic to the drug cartels? Are not the cartels examples of capitalism at its best (or worst, as the case may be)? And yet do they not serve as paradigmatic instances of exploitation and oppression? This casts serious doubt on the rebels being viable candidates to replace the Uribe regime with a morally viable democracy.

While Richard W. Miller proposes rules for the intervention of states having morally unclean hands, this suggestion, while admirable, seems to forget the real-world politics of outlaw states like the U.S. in violating such rules. So why not simply demand that such states be held to the Walzerian and Rawlsian principles of humanitarian intervention and assistance? It is unjustified, given Walzer's conditions of justified humanitarian intervention, for the U.S. to continue to interfere with Colombian affairs at this time and in the way in which it effects U'was and Colombians. This vitiates any possible moral duty the U.S. might think it has to the same. The principles of humanitarian intervention devised and defended by Walzer and Rawls, respectively, hardly support the U.S.'s effort to further interfere in Colombian affairs. Of course, the U.S. rarely, if ever, stands by in order to listen to and heed the dictates of moral truth and reasoning prior to its acting in its own interests, or in the interests of some of its controlling corporate lobbyist constituents. Instead, what is likely to happen is what has happened in Latin America for over a century: the U.S. will simply impose its imperialistic powers to have its way with a country most of the citizens of which will, beneath their breath, curse the U.S. for its moral impudence. And accompanying such Colombian resentment will no doubt be an increase in political violence against the U.S. and U.S.-supported regimes in the Americas. It is time that we stand back and see the moral forest from the trees. In so doing, we might begin to gain whatever glimpse we can of a plausible answer to the complex problems that underlie Colombian society.

Whatever else happens in Colombia, the *U'was deserve genuine sovereignty and reparations from the Colombian government for lands stolen from the former by the latter. Once independent statehood for the U'wa nation is secured and maintained (perhaps by the UN and its forces), then UN attention should be devoted to democratizing Colombian citizens as they deserve freedom and democratic reform.* As for the drug cartels, perhaps they, along with the rebel forces who have become infamous for their thousands of terrorist kidnappings often of innocent persons, and well-supported by millions of U.S. citizens who transport, sell, and purchase their products,

represent to both the U'was and Colombian citizens the gypsy, Melquiades, of whom the famous Colombian novelist Gabriel Garcia Marquez writes, "death followed him everywhere, sniffing at the cuffs of his pants, but never deciding to give him the final clutch of his claws."[39] To employ, if I may, Marquez' imagery of the "happy" village of Macondo: Macondo belongs to the U'was, Colombian citizens are their guests. However, the Colombian government, the imperialistic U.S.,[40] the drug cartels, and their supportive rebels have become most unwelcome. For they have caused the deaths of thousands of innocent U'was and Colombian citizens who truly belong in Colombia. But for their thousands of violations of rights, we must long for the moment when, not unlike Melquiades, the Colombian government with its corrupted army, its self-serving ally (the U.S.), the drug cartels (and the U.S. citizen cocaine users who support them), and the rebels are indeed gone so that the only morally rightful occupiers of Colombia may live in peace.

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[39] Gabriel Garcia Marquez, *One Hundred Years of Solitude*, Gregory Rabassa, Translator (New York: Alfred A. Knopf, 1970), p. 9.

[40] The U.S. does so by providing substantial aid to a government that, not unlike the U.S., serves paradigmatically as a violator of rights.

Conclusion

This book has traversed a set of topics in mainstream philosophy of law: legal interpretation, justice, international law and global justice, individual and collective rights, and humanitarian intervention. But it has done so by reaching some conclusions that take the rights of certain underclasses seriously.

In Chapter 1, I critically assessed Robert Bork's theory of original intent, but in some ways that have not been noted by other philosophers. Indeed, I injected into the assessment the critical race studies perspective that original intent as it pertains to the United States Constitution implies that the Court ought to rely on the racist, classist, and sexist prejudices of the framers and ratifiers in deciding the content of law and the rights inherent therein. This itself casts serious doubt on the doctrine of original intent. And this assumes for the sake of Bork's argument that it is even possible to decipher what was in the minds of the framers and ratifiers to begin with.

