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Race, Rights, and Justice

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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,

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

[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]

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[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.