



Shaping a Just World: Reinterpreting Rawls's Approach to Global Justice

Citation

Jiahui Huang, Shaping a Just World: Reinterpreting Rawls's Approach to Global Justice (Harvard Law School, Laylin Student Writing Prize, June 2015).

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Shaping a Just World:
Reinterpreting Rawls's
Approach to Global Justice

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Submitted in satisfaction of the LL.M. Long Paper requirement

April 2015

Shaping a Just World: Reinterpreting Rawls's Approach to Global Justice

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This paper discusses the question of global justice through the lens of the theories of justice expounded by John Rawls in A Theory of Justice, Political Liberalism, and The Law of Peoples. In any theory of justice, some features of the world we know are held fixed; such constraints may be genuinely unchangeable facts about the world, or they may be contingent facts assumed to be fixed for the purposes of the theory. I argue that a fully adequate theory of justice ('ideal theory') should free itself of contingent constraints wherever possible. At the same time, ideal theory will require a complementary theory which does admit contingent constraints ('non-ideal theory') and which is therefore realistic enough to explain how ideal theory can be attained given the present state of society. This two-theory approach I call a 'realistic utopia'. I suggest that in Justice as Fairness, Rawls's confinement of the theory to a domestic society is one such contingent constraint, and that it cannot be justified. Meanwhile, when Rawls extended his theory to international justice in the Law of Peoples, a number of unjustifiable contingent constraints emerged, particularly the assumption that states exist as we know them. My argument is that Justice as Fairness can be an ideal theory if its scope is made global; then its complementary non-ideal theory can be derived from the Law of Peoples. This, I suggest, is the realistic utopia that Rawls sought, and that we should seek.

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Introduction

The more ambitious the theory of justice, the more difficult it is to envision how the world might be ordered so as to meet its demands. There is surely no theory of justice in recent memory more ambitious than the one that John Rawls began to set out in *A Theory of Justice*,¹ and which he elaborated in *Political Liberalism*² and *The Law of Peoples*.³ Despite the ambition of this project, or perhaps as a sign of it, Rawls argued that his conception of justice was both realistic and utopian.⁴ Many commentators have, correspondingly, responded to Rawls's work by arguing that parts of his theory were either not sufficiently realistic, or not sufficiently utopian.

In this paper, I ask if a realistic utopia is really possible within a Rawlsian theory of justice. In particular, I draw upon Rawls's attempt to extend his theory of justice to international society in *The Law of Peoples*. This uneasy extension has not been well-received, and many commentators have sought to catalog its shortcomings. Although I share many of their misgivings, I take a different approach. I am motivated by two key concerns: first, why a theory of justice which claims to be ideal requires an addendum to address fundamental features of the modern world, and second, why an extension in the scope of an ideal theory of justice produces conclusions that largely echo the status quo, which appears to be so far from ideal. In my view, the answer to the first question is that justifications provided in *Theory* and *Liberalism* support a theory of justice whose scope is global, not domestic; no addendum is needed. Meanwhile, the transformations applied in *Peoples* to the foundational concepts of Rawls's theory, such as the basic structure, the original position, and the fact of reasonable pluralism, seem to alter the nature of the theory that results; it is no longer ideal or utopian.

If we take these concerns into account, we shall reach the conclusion, familiar in the literature, that what began as Rawls's domestic account of justice ought to be international in scope. Following through on this logic produces a theory of justice that is more utopian than realistic. For this reason, we should not so easily discard the approach in *Peoples* which produces

¹ JOHN RAWLS, *A THEORY OF JUSTICE* (1999) [hereinafter *THEORY*].

² JOHN RAWLS, *POLITICAL LIBERALISM* (1996) [hereinafter *LIBERALISM*].

³ JOHN RAWLS, *THE LAW OF PEOPLES* (1999) [hereinafter *PEOPLES*].

⁴ *PEOPLES* 11.

an account of international justice that is realistic but less than utopian. I argue that the realistic theory of *Peoples*, which is designed to be practicable in our world as it exists today, can – when properly conceived – serve as a guide towards the beacon of utopian theory, which presents a Rawlsian vision of justice that is distant from our reality, but nevertheless an aspirational goal worthy of our pursuit if we can be properly guided.

I make the argument in four parts. First, I set up the distinction between ideal and non-ideal theory drawn by Rawls, and argue that it needs to be reconceived in terms of the extent to which a theory takes existing contingencies as given. I suggest that the kind of theory of justice we should be looking for is a realistic utopia, conceived of as a theory with ideal and non-ideal components each serving different purposes. Second, I explain why we should require an ideal theory of justice to be global in scope, and why such a theory will require a separate non-ideal account that tells us how we might eventually attain the circumstances required for it to become realistic, given the starting point of our present world. Third, I explain why the approach in *Peoples* is non-ideal in nature, and how such an approach can provide the requisite separate account. Finally, I briefly sketch how the two-theory approach suggested by the idea of a realistic utopia could get us in the long run from non-ideal to ideal theory, what conclusions this approach may draw, and why such an approach is the best possible account of justice in the Rawlsian tradition.

I. Ideal and non-ideal; realistic and utopian

In *Theory*, Rawls draws a distinction between two parts of a theory of justice, ideal and non-ideal. In *Peoples*, Rawls rephrases his search as one for a realistic utopia. In this section, I explore what these concepts mean. I suggest that the concept of ideal theory, as Rawls defines it, is infelicitous because it suggests and is inextricably linked to, but fails to capture, multiple ways in which a theory might be ideal or non-ideal. Instead, the main feature of ideal theory is that it does not consider justice beholden to fixed assumptions about the world, but instead contemplates the possibility that circumstances of the world must be changed in order for us to achieve justice. Since ideal theory is therefore situated in a state of affairs not reflective of our real world, the enterprise of ideal theory can only be attainable through a complementary non-ideal theory, a theory which directs us towards ideality. I suggest that such a composite theory of justice, involv-

ing an ideal and a non-ideal component, can be conceived of as the pursuit of a realistic utopia, because ‘realistic’ and ‘utopian’ capture the tension and complementarity that is both internal to ideal theory and non-ideal theory, and exists between ideal and non-ideal theory.

A. Ideal and non-ideal theory

According to Rawls, ideal theory “assumes strict compliance and works out the principles that characterize a well-ordered society under favorable circumstances. It develops the conception of a perfectly just basic structure and the corresponding duties and obligations of persons under the fixed constraints of human life.” Non-ideal theory “is worked out after an ideal conception of justice has been chosen; only then do the parties ask which principles to adopt under less happy conditions.”⁵ Although our immediate concerns with justice generally arise under these unhappy conditions, Rawls’s main concern is with ideal theory, on the grounds that it provides “the only basis for the systematic grasp of these more pressing problems.”⁶

The word ‘ideal’ has an ordinary, unspecific meaning that is liable to an expansive reading. To avoid going astray, we should prune the description of ideal theory offered by Rawls above to better understand what Rawls’s distinction between ideal and non-ideal theory entails. In the passage above, Rawls refers to the following features of ideal theory:

1. Strict compliance
2. A well-ordered society
3. Favorable circumstances
4. A perfectly just basic structure
5. Fixed constraints of human life

⁵ THEORY 216; *see generally*, the structure of PEOPLES as found on its contents page.

⁶ THEORY 8.

1. Circumstances and constraints

Here and elsewhere, two particular expressions are used in a way that is idiosyncratic to Rawls's work: '*well-ordered*' and '*perfectly just*'. Although the distinction is not always made clear,⁷ these expressions are not in fact coterminous with 'ideal theory', but are specific ways in which ideal theory is ideal. A society is well-ordered if "it is a society in which (1) everyone accepts and knows that the others accept the same principles of justice, and (2) the basic social institutions generally satisfy and are generally known to satisfy these principles."⁸ Meanwhile, a society is perfectly just only if it has achieved the most efficient arrangement compatible with justice: as opposed to a society which is merely just insofar as the positions of each representative individual are just relative to each other, but in which it remains possible to improve the position of the worst off without making anyone else worse off.⁹ Already, we can see that the idea of strict compliance is nothing more than the idea of a well-ordered society, and that a well-ordered society in the strictest sense of the term is also perfectly just.¹⁰ Therefore our list reduces to:

1. A well-ordered society
2. Favorable circumstances
3. Fixed constraints of human life

Amongst these, the existence of favorable circumstances and fixed constraints stand out because at first glance they are in tension. The existence of favorable circumstances is an idealizing assumption – it draws the distinction between non-ideal theory, where favorable circumstances may not obtain, and ideal theory, where we work on the basis that they do. Conversely, the existence of fixed constraints of human life plays a different role: they *constrain*, rather than idealize, ideal theory. These constraints must therefore be a pervasive feature of Rawls's theory of justice,

⁷ Especially in THEORY 8, where Rawls speaks of ideal theory as involving "the principles of justice that would regulate a *well-ordered* society," and as dealing with "the nature and aims of a *perfectly just* society" (emphasis added).