The history of constitutional law also poses embarrassments for the standpoint of original intent, as the Court has decided cases in unjust ways in thinking that the Mann Act, the Alien and Sedition Acts, and others like them were constitutional, when they most certainly were unjust by any stretch of the moral imagination. *Plessy v. Furguson, Dred Scott*, and some other cases having to do with the Fugitive Slave Laws and freedom of expression (respectively) showed how original intent, if it did have an effect on judicial decision-making, was deleterious in a maximal way. In the end, original intent is a disguised form of legal and political conservativism, one that bemoans the fact that the Court has from time to time used its power to check the awful errors of legislators and executives. It is high time that we embrace, rather than lament, the fact that the Court as well as the executive and the legislative branches serve to balance political power, and that this is an aspect of U.S. government that is intended to protect citizens from an imbalance of power that is to be welcomed.

Judicial review should be welcomed rather than abhorred, at least by those who value pluralism and democratic checks and balances of power in the

various branches of government. Quite interestingly, the U.S. Supreme Court has recently shifted even further to the right as two recent appointments to it by the current rightist president reflect anything but moderation or leftism. And it will be interesting to watch and listen as those like Bork who up to now have disdained judicial "activism" now have fellow rightist judges dominating for some time to come the highest court in the country, and making (and remaking) law according to their lights. And it will be equally fascinating to watch and listen to those who once supported judicial review begin to question it given that there are insufficient numbers of judges on the left or in the middle in the Court to support leftist and moderate rulings. It is important to point out that my arguments about constitutional interpretation in no way depend on what sorts of judges, politically speaking, are on the bench. Constitutional coherentism is a theory of legal interpretation that in a principled manner seeks to hold any and all judges to the same standards of critical assessment. It takes no sides vis-à-vis politics, except to admit, as critical legal studies, critical race studies, Benjamin Cardozo, Ronald Dworkin, and others do, that judges will inevitably be influenced by extra-legal considerations in making many of their decisions.

Chapter 2 contained an examination of constitutional constructivism as an alternative to the doctrine of original intent. After pointing out how Cardozo's theory of judicial decision-making in various ways predates Dworkin's theory of law as integrity, I defend Dworkin's theory against objections from J. L. Mackie who presumes a legal positivist stance against Dworkin's theory, and Andrew Altman, who represents a critical legal studies perspective. I defeated or neutralized each of their objections, showing that law as integrity has more resilience than one might have thought in light of the said criticisms. But I find Dworkin's theory to be weak in that it appears to imply the acceptance of some kind of legal foundationalism regarding established law.

In the spirit of attempting to rescue Dworkin's theory from this and other concerns, I develop a version of constitutional constructivism that I refer to as "constitutional coherentism." This is a theory of legal interpretation that seeks to demythologize the U.S. Constitution by stripping it of its contextual mythology concerning the motivations behind the words of the text and framers' and ratifiers' intent. It further seeks to make the Constitution a truly living document that judges ought to play a crucial role in molding law in hard cases, especially where the other branches of federal government and society are intractably bound to injustice and in need of fundamental reform. Thus constitutional coherentism raised judicial review to a new level, philosophically speaking. The text of the Constitution is reconstrued as one that is made legitimate by "We the People" in the sense that each new generation of citizens and their representative judges are asked to reconsider, as cases

arise, various points of the text. No part of the Constitution is, in principle, beyond rejection for the best of reasons. And each generation of judges must play their roles in shaping the text into its own image of what best reasons demand in this or that case brought before the Court.

Chapter 3 focused on desiderata for a viable system of international law, one grounded in the idea of global justice. Immanuel Kant's views on international law were canvassed, along with H. L. A. Hart's thoughts on its possibility. This chapter was meant to set the background for the chapter to follow. The main contribution of this chapter was the delineation of desiderata and that mostly in terms of Lon Fuller's ways to fail to make law.

In Chapter 4, Rawls' Law of Peoples was found to have failed to make room for principles of compensatory justice that would complement Rawls' principles of justice between states. I provide some principles of compensatory justice that would fit well with Rawls' Law of Peoples. Unlike some scholars (namely, cosmopolitan liberals) who criticize Rawls' theory for its being, they argue, overly tolerant of some societies that, they aver, are unjust, I accept the remainder of Rawls' theory as the best one currently available. But I argued that cosmopolitan liberalism, for all its incessant mention of rights, fails to make the case for their being global duties of egalitarian justice that would correlate with the rights of those who are putatively entitled to equality. Even if they could establish this point, cosmopolitan verbiage about equality suffers from a fundamental ambiguity pertaining to the equality that it claims ought to obtain in the world among peoples. The cosmopolitan liberal notion of equality is stricter than the ones employed by the leading egalitarian theorists in recent years, forcing the burden of argument onto the cosmopolitan liberal to prove her claim that there is a duty of global egalitarian justice. Furthermore, even if the concerns with cosmopolitan conceptions of rights and equality can be satisfied, there remains its highly problematic rejection of basic compensatory rights, exposing the cosmopolitan liberal scheme of justice as being, at the very best, highly limited in scope as it fails miserably to account for the compensatory rights of those whose basic rights have been violated. Of what good is distributive justice without a notion of compensatory justice to protect the basic human rights cosmopolitan liberals are so oft to claim, and so prolifically and loudly?

Chapter 5 is devoted to rights, though in a way that clarifies some confusions about political theories. It begins with a brief discussion of the nature and value of rights in order to set the stage for the analysis that follows. While many have argued that what separates political liberalism from Marxism is that the former respects rights, while the latter does not, I demonstrate that this view perverts Marxism in serious ways. It misreads, to a degree almost unprecedented in analytical philosophy, Marx's own rather precise wording

on rights. Marx never rejects rights *per se*, and when he condemns rights as fostering undue individualism and "monadism" Marx is focusing on certain rights and not all rights. Heavily implied throughout Marx's critique of capitalism are several rights: the right to not suffer alienation, the right to the full value of one's labor power, the right to not be exploited, the right to revolution, to name only a few. Indeed, Karl Marx's fierce defense of freedom of expression predates John Stuart Mill's defense of it in *On Liberty*! If we infer that Mill believed in the right to freedom of expression, we must in all fairness say the same of Marx. The view that Marxism rejects all rights is a straw man argument of tremendous proportions, and after my refutation it deserves no more philosophical attention than the KKK belief that Jews are monsters.

In Chapter 6, I continued the analysis of rights at the level of collectives of the decision-making type, and perhaps even ethnic groups that exhibit a kind of decision-making structure that qualifies them, at least minimally, as conglomerates. Here I have in mind the organized groups of Crees, the Diné, the Cherokees, etc. After setting forth the conditions necessary and sufficient for collective rights possession, I cite as a paradigmatic collective right the right to secede. Although it is possible in theory and practice for an individual to secede, secession is paradigmatically a group right.

The attempt to establish a viable system of international law has as its goal the attainment and sustaining of global justice, both distributive and compensatory. Whatever rules are adopted by an international body of representative parties in what Rawls refers to as the international original position will reflect the rights and duties that hold globally. So it is important to both know which rights should be included among those adopted by parties in the international original position, and know which theory of legal interpretation best suits such a body of law so that it is understood when and how such rights accrue in the real world where claims and interests often conflict. All of this is connected to the problem of which theory of international law or global justice will best serve the interests of all parties in the world, both individual and collective. It is clear, then, that the matters of legal interpretation, rights, and justice are interrelated.