⁸ THEORY 4.

⁹ THEORY 68, 69.

¹⁰ Note that in Zofia Stemplowska & Adam Swift, *Rawls on Ideal and Nonideal Theory*, in A COMPANION TO RAWLS 112 (Jon Mandle & David A. Reidy eds., 2014), 'perfect justice' is used to refer to a theory that is 'ideal', casually defined (*see id.* 112 and *passim*). This is unhelpful, not least because we do not know what 'perfect justice' refers to or how it differs, if at all, from Rawls's ideal theory.

since they would exist, *a fortiori*, under non-ideal theory. What might such constraints be, and how do they differ from the absence of favorable circumstances?

We can start by considering what Rawls means by favorable circumstances: “social circumstances which, provided the political will exists, permit the effective establishment and the full exercise of [the basic] liberties.”¹¹ Favorable circumstances therefore do not include the requisite political will, but do include “historical, economic and social conditions,”¹² such as “a society’s culture, its traditions and acquired skills in running institutions, and its level of economic advance (which need not be especially high), and no doubt [...] other things as well.”¹³ However, in Rawls’s discussion of non-ideal theory, there is also another category of *unfavorable* circumstances:¹⁴ “natural limitations and accidents of human life,” which are not contingent facts but “the more or less permanent conditions of political life” or “adjustments to the natural features of the human situation” such as the fact of childhood and the limited liberties of children.¹⁵ These two categories of favorable (or unfavorable) circumstances do not seem of a piece: whereas the former are contingent circumstances that are likely to change when we realize the ambitions of our theory of justice, the latter seem to be unchangeable facts about the world.

Once these diverse features of the world are enveloped into the capacious category of favorable circumstances, we might well question what is left of fixed constraints. One answer that plays a prominent role in Rawls’s ideal theory is that fixed constraints include “general facts about human society” such as politics, the principles of economics and the laws of human psychology.¹⁶ Rawls suggests that a conception of justice must simply take these general facts as given, and argues that doing so is quite proper.¹⁷ This position also appears to be a necessary one as far as Rawls’s original position is concerned, because in the absence of any general facts about the world, it is

¹¹ LIBERALISM 297.

¹² JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 47 (2001); Stemplowska & Swift, *supra* note 10, at 113.

¹³ LIBERALISM 297; Stemplowska & Swift, *supra* note 10, at 113.

¹⁴ Stemplowska & Swift, *supra* note 10, at 113.

¹⁵ THEORY 215.

¹⁶ THEORY 119.

¹⁷ THEORY 137 (“Contract theory agrees, then, with utilitarianism in holding that the fundamental principles of justice quite properly depend upon the natural facts about men in society.”).

difficult to understand how parties in the original position can usefully evaluate propositions like the difference principle at all.¹⁸

One problem that surfaces from this exposition lies with the similarities between the category of the ‘natural limitations and accidents of human life’ such as the fact of childhood, which Rawls claims is a category of unfavorable circumstances, and Rawls’s concept of fixed constraints, which include general facts about human society. One good reason to think that this distinction is misconceived is that there is no reason why we should place facts like childhood beyond the veil of ignorance; on the contrary it is important for parties in the original position to know that functioning, rational adults do not emerge into the world fully formed.¹⁹ It is not that “the question of the justice of these constraints do not arise”;²⁰ rather, our answer must be that the way an adequate theory of justice treats children *is* just, in that their limited liberties are the most just way of dealing with their inherent impairments.²¹ In the absence of this justification, it is an objection to any theory of justice that it treats children unjustly, even if other aspects of that theory are perfectly just.

A possible response, which defends Rawls’s understanding of unfavorable circumstances, is to argue that certain facts, like childhood, are distractions to our answering the particular question of justice we are addressing, and are for that reason excluded from ideal theory even though we accept that they must at some point be addressed. But I am inclined against conceiving the ideal/non-ideal distinction in this way, because such a view requires us to consider the fact of childhood, which every person must go through, as an aberration in our primary consideration of the question of justice through the lens of ideal theory, when the ability of a society under a particular conception of justice to deal with the fact of childhood so as to ensure that the adults that

¹⁸ THEORY 138 (“A problem of choice is well deined only if the alternatives are suitably restricted by natural laws and other constraints, and those deciding already have certain inclinations to choose among them. Without a definite structure of this kind the question posed is indeterminate.”).

¹⁹ See LIBERALISM 41.

²⁰ THEORY 215.

²¹ See A. John Simmons, *Ideal and Nonideal Theory*, 38 PHIL. & PUB. AFF. 5, 13 (2010).

are produced under that society are capable of sustaining its justice ought to be a paramount question for any theory of justice.²²

A potentially more illuminating way of understanding these various features of life in society that Rawls discusses as favorable circumstances and fixed constraints is to draw a different distinction from now on. One category includes contingent circumstances of society as we know it now, but which we assume are capable of being transformed over time into different and more favorable circumstances: let us call them *contingent constraints*. The second category are circumstances which seem to be more or less permanent features of human life, and which are therefore assumed to be unchangeable for the purposes of a theory of justice: let us call these *fixed constraints*.

2. What is ideal about ideal theory?

The question that must be asked about the categories of fixed and contingent constraints is their relationship with a theory of justice. As far as contingent constraints are concerned, the relationship is relatively easy to explain – these constraints allow us to focus on the question of what justice demands under ideal circumstances,²³ because such constraints only persist in non-ideal circumstances. Favorable circumstances in the form of historical, economic and social conditions as Rawls described are therefore examples of contingent constraints. It is not that such unfavorable circumstances would be irrelevant to justice; rather, in the ideal theory of justice that we have conceived, they will no longer exist because we hope to eventually eliminate them altogether in the process of realizing our theory of justice.²⁴

²² See Stemplowska & Swift, *supra* note 10, at 116.

²³ See Stemplowska & Swift, *supra* note 10, at 126 n.3 (“[W]e distinguish two kinds of idealizing assumptions, both of which may be counterfactual in involving departures from the real world: *simplifying* assumptions make a complex problem more manageable, whether that problem is one of ideal or nonideal theory; *assumptions of ideal theory*, on the other hand, are those that allow us to focus on the particular question addressed by an ideal theory of justice.”).

²⁴ For the sake of completeness, it is worth noting that one kind of problem which Rawls leaves to non-ideal theory and therefore treats as assumptions of ideal theory, are certain permanent features of human life which lead to partial compliance, such as the existence of intolerant persons or groups. See THEORY 217. Leaving aside whether we consider these facts to be permanent and unchangeable features, they are justifiably dealt with under non-ideal theory because they are examples of partial compliance. A society where there are no such persons or

a. *Fixed constraints*

Conversely, both the general facts about society and natural facts like childhood can be understood as fixed constraints. How can we conceive of the relationship between these fixed constraints and justice? To be sure, to the extent that these constraints are indeed unchangeable, they are “simply natural facts,” and can be neither just nor unjust; nevertheless, we should not assume that fixed constraints are therefore irrelevant from the point of view of justice: “What is just and unjust is the way that institutions deal with these facts.”²⁵ To return to our discussion of childhood, the assumption that childhood as we know it is a fixed constraint of human life does not mean that any institutional arrangement that deals with children’s limited capacities is therefore beyond the question of justice: children used to be treated as the property of their parents, which was a way of accommodating their limited capacities, but I think it is now clear that this is unjust. The danger is that when an institution responds in a certain way to a fixed constraint of life, there is a tendency for that institutional response to be naturalized alongside the natural fact itself. As Rawls forcefully points out, “there is no necessity for men to resign themselves to these contingencies. The social system is not an unchangeable order beyond human control but a pattern of human action.”²⁶

In case we are lulled into the false confidence that such injustice lies in the past, we need only consider the implications for justice of childhood in present societies. Although we no longer regard children as the property of their parents, their relationship is not all that different; whenever the possibility that the institution of the family does a disservice to some children is even broached, there is always a reactionary rebuttal along the lines of the inviolable autonomy of parents in raising their children.²⁷ This autonomy – even if conceived as only a limited, *pro tanto* autonomy within limits – has far-ranging implications for justice. Insofar as we would like to

groups is fully conceivable, even if their existence is an unchangeable fact of life, in the way that a society where childhood does not exist is not.

²⁵ THEORY 87.

²⁶ THEORY 88.

²⁷ For a classic example of such a reaction, see ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 167 (1974) (“To such views, families are disturbing ...”).

think, alongside Rawls, that justice demands that a person's prospects in life should not depend on the circumstances of his birth, the family is inimical to justice:²⁸

Parental advantages make the principle of fair life chances impossible to achieve. Not all parents are equally motivated or equally able to pass on advantages. Even very sweeping, large-scale changes to the institution of the family or the norms surrounding parenting would not solve this problem. As long as families differ in some respects, and some parents have somewhat more resources or more ability to pass on advantages than others, fair life chances cannot be achieved.²⁹

Of course, what should have become obvious by now is that while all humans begin their lives with a period of limited capacity known as childhood, the institution of the family does not thereby acquire the status of a fixed constraint. We could conceive of a society in which children were taken away from their families at birth and raised communally. Such a proposal would no doubt be morally outrageous to most, but it does not violate a fixed constraint of justice, like a theory of justice that proposed skipping childhood altogether; the most that can be said is that it is conclusively ruled out by other important moral and prudential reasons in our present world. In fact, when it comes down to it, there is also much to be said in favor of such an institution from the viewpoint of justice.³⁰ Unless we are so diffident in our moral capacities that such potentially deleterious proposals must be censored from the deliberations of justice, we should not pretend

²⁸ THEORY 64 (“[T]he principle of fair opportunity can be only imperfectly carried out, at least as long as some form of the family exists”).

²⁹ JOSEPH FISHKIN, BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY 50 (2014). Tellingly, Fishkin goes on to say: “In theory, we could solve this problem by eliminating the institution of the family entirely. But this is not a serious idea. There are powerful reasons to continue to allow families to exist in ways that will pass along advantages to children.” *Id.*

³⁰ Besides the fact that it would help us attain the vision of fair equality of opportunity, such an institution need not be as destructive of the family as it might be thought. Children need to be raised by someone, and in the absence of sufficiently advanced artificial intelligence, the state cannot raise them without enlisting the help of actual persons. In such a society, every parent could potentially have a stake in the child-raising institutions of the state, discharging all the functions that parents play in our society today. But because in such a society no caretaker-parent would have a right to look after a particular child, we can avoid many of the worst problems that arise from having children permanently attached to a single set of parents. In addition, the sense of the invasion of autonomy that would be felt by parents today who are deprived of the right to raise their own children would no longer exist in a society where such an institution of common child-raising gradually developed into the norm. Obviously, this account has a dystopian quality to it – that is because it faces a real risk of catastrophic consequences. But the least we should do is separate the reasons from the orthodoxy, and ask ourselves what *really* would be the consequences of such an institution.

that childhood *and* all the attendant institutions that cater to it in a recognizably familiar society are fixed constraints beyond the question of justice.

Likewise, it is worth appreciating, even if only at an intuitive level, that the general facts about human society which Rawls refers to as “natural facts”³¹ are neither unchangeable nor objective truths. If we attempted to set out to parties in the original position what they should properly know about economics or politics, we will certainly fail. This is because, unlike the laws that govern the physical world, there are hardly any laws about economics or social behavior that are neither themselves subject to dispute amongst reasonable people, nor reasonably subject to dispute even in their application to relatively simple and commonplace scenarios. Disagreements in the literature over what parties would decide in any given original position, for example, might be thought to exemplify this problem. Moreover, any set of principles that set out to describe human behavior must be subject to change to the extent that human behavior can change, and we must not underestimate the degree to which even our fundamental instincts are shaped by the circumstances in which we grow up and live.³²

To take one famous example raised by the interaction between social meaning and cool-headed economic theory, a study of Israeli childcare centers showed that when a fee was imposed on parents who were late in picking up their children, late pick-ups actually increased, when the laws of supply and demand would suggest that they would decrease.³³ The reason, the researchers suggested, was that when the fee was introduced, what had initially been a morally irresponsible action, inconveniencing childcare center teachers who had to stay back to look after the children of the tardy parents, became an additional service with a price attached after a fee was imposed. The imposition of a fee, an insight from classical economic theory, acquired an unexpected social meaning in a society in which people were used to the freedom of choice provided by markets. More generally, the difficulty also runs the other way, with potentially greater implications for justice. There is a tendency to think that outcomes in a free market reflect not merely the interactions across the economy of demand and supply for various goods, but are also imbued with normative social meaning, such that any interference with these outcomes is a kind of wrong in

³¹ THEORY 137.

³² See note 274, *infra*; and see text accompanying note 275.

³³ See MICHAEL SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS 64 (2013).

itself.³⁴ This kind of thinking leads to conclusions like taxation being akin to forced labor.³⁵ Although such equivocation between economic and normative value is by no means logically entailed by the market system, an understanding of the tendentiousness of the link against the background of a society like ours should give us pause: it suggests not that our more enlightened approach to economic theory should be what we consider under the original position, but instead that we should be wary in assuming the universal applicability of *any* general facts about human society such as prevailing understandings of economic theory.

Given these points, what is the best that can be said about these constraints in a theory of justice like Rawls's? We might explain the need to treat such constraints as fixed on the basis that in the initial stages of theorizing about justice, our enterprise runs so far and deep that it is not practicable to require our theory of justice at this initial stage to deal with all conceivable matters with the greatest degree of rigor. We must hold at least some things fixed, or else we will find ourselves unable to wrap our heads around the question of justice at all. In other words, if we do not have the capacity to deal with problems like childhood at the initial stages of theorizing, we can stow them away for a later stage in which we consider a more comprehensive ideal theory. Likewise, the difficulty posed by treating general facts about human society as subject to change under the initial stages of theorizing, combined with the difficulty of actually causing those general facts to change, allow us to set aside the question of changing those general facts, too, for later consideration.

Indeed, since presumably the prevailing understandings of such fixed constraints are likely to be the most enlightened accounts accessible to us of these features that have stood the test of time, why should we not happily take them into account when theorizing about justice as more or less fixed? The answer, I suggest, has something to do with the way we reason, especially against the backdrop of an institutional context. The myth of the normative significance of market outcomes, for example, has taken on a life of its own; at any rate it far outstrips any available basis for believing in it. The more we assimilate such institutional arrangements to the natural facts about the

³⁴ See, e.g., LIAM MURPHY AND THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 32–33 (2004).