The final chapter was an attempt to apply some of what was dealt with in the chapters on international law, global justice, and rights to the quagmire in Colombia. What began about 40 years ago as a civil war between the FARC and the Colombian government quickly escalated, not without the assistance of the U.S. government, into an all-out involvement of drug cartels (whose cocoa fields are protected by rebel forces) and a U.S.-based oil company's pipelines which were placed (with protection of Colombian military) on the sacred lands of the indigenous U'was. Insofar as the U'was are the only

rightful inhabitants of the lands they still inhabit (after being forced off of much of their lands), they have the only clean moral hands in this scenario. But what is equally clear is that no country with moral hands as malodorous as those of the U.S. is morally justified in intervening in the affairs of Colombia—or any other state, for that matter! This is especially true given that for decades now it is the citizens of the U.S. who constitute the largest client of cocaine products from Colombian drug cartels. So when U.S. citizens purchase cocaine and other illicit drugs from Colombian cartels, they end up funding large-scale kidnapping projects headed by the rebels in collusion with the cartels, thus helping to make Colombia a kidnapping capital of the world. All the while, the U.S. government funds Colombia's efforts to squelch the "drug problem," though it is really a way of fighting Marxist rebel forces since they are protecting the cocoa fields. But the U.S. government is providing this funding each year with the full knowledge (and occasional protest) of Colombia's unwillingness or inability to prosecute many of its paramilitaries who are responsible for some of Colombia's worst human rights violations against those Colombian citizens who are perceived to be rebel sympathizers. Even worse, the U.S. government supports the Colombian government's making it possible for U.S.-based oil companies like Occidental Petroleum to invade U'wa land and drill and extract oil without even obtaining permission from the U'wa for doing so.

No analysis of the justificatory conditions of humanitarian intervention should ever permit a country with hands as filthy as those of the U.S. to be anything like one that would qualify for the duty or right to humanitarian intervention, or even Rawls' duty of assistance. With a record of unrectified human rights violations that the U.S. has, it is more than obvious that the world needs protection from it rather than being in need of its assistance. Indeed, the U.S. cannot in a century even begin to afford to pay the reparations it owes to the hundreds of millions of folk globally. And it appears that whenever it engages in what it declares to be assistance for other countries, history reveals that it is usually a disguised form of mephitic injustice designed to benefit among the wealthiest within its domain. I have no perfect solution to the troubles engulfing Colombia, except that the first step in the right direction is for the U.S. to cease all connections with that country, force Occidental Petroleum to pay billions in reparations to the U'was, and vacate their land immediately, removing all foreign objects that pertain to the seeking and drilling and extracting of oil products. Perhaps the United Nations is in a position to intervene in Colombian affairs in ways that do not worsen matters, and benefit all main parties significantly in terms of peace. The rebels, being connected to the drug cartels, speak against their moral cause. So perhaps what needs to be done after what was just mentioned about

the U.S. connections to Colombia is for the UN or a similar agency to violently root out the drug cartels in cooperation with all other Latin American countries. At the same time, it can prosecute and punish those Colombian paramilitaries responsible for the deaths of innocent civilians. These steps would bring quite welcomed responses from U'was and Colombians alike. Then perhaps the rebels and the Colombian government can reach some agreement as to how to resolve their deep-seated problems. But that scenario, even if bleak, is far superior to the present one. For it gets Colombians and rebels closer to sovereignty, unabated by U.S. untoward influences.

The suggested actions just mentioned, however, would be hypocritical if severe actions are not taken against the U.S. for refusing to pay what it owes in trillions of dollars of reparations to American Indians and blacks.[1] Whether or not such actions include violence would depend at least in part on the U.S. response to a global and collective demand for not only reparations to those domestic groups victimized by generations of genocide, slavery, and Jim Crow, but to its response to the global and collective demand for compensatory justice to other (foreign) groups the U.S. has wrongfully and severely harmed, such as those caused by unjust wars, invasions, deposing of foreign government leaders, etc., in which it has engaged on the pretense that its own interests and security were at risk. Of course, the sad irony is both that most U.S. citizens actually believe that such U.S. actions against others were justified. However, in attempting thusly to secure its own perceived interests and security, the U.S. has indeed placed itself in even greater harm's way.

This book has been a set of philosophical discussions about concerns both within the tradition of mainstream analytical philosophy of law as well as outside it. It is hoped that the reasoning herein has challenged readers to rethink some of their positions on certain problems, perhaps even so much as to begin to take race, rights, and justice—especially indigenous rights—more seriously than ever before.

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[1] These matters are discussed in J. Angelo Corlett, *Race, Racism, and Reparations* (Ithaca: Cornell University Press, 2003), Chapters 8–9.

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