³⁵ NOZICK, *supra* note 27, at 169.

world, like childbirth and physics, the more they are naturalized and entrenched into our thinking:

[M]ost established institutions, if challenged, are able to rest their claims to legitimacy on their fit with the nature of the universe. A convention is institutionalized when, in reply to the question, ‘Why do you do it like this?’ although the first answer may be framed in terms of mutual convenience, in response to further questioning the final answer refers to the way the planets are fixed in the sky or the way that plants or humans or animals naturally behave.³⁶

We must therefore be careful in what we consider fixed constraints when theorizing about justice. In this regard, we should bear in mind that even when simplifications are made for the ‘initial stages’ of theorizing, they are likely to irreversibly influence the shape of the theory that results – especially since we are unlikely to be successful in constructing a theory of everything that even gets us past these initial stages. The upshot of this is that we should err on the side of caution, and prefer conceptualizing features of the world as contingent rather than fixed, reflecting the reality that most features of the world are in fact contingent, not fixed. What we should seek, I suggest, is an ideal theory that is *fully adequate*: in which any features taken as constraints on what justice is capable of changing must be properly justified as genuinely fixed constraints; any remaining constraints, then, are contingent constraints, and their presence as constraints counts against a theory being fully adequate.

b. *A fully adequate ideal theory*

It is clearly possible, therefore, for a society that is well-ordered to be deeply unjust: it may be well-ordered with respect to a theory of justice that accepts so many of the facts that we know about the world as constraints that its principles, which are the best that they can be within these constraints, are really principles of *injustice*: for example, a theory which accepted as a constraint that people’s sense of justice can never be cultivated beyond what they factually are in the world today. The heavy emphasis that Rawls places on well-ordered societies whenever he invokes the idea of ideal theory, therefore, may be an error of omission. Instead, we ought to aspire to a fully

³⁶ MARY DOUGLAS, HOW INSTITUTIONS THINK 46–47 (1986).

adequate ideal theory, which is one that is as adequate as our powers of reason and understanding of the social and physical sciences will permit.

At first blush, it might appear that the distinction between a theory that is fully adequate and one that is not can be drawn in terms of the distinction between the natural sciences and other fields: learning from the natural sciences are simply objective facts about the world, while that from other disciplines deals with the contingent or the socially constructed. Unfortunately, such a distinction is not sufficiently useful for our purposes – it neglects the fact that many of the important pieces of knowledge we have about the world have a hybrid nature, involving the interaction of objective and contingent facts – for example, the current state of science and technology accessible to us may be more important for most practical considerations than our current knowledge of what is scientifically or technologically *possible*.³⁷

On the one hand, when tackling the question of justice it is simply impossible to derive any useful conclusions solely from physical facts about the world; at a minimum, what is necessary is an interpretation of the implications for human society of the interactions of a number of these facts. Here, I am thinking of what Rawls calls the ‘circumstances of justice’ – prime amongst them, the fact of the moderate scarcity of resources that gives rise to the question of distributive justice,³⁸ since a world in which almost every person could easily gather all the resources they needed without coming into conflict with the desires of other persons would be a very different one from the perspective of justice. At the same time, we must appreciate the proper place of such a fixed feature: we should not understand it as assuming that the world does not contain sufficient resources to satisfy everyone’s *needs*, for example – the claim, rather, is a hybrid one that combines the physical facts about the Earth with the psychological propensities of humans have which suggest that their desires, partly driven by relative comparisons with others, cannot be fully satiated by the resources that exist.³⁹

³⁷ An important dimension of this point is that scientific facts are contained in and constituted by narratives, and therefore not thoroughly objective in the form in which they are accessible to us. *See generally* LUDWIK FLECK, GENESIS AND DEVELOPMENT OF A SCIENTIFIC FACT (Thaddeus J. Trenn trans., 1981); THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1970).

³⁸ THEORY 110.

³⁹ On this point, see the distinction drawn between subsistence poverty, status poverty, and agency poverty in Jiwei Ci, *Agency and Other Stakes of Poverty*, 21 J. POL. PHIL. 125, 125–27, 132–35.

On the other hand, merely the fact that something is inaccessible to us based on the current state of science and technology does not necessarily preclude its being relevant to justice. For example, one of the commonly accepted facts about present societies is that there is a wide array of occupations available, which invariably range in prestige and reward. This being the case, fair equality of opportunity must still produce winners and losers. According to the difference principle, those who end up in the lowest-status and lowest-paid jobs must be prioritized, such that the better-off are allowed to benefit only if this is also to the advantage of these worst-off.⁴⁰ Nevertheless, any compensation provided by the difference principle will invariably be insufficient to level the inequalities that are likely to arise in a society stratified by occupation. As James Fishkin describes the problem:

The recipients of compensatory aid will gain the substantial subset of opportunities that money can buy but will lack many other opportunities not fully commensurable with those. Money generally does not enable or qualify a person to do the jobs and inhabit the social roles that are desirable for reasons not limited to external rewards.

One response to this argument is to hold that we need broader forms of redistribution that are not limited to income and wealth Paul Gomberg argues that society should alter the structure of work itself in order to more broadly distribute the opportunities “to develop complex abilities, to contribute those developed abilities to society, and to be esteemed for those social contributions,” so that “no one’s working life need be consumed by routine labor.”⁴¹

According to Gomberg, such a transition “will be violent and coercive,”⁴² because it will involve forcing everyone to perform a combination of routine and complex labor such that no one is left to do only routine and menial work. There is, however, another way to make the transition that Fishkin attributes to Gomberg which is likely to be gentler and less transitionally unjust. Rather than redistributing the work that presently exists, society can instead revolutionize the range of occupations that need to be filled in the first place. For example, with the invention and popularization of the combine harvester, what used to be the most menial jobs on farms in the

⁴⁰ Bracketing, for the moment, those with no jobs at all.

⁴¹ FISHKIN, *supra* note 29, at 52 (quoting PAUL GOMBERG, HOW TO MAKE OPPORTUNITY EQUAL: RACE AND CONTRIBUTIVE JUSTICE 1–2 (2007)).

⁴² Gomberg, *supra* note 41, at 84.

Western world were replaced by machines and automation. The same trend can be observed in the so-called ‘three industrial revolutions’ in which similar leaps in technology led to vast increases in economic output.⁴³ This suggests that, faced with the routine and menial work of today which diminishes the self-respect and represses the full potential of those doing it, we should seek to eliminate the need for humans to do such work altogether. In our society today, it is certainly technologically possible, although perhaps not yet feasible, for machines to do all work involving cleaning, driving, and data entry, to take a few examples. Given the choice between injustice perpetuated by the status quo of the division of labor, a violent upheaval in the social order, and a transition to a more even-keeled division of labor brought about by the automation of the most menial jobs, I would suggest that justice demands the last option – even though what it requires is the advancement of science, technology, and economic infrastructure, unorthodox fields for the intercession of justice.

Now, we might wonder, what is it about Rawls’s theory that we should consider not sufficiently adequate? After all, when it comes to the principles of justice that it in fact reaches, Rawls’ approach seems capable of accommodating most of the points that have been made above. Of course, this is to be expected – it is much more difficult to see the contingencies inherent in those features that Rawls has already shown us to be arbitrary or changeable in other respects; to find the objectionable contingencies that remain hidden in Rawls’s theory will be much more difficult. Nevertheless, as we will see later in Section II.A, there is one constraint in Rawls’s approach which is particularly unjustifiable, and that is the existence of states and the international system as we know it today. Rawls’s theory of justice addresses the basic structure of a domestic society, and in doing so ensures that its conclusions cannot escape these bounds. Although much has been said about the limits posed by the basic structure as the subject of justice,⁴⁴ the fact that the theory of justice is bound by the boundaries of a state, and therefore cannot comprehensively address any questions of justice across those boundaries, is an even more serious shortcoming to my mind. It

⁴³ See, e.g., Robert Gordon, *Is US economic growth over? Faltering innovation confronts the six headwinds*, 63 CEPR POL. INSIGHT 1 (2012), http://www.cepr.org/sites/default/files/policy_insights/PolicyInsight63.pdf. The three industrial revolutions are the invention of steam and railroads (1750 to 1830); electricity, the internal combustion engine, communications, and petrochemicals (1870 to 1900); and computers, the web, and mobile phones (1960 to present).

⁴⁴ See, e.g., G.A. Cohen, *Where the Action Is: On the Site of Distributive Justice*, 26 PHIL. & PUB. AFF. 3, 18–23 (1997).

implies, uncritically, that while we must curb the benefits that we receive in the interests of the worst-off in our own society, the much more significant problem of inequality across the world is of no concern to justice.

In the final analysis, the only constraints that we should permit in a theory of justice that can be called fully adequate are the ones that have been justified above: the basic circumstances of justice, properly understood, and the basic scientific facts about the world.

c. *Ideal theory and the original position*

Under Rawls's approach, the principles of justice are derived under the original position. Rawls suggests that what is required for the principles arrived at to be just is that they are arrived at through the original position as a fair procedure; at points, he even regards the original position as an example of pure procedural justice.⁴⁵ The key idea in pure procedural justice is that we only need concern ourselves with the fairness of the procedure, from which all else follows. If so, the question of whether Rawls's theory of justice is fully adequate becomes the question of whether the original position is a fair procedure from which to derive the principles of justice.

If we consider the original position to be true in a transcendental way, to borrow Sen's term of critique,⁴⁶ then there is nothing to dispute here. But the original position is clearly not transcendental; the device of the original position is constructed using the premises and boundaries that we give it. These include the general facts about human society that are supplied to parties in the original position, which as I suggested above, cannot claim objective truth and hence cannot be transcendental. At the same time, the original position also depends on a number of deeply normative premises that relate to the nature of justification and morality.⁴⁷ A full discussion is beyond the scope of this paper, but we can recognize at least at an intuitive level why these moral premises must be present: direct utilitarians, for example, would reject the need to achieve a con-

⁴⁵ See, e.g., THEORY 118 ("The idea of the original position is to set up a fair procedure so that any principles agreed to will be just. The aim is to use the notion of pure procedural justice as a basis of theory."). *But see* William Nelson, *The Very Idea of Pure Procedural Justice*, 90 ETHICS 502, 510, 511 (rejecting Rawls's claim that the original position is an example of pure procedural justice).

⁴⁶ Amartya Sen, *What Do We Want from a Theory of Justice?*, 103 J. PHIL. 215, 216 (2006).

⁴⁷ See, e.g., Thomas Nagel, *Rawls on Justice*, in *READING RAWLS: CRITICAL STUDIES ON RAWLS' 'A THEORY OF JUSTICE'* 1 (Norman Daniels ed., 1975); Ronald Dworkin, *The Original Position*, in *id.* 16; T.M. Scanlon, *Rawls' Theory of Justice*, in *id.* 169.

ception of justice mutually acceptable to all parties.⁴⁸ Supposing, for the sake of argument, that the deep normative premises underlying the original position can be justified, the acceptability of the other premises, such as constraints, will then determine whether the resulting theory of justice is fully adequate.

So far, there are a number of claims that we have accepted for the sake of argument, such as the moral basis of the original position and the basic circumstances of justice, and a number of claims that we have raised but suggested should not be accepted as unchangeable, such as the various constraints we have attributed to Rawls. This gives us a foothold on which we can build a conception of a fully adequate theory of justice. The basic idea is that we ought to consider the features of the world that are assumed to be fixed at the starting point of the theory, and if on reflection those features are not required by the justifications offered by the theory, and produce results which are questionable on the basis of those justifications, then we ought to seek to improve the theory by considering how we might remove those contingent constraints.

3. What is ideal about non-ideal theory?

We have looked at non-ideal theory from the perspective of distinguishing it from ideal theory, but unlike Rawls's discussion, which draws a neat analytical distinction, our discussion so far is not so amenable to distinctions. To my mind, the usefulness of non-ideal theory lies elsewhere: even without analytical clarity, non-ideal theory may serve to help us better understand the aspirations of ideal theory, and how they can be realized.

As I noted above, in the long run, contingent constraints which we have good reason to regard as fixed for certain intermediate purposes must change so that they no longer pose as constraints to justice. There is an inherent tension here, for the theory of justice that results will likely not be capable of fulfillment so long as the contingent constraints continue to exist, and we have already acknowledged the likely entrenched nature of such constraints. Therefore our theory

⁴⁸ See Rawls's discussion of the separateness of persons. THEORY 23–24. To restate the claim in another way, direct utilitarianism is committed to the position that a person cannot invoke the argument 'But what about *me*?' as a normative objection to a utilitarian calculus that turns out against his favor.

of justice, which as a matter of its internal logic primarily⁴⁹ issues guidance on actions and institutions under the right conditions, will likely be unable to serve this action-guiding function (by which I mean either guiding actions or guiding institutions) in the short- and medium-run.

The first response is that this does not therefore render ideal theory futile. Stemplowska and Swift point to three supplementary roles for ideal theory which are not action-guiding in nature:

1. It can show that we are capable of envisioning a better world, and therefore should not despair.
2. It can show us which features of the present world are justifiable and which are not, by showing which such constraints would be present even in an ideal world.
3. It can constrain non-ideal theory by insisting that we act according to the *spirit* of ideal theory even if not the letter.⁵⁰

Our second, considered, response, however, should be to ask how we can tell that a certain ideal theory has such poor chances of success that it is no longer worth pursuing. My implicit assumption here is that an ideal theory which we have good reason to prefer as our theory of justice, and which is likely to succeed in being implemented, ought to be implemented. In the face of such a theory we should not rest on our laurels and remain content with merely the supplementary roles above. This assumption seems fundamental to the whole enterprise of justice.

One way in which an ideal theory that does not immediately describe the real world can be practicable in the longer run is through incrementalism: scaling the theory to match present circumstances, knowing that the theory is likely to hold under these circumstances, and hoping that the circumstances will likely improve over time, for reasons either endogenous or exogenous to the theory, such that eventually the ideal conditions subsist. Amongst theories of justice, direct utilitarianism may be such a theory, since given slightly imperfect conditions, the theoretical

⁴⁹ I call this function ‘primary’ in the sense that action-guiding is what a theory of justice *does*, although it is possible that a theory may have such an immediate function and yet be devised primarily for some other functions. If we believe ideal theory to have no realistic chance of success at all, we might still want to derive ideal theory for these purposes (e.g. the three discussed by Stemplowska and Swift – *see infra* text accompanying note 50). In this case, the fact that the internal logic of the theory dictates that it is action-guiding remains unchanged, and it is intelligible to say that the primary function of the theory is action-guiding, but that given our beliefs we can only have recourse to its secondary, or supplementary functions.

⁵⁰ Stemplowska & Swift, *supra* note 10, at 116–18.

analysis may only be incrementally different. However, other kinds of theory may not share this feature, especially if ideal theory demands a significant amount of change in features of the world that are fixed in the short run. This traces the idea of the ‘second-best’ in economic theory, where the best course of action given certain imperfect conditions may be something other than a simple linear variation in the application of the theory.⁵¹ One important caveat, however, is that if the second-best option would amount to abandoning hope of reaching ideal theory altogether and take us on a different path, we might want to take the third- or fourth-best option and stay on the long-term path towards ideal theory.⁵² For example, Rawls raises the example of a situation in which the enslavement of prisoners of war may be justifiable, such as when the enslavement is not hereditary and the old practice involved executing prisoners of war upon capture.⁵³ The example would become more compelling if we considered that through this institution of enslavement, the societies involved could eventually move towards the fully just practice of exchanging prisoners of war after the end of hostilities, whereas a different option which may have been on its own closer to the fully just outcome would not have this transitional potential.

In this sense, non-ideal theory may consist of “transitional principles relative to an integrated ideal.”⁵⁴ Rawls seemed to have come around more fully to this position over time, and later wrote: “Nonideal theory asks how this long-term goal [of ideal theory] might be achieved, or worked toward, usually in gradual steps. It looks for courses of action that are morally permissible and politically possible as well as likely to be effective.”⁵⁵ In this statement Rawls has put his finger on one of the key contributions that non-ideal theory has the potential to make. Besides the requirements of effectiveness and political possibility, which are crucial for non-ideal theory’s transitional role, he is suggesting that non-ideal theory may impose requirements of morality that are independent from those of ideal theory. I agree with Simmons that an important such re-

⁵¹ THEORY 247; CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 171 (1979); BRIAN BARRY, POLITICAL ARGUMENT 261 (1965).

⁵² Simmons, *supra* note 21, at 25.

⁵³ THEORY 218; *see* Simmons, *supra* note 21, at 23.

⁵⁴ Simmons, *supra* note 21, at 23.

⁵⁵ PEOPLES 89.

quirement may involve according appropriate weight to the legitimate expectations⁵⁶ that people have acquired under existing institutions.⁵⁷

The idea of non-ideal theory as transitional and integrated is an appealing one: ‘transitional’ meaning that non-ideal theory seeks out ideal theory rather than simply the better of the immediate options; ‘integrated’ meaning that non-ideal theory is not simply directed towards any particular aspect of life but takes into consideration the question of justice as a whole.⁵⁸ We might ask ourselves, however, how we should decide whether to take the third-best option which represents non-ideal theory, or the second-best option which abandons ideal theory, if the second-best option seems ‘close enough’ to ideal justice. But this risks confusing the pursuit of justice with an entirely different enterprise, such as Sen’s example of climbing the highest peak.⁵⁹ For one, the pursuit of justice is marked by a lack of clear markers as to varying or comparative degrees of justice; it is thus difficult to speak of ‘close enough’ with respect to an option that closes off the path towards ideal justice, since it is likely to be a very different kind of path. For another, given the moral constraints on non-ideal theory that we have discussed, it is unlikely that the pursuit of justice will include both periods of great injustice and periods of increasing justice; instead, if all paths involve a gradual ascension in terms of degrees of justice, the gradient and shape of the particular path should matter less.

An important conclusion of our discussion so far is that non-ideal theory cannot stand on its own – it must be directed towards some conception of ideal theory. Without this directedness, non-ideal theory loses its moral grounding; transitional justice becomes permanent injustice. Under this distinction between ideal and non-ideal theory, it is crucial that non-ideal theory sup-

⁵⁶ This term may be used in the Rawlsian sense, but it might be misleading in that to Rawls, legitimate expectations are equivalent to institutional entitlements (THEORY 275–276), and in addition may require a strict standard of justice on the part of the institutions involved in creating those entitlements. A broader concept of legitimate expectations may be warranted, such as that used in English administrative law: expectations which have been legitimately incurred by a representee, and although not amounting to a legal entitlement, cannot be defeated by the representor (a public authority) without resulting in a wrong under public law. *See generally* MARK ELLIOTT, BEATSON, MATTHEWS AND ELLIOTT’S ADMINISTRATIVE LAW: TEXT AND MATERIALS 179 *et seq.* (4th ed. 2011). This broader concept accords roughly with the ‘rug-pulling’ idea put forward in Simmons, *supra* note 21, at 20.

⁵⁷ Simmons, *supra* note 21, at 20.

⁵⁸ *See* Simmons, *supra* note 21, at 21–22.

⁵⁹ Sen, *supra* note 46, at 222.

plements the ideal theory with which it is paired, either by dealing with cases of partial compliance in a society that has otherwise attained the ideal, or by illuminating the road towards ideal theory, including partial compliance at that stage.

B. The idea of a realistic utopia

I have therefore described a conception of a theory of justice in which ideal theory is the aspirational part, and non-ideal theory the practical part. Although this is the rough division of labor between ideal and non-ideal theory, piecing together the arguments we have canvassed so far will show that the division is less than clear-cut. ‘Ideal theory’ has been used by Rawls and others to describe theories of varying levels of ideality, which might be described as falling along a spectrum of constraints: the greater the number and magnitude of constraints pre-supposed by a theory, the less ‘ideal’ it should be seen to be. Although other components of ideal theory, such as the concept of a well-ordered society, have their place in distinguishing the work of ideal theory from that of non-ideal theory, alone they do not provide a sufficient account of what ideal theory is. An ideal theory thus conceived may fail to be ‘ideal’ in any realistic sense, and in fact perpetuate what amounts to injustice under higher standards, while obfuscating quite why this is so by being associated with monikers like ‘ideal’ and ‘well-ordered’.

This is not merely a matter of definitional preference, because as our earlier discussion implies, the distinction between contingent constraints, which are traditionally only a matter for non-ideal theory, and fixed constraints, which are not, is one that depends on the scale of time over which a theory of justice is considered, and the degree of adequacy in its ambition. The distinction is only stable given a set of immutable background assumptions, but as we have seen, such assumptions are not in fact immutable.

Meanwhile, non-ideal theory that is focused on more than partial compliance theory also falls along a spectrum of ideality. In one way, this is simply the corollary of the argument for ideal theory above, that the fixity and contingency of constraints lie along a spectrum. In addition, given the degree to which any given ideal theory is likely to diverge from present reality, including – as I will argue later – Rawls’s theory of justice, we need not think that a single non-ideal theory will provide sufficient transitional guidance for all purposes. In Zeno-like fashion, a variant of a non-ideal theory can be conceived of for every set of present circumstances and ideal conditions

along the path towards ideality. Of course, the guidance provided by non-ideal theory, to the extent it is feasible to spell it out, will tend to lie at a high level of generality, and the guidance will relate to the arc of developments required to reach ideal theory rather than discrete steps. Nevertheless, given the theory of the second-best, there is reason to suspect that a single comprehensive non-ideal theory, although conceptually possible, may require several component non-ideal theories at its various crucial stages, especially given that the evolution of a society's conception of justice is unlikely to be predictable *ab initio*, not least under an original position when the theories are conceived.

Because the ideal/non-ideal distinction as we have conceptualized it so far has multiple moving parts which lie along a spectrum (or potentially, spectra), it might be thought that the distinction itself is now at the limits of its usefulness. This is particularly since the rest of the literature on ideal/non-ideal theory also treats the distinction as a spectrum rather than a dichotomy, conceiving of theories as prototypically including both ideal and non-ideal components.⁶⁰ We can avoid this distinction from becoming meaningless, however, by recognizing that ideal theory and non-ideal theory do not stand by themselves. Rather, they must function as the two indispensable components of any sufficiently adequate theory of justice – a two-theory approach, so to speak. Borrowing from Rawls's later terminology, two terms seem particularly apt to describe the duality that is established: the more ideal a theory, the more it is *utopian*; the more non-ideal a theory, the more it is *realistic*.

1. Realistic utopia as a spectrum

In *Peoples*, Rawls makes use for the first time of the concept of a realistic utopia: a conception of political philosophy which “extends what are ordinarily thought to be the limits of practicable

⁶⁰ In one more radical account, Charles Mills suggests that an ideal theory is any theory that builds a model on the basis of assumptions that are *significantly false*. Charles W. Mills, ‘Ideal Theory’ as Ideology, 20 HYPATIA 165, 167–68 (2005) (quoted in Zofia Stemplowska, *What’s Ideal About Ideal Theory?*, 34 SOC. THEORY & PRACTICE 319, 321 (2008)). Meanwhile, Stemplowska suggests that non-ideal theory is any theory that issues recommendations that are both achievable and desirable in light of circumstances we face or are likely to face in the near future (“AD-recommendations”), while ideal theory is any theory that does not (presumably, because not achievable within those parameters). Zofia Stemplowska, *What’s Ideal About Ideal Theory?*, 34 SOC. THEORY & PRACTICE 319, 324 (2008). Since it is very unlikely for any theory to issue only AD-recommendations, or non-AD-recommendations, on this view conceive the distinction between ideal and non-ideal theory must be more than a dichotomy of theories. *Id.* 326.

political possibility and, in so doing, reconciles us to our political and social condition.”⁶¹ In particular, such a political philosophy is also realistic, and not just utopian, because “it could and may exist.”⁶² In his characterization of his theory of domestic justice as an example of a realistic utopia, Rawls points to six different conditions. We can focus on the two most salient to obtain a general sense of the concept of a realistic utopia.

First, let us take up Rawls’s second condition, which he describes as a necessary condition for a political conception of justice, such as his theory, to be *utopian*.⁶³ What is required is that the theory use “political (moral) ideals, principles, and concepts to specify a reasonable and just society.”⁶⁴ To summarize, such a theory will take a certain general form, protecting basic liberties and their priority, and then ensuring to each citizen sufficient primary goods. It must satisfy the principle of reciprocity, such that its principles can be agreed to by free and equal citizens. This is clearly not simply a generic description of a utopian theory of justice, but that of one that shares Rawls’s normative premises.

Next, we look at Rawls’s first condition, which turns out to include two conditions; he describes them as necessary for a liberal conception of justice to be *realistic*.⁶⁵ The first sub-condition is that the theory must “rely on the actual laws of nature,”⁶⁶ in the words of Rousseau, “taking men as they are and laws as they might be.”⁶⁷ The second sub-condition is that its first principles and precepts must be “workable and applicable to ongoing political and social arrangements,”⁶⁸ in the sense that we should be able to draw conclusions about them with reference to an actual state of affairs. When contrasted with the condition of utopia described above, Rawls’s conditions here may appear agnostic with respect to theories of justice. But if we look back to our discussion of fixed constraints in the context of ideal theory, we should see that precisely what it means for a theory to rely on the laws of nature will differ from theory to theory in accordance with the fac-

⁶¹ PEOPLES 11.

⁶² PEOPLES 7.

⁶³ PEOPLES 14.

⁶⁴ *Id.*

⁶⁵ PEOPLES 12.

⁶⁶ *Id.*

⁶⁷ PEOPLES 13.

⁶⁸ *Id.*

tors we discussed earlier. Even the question of workability is not one which Rawls can take for granted. Because Rawls's principles of justice only assess the basic structure of society, it is unclear what they – and particularly the difference principle – demand of actual outcomes in a given society.⁶⁹ If workability is defined on the basis of a 'snapshot' of what a given society looks like, Rawls's theory will not be workable.

Although Rawls's own use of the idea of realistic utopia conceives of it as a singular concept, it really appears to refer to a family of concepts that are related in their attempt to balance realism and utopia, the two perennial impulses of theorizing about justice that are reflected in our discussion of the ideal/non-ideal distinction. Rawls asserts 'realistic' and 'utopian' as fixed requirements of a realistic utopia, but his explanation that we considered above shows them in a slightly different light: 'realistic' and 'utopian' are not fixed points of theories of justice, but qualities that can vary in intensity, and which are constituted by the underpinnings of the theory of justice which they serve. We know this because we have just seen descriptions of the particular applications of the two terms as they relate specifically to the conception of justice that Rawls presents. Through our earlier discussion of constraints, we can also appreciate how the respective spectra of realism and utopia are in fact aligned along one continuum: Given a stronger conception of realistic constraints, we are less likely to reach a theory that fully expresses our moral premises; given a greater emphasis on achieving a fully adequate development of our moral premises, we are likely to reach an ideal theory under which realistic constraints are not in fact constraining.

2. The kind of realistic utopia we seek

The notion that our theorizing about justice should be directed ultimately towards a fully adequate ideal theory might be subject to the charge of 'idle utopianism'. Indeed, Rawls might level such a charge against the discussion so far:

Some philosophers have thought that ethical first principles should be independent of all contingent assumptions, that they should take for granted no truths except those of logic and others that follow from these by an analysis of concepts Now this view makes moral philosophy the study of the ethics of creation: an examination of the reflections an

⁶⁹ See THEORY §14.

omnipotent deity might entertain in determining which is the best of all possible worlds. Even the general facts of nature are to be chosen But it would appear to outrun human comprehension.⁷⁰

Of course, I do not exclude the possibility that no fully adequate yet realistic ideal theory can be theorized, and that we therefore will forever fall short of fully satisfying the demands of justice. In fact, given our limited imagination and capacity for reasoning, it would be unrealistic to think that we can actually derive a realistic utopia with comprehensive ideal and non-ideal components in a finite amount of time. A greater worry is that although we should accept some shortcomings in any conceivable theory of justice by the yardstick of a realistic utopia, the shortcomings of our best attempt at such a theory will be very extensive – perhaps so extensive as to be fatal to our ability to recognize the theory as being the most adequate one that we have found. But once again, we are unlikely to be able to discover whether this is the case without actually trying to reach towards a fully adequate theory – there seems to be no better way.

The broader attack, that my enterprise is equivalent to ‘the ethics of creation’, however, seems unwarranted. To my mind, the primary problem of searching for the ethics of creation is that such a theory will be orthogonal to the problem of justice, since it will pay no regard to what our reality and history look like. The question of justice that I am pursuing, no matter how utopian it may be, still asks whether we can plausibly pursue a given theory of justice, even if it this may be practicable only in the very long run. Given my position on fixed and contingent constraints, it should be the case that, at infinity, this practical question of justice closely resembles an ethics of creation, since nothing is certain to be fixed in the infinitely long run.⁷¹ In practice, it is unlikely that we should succeed in proceeding this far, in which case we should proceed in a way that prioritizes the practical question that is posed by the problem of justice, a question of how we can achieve a more just world – not in respect of any world, but *our* world. That is why when we “seek to improve the theory by considering how we might remove those constraints,”⁷² part of the

⁷⁰ THEORY 137–38.

⁷¹ The fundamental laws of physics might be thought to be a candidate for something that will forever be fixed. However, our knowledge of physics is likely to forever be incomplete, and therefore forever open to new advances. It should be recalled that some of the most fundamental insights into the laws and building blocks of the physical world have only been discovered in recent years.

⁷² See *supra* at the end of Part I.A.2.

consideration is whether we can contemplate a world that does not have those constraints. In that sense, we are in the business of searching for a realistic utopia, albeit one that is as utopian as we can plausibly make it. At the same time, a realistic utopia must give us a sufficient degree of assurance that it is worth striving for, in the sense that it will eventually be at least within reach, even if this is only in the very long run. Checking to make sure that our ideal theory can be complemented with workable non-ideal theory thus serves a useful function in making our realistic utopia both realistic and utopian. Ultimately, the only way we know that we have found it is that it is more utopian than the theory that we are trying to improve or replace, but nevertheless is sufficiently realistic to command our allegiance in the pursuit of justice. Ultimately, the proof is in the pudding.

Setting this discussion alongside my conclusions about the directedness of non-ideal theory earlier,⁷³ the idea of a realistic utopia comes into clearer focus. A realistic utopia as I have conceived of it is a theory of justice with two components, one that is ideal, and another that is non-ideal. Ideal theory presents us with a world that we should aspire towards, and non-ideal theory tells us how we can get there. This ideal theory is by its nature utopian, but it also realistic – realistic because in non-ideal theory we have a plausible way of getting there eventually, and also because the theory concentrates in particular on the kinds of positive changes that we can plausibly strive for, prioritizing these over changes that are impracticable even in the long run. The non-ideal theory, meanwhile, is by its nature realistic, but at the same time utopian – utopian because its realism is intended to get us to ideality, and because it pays attention to the demands of justice even in its transitional efforts. Because a realistic utopia is a single coherent theoretical approach to justice, it does not simply comprise two disparate theories. Instead, it represents a kind of reflective equilibrium – instead of achieving equilibrium between intuitions and principles in a single theory, reflective equilibrium applied to the idea of a realistic utopia itself seeks to achieve equilibrium between the degree of realism and utopianism both within its ideal and non-ideal components, and across these two limbs.

I will put this idea into practice in later sections of this paper, where I will identify the assumption that the theory of justice only applies to the basic structure of a domestic society as

⁷³ See *supra* the conclusion of Part I.A.3.

equivalent to a contingent constraint placed by Rawls on his theory. I will argue that by Rawls's justifications, the theory of justice ought to apply to the world at large; therefore the principles of justice envisioned in *Theory* are not fully adequate: a well-ordered society implementing those principles is nevertheless unjust because it does not achieve justice beyond its own borders. I will suggest that the theory of international justice provided by Rawls in *Peoples* is non-ideal theory, and it provides an account of an intermediate position on the long and difficult path to the ideal theory of justice, and thereby illuminate that path for us.

II. Rawls's ideal theory: from domestic to global justice

In *Theory* and *Liberalism*, Rawls is focused on developing a theory of domestic justice, the subject of which is the basic structure of a domestic society; for this theory, the international community and international justice do not exist.⁷⁴ I will refer to this theory as Justice as Fairness.⁷⁵ In taking this position, Rawls does not of course consider international justice to be inconsequential. Instead, he acknowledges that the model of a hermetically sealed domestic society is “a considerable abstraction, justified only because it enables us to focus on certain main questions free of distracting details.”⁷⁶ The justified use of such a simplification must be supported by two constituent assumptions: first, that it does not result in any severe distortions in the picture of justice within a domestic society, and second, that the question of global justice is one that ought to, or can properly be, answered after the question of domestic justice is settled.

In the parlance of our earlier discussion, this ‘abstraction’ plays the role of a fixed feature in Justice as Fairness. For us to conclude that Justice as Fairness is fully adequate, we must either conclude that its constraint of a closed domestic society is compatible with developing fully adequate principles of justice, or seek to model a theory that does without that constraint. In fact, in *Peoples* Rawls argues for the former position: he suggests that even when we consider the question

⁷⁴ See LIBERALISM 12 (“[T]he basic structure is that of a closed society ...”).

⁷⁵ I will treat ‘Justice as Fairness’ as shorthand for the theory advanced by Rawls in *Theory* and *Liberalism*. I leave aside the question of whether Justice as Fairness, *qua* theory, also includes the extensions made by Rawls in *Peoples*. When we come to discuss those extensions, I will refer to them as ‘the Law of Peoples’, again as a convenient shorthand.

⁷⁶ LIBERALISM 12.

of international justice, we will conclude that his principles of justice apply only to domestic societies.⁷⁷ In this section, I will reject this argument by assessing the proper scope of the question of justice. Having concluded that we must choose the latter position and model Rawls's theory of justice as a theory of global justice, I turn to the question of non-ideal theory (reserving the question of what the theory of global justice might look like for the last section of the paper). I suggest that Rawls's theory of justice, both before and after this remodeling, requires a distinct non-ideal theory before we can believe that it has a genuine chance of success given what we know about the current world.

A. The grounds of justice

1. The scope of justice and the grounds of justice

A theory of justice will have a *scope*: this refers to the population (usually, of persons) to which the theory of justice applies. The question of why a theory of justice has its particular scope asks after the *grounds* of justice: the shared features of the population (such as a particular relationship between all of its members) that give rise to the demands of justice to which the theory of justice is an answer.⁷⁸ This matters because, as Rawls suggests, there is no reason to believe that principles of justice developed with one scope in mind will be relevant to a different scope.⁷⁹ So we should not expect a theory of justice whose scope is a monastery or a country club to be deserving of that name, even if its approach is analogous to that of Justice as Fairness.

The scope of justice would be immaterial if we considered 'just' and 'unjust' to be judgments that can in every case be reduced to apply to individual persons. But we generally do not think this to be the case. Even under a theory in which justice consists solely of rewarding people in accordance with their effort, measured simply by the number of calories they exert, we do not know whether a particular reward is just or unjust outside of an institutional context in which rewards are calculated (for example, through a market economy or central planning) and quanti-

⁷⁷ See, e.g., PEOPLES 41.

⁷⁸ In drawing this distinction I am following some of the literature on the topic: see e.g., A.J. Julius, *Nagel's Atlas*, 34 PHIL. & PUB. AFF. 176, 178 (2006); MATHIAS RISSE, *supra* note 78, at , ON GLOBAL JUSTICE 4 (2012).

⁷⁹ See THEORY 7 ("There is no reason to suppose ahead of time that the principles satisfactory for the basic structure hold for all cases.").

fied (for example, through the institution of money). Similarly, under a theory in which justice consists solely of the qualities of interactions occurring between pairs of individuals, we cannot do without understanding the relations in which each interaction stands with all the other interactions occurring in the system, potentially including historical interactions: Nozick's theory, with its Lockean proviso and principle of just acquisition, serves as an illustration.⁸⁰ So even under theories of justice in which the subject of justice is not institutional, the question of justice is generally situated in an institutional context which has fundamental implications for what constitutes justice or injustice.

Having established the importance of the scope and – by implication – the grounds of justice, we can now turn to the question of what these grounds might be. Intuitively, one possible ground is the ground of being human: that some characteristics of being human brings us into relations of justice. In contrast, other possible grounds consider *social* relations to be relations of justice. Matthias Risse calls this same distinction one between 'non-relationism' and 'relationism', whereby relationists regard only a particular type of relations as salient to justice – those that are 'essentially practice-mediated'.⁸¹ Within relationism, one category of grounds refer to relations that are global, and suggest therefore that justice is global in scope, while another category of grounds consider only relations based on shared membership of a state to be relations of justice – 'globalism' and 'statism' respectively, in Risse's terms.⁸² In addition, it is possible to be pluralist about grounds of justice – to take the position that there are multiple salient grounds of justice, which justify developing principles of justice with differing scope. Risse endorses this pluralist position, calling himself an 'internationalist', and suggests that in our world the grounds of justice are variously non-relational, statist, and globalist.⁸³

⁸⁰ See generally NOZICK, *Distributive Justice*, *supra* note 27, at 149.

⁸¹ RISSE, *supra* note 78, at 7–8. The term 'essentially practice-mediated' is meant to describe the difference between the 'relations' that count for so-called non-relationists, such as common humanity, and those that count for relationists, which are social in nature. It is perhaps a more precise way of drawing the same distinction I drew in the preceding sentence.

⁸² RISSE, *supra* note 78, at 8.

⁸³ RISSE, *supra* note 78, at 10; *but see id.* 48–49.

2. Non-relational grounds

If we are convinced that the grounds of justice are non-relational, then Justice as Fairness is clearly not fully adequate; any fully adequate theory of justice would have to have as its scope the entire human population. If we are pluralists, and believe that at least one ground of justice is non-relational, this conclusion still holds, but we might have to ask a further question: are the non-relational ground(s) of justice important enough that by any standard, we will have a wholly inadequate account of justice unless it considered the entire human population? The most obvious way of answering such a question is to actually determine what the principles of justice are given our conclusions on the grounds of justice, a discussion which we will have to postpone.

One easy way to begin exploring our intuitions about non-relationism is to pose Derek Parfit's Divided World example: suppose there is a world divided into two halves, containing two societies that have never had contact with each other.⁸⁴ Consider, then, the following possible distributions of utility:⁸⁵

1. One half at 100; the other half at 200
2. Both halves at 145

(1) is better than (2) in terms of utility, since the average and total utility is higher in (1) than in (2). Assuming that 100 is well above the level needed to sustain a liberal democracy, then there are not many reasons we might consider (2) to be better than (1) in any way. If we do consider (2) better in at least some way, then we are what Parfit calls *telic egalitarians*: we are concerned about equality for its own sake, even if it has no other moral impact. Suppose then that at least part of the difference underlying (1) and (2) is a difference in the distribution of natural resources in the world – in (1), part of the prosperity of the better-off society is owing to the greater availability of natural resources. In the absence of any better way to achieve greater equality under (1), telic egalitarians would therefore support a redistribution of the untapped natural resources in the Earth such that each society has access to the same amount of natural resources. To me, this seems

⁸⁴ Derek Parfit, *Equality and Priority*, 10 *RATIO* 202 (1997).

⁸⁵ Because the numbers refer to a linear scale of utility, and not one of primary social goods, each additional unit at any level confers an equal amount of benefit. *Id.* 204.

right: differences in the distribution of natural resources around the world give rise to a plausible ground of justice regardless of whether there is any social cooperation between states.

However, for the purposes of our discussion, it would not be very useful to discuss non-relationism further: there is good reason to think that such non-relationist views stem from our deep-seated beliefs about moral philosophy, which are beyond the scope of the discussion in this paper; so if one is thoroughly non-relationist (and not merely pluralist) about justice, then one is already deeply committed to the inadequacy of Justice as Fairness and needs little further persuasion from me.

What if we are not non-relationists? One way we can still argue for the redistribution of natural resources in the Earth is by making a *prioritarian* argument. Suppose that in the Divided World example above, the worse-off society is so badly off that it faces the risk of subsistence poverty and can no longer sustain its political institutions. In this case, it would seem that redistribution has some moral basis simply if that is what it takes to stave off catastrophe in the worse-off society. This is not because the inequality between the societies is bad in itself; rather, it is bad if societies fall below a certain level of resources, and given that there are finite resources in the world, redistribution is necessary in order to address the pressing priority of a society's need for resources. Prioritarianism, therefore, is not an egalitarian view as such. This prioritarian ground of justice is part of the argument offered by Charles Beitz for the redistribution of natural resources.⁸⁶ Beitz suggests that states' appropriation of natural resources located in their territory may violate the Lockean proviso,⁸⁷ because doing so would not leave sufficient resources for other states, given that some natural resources in the world are strongly concentrated in a few states, and many states exist in territories where most of the natural resources modern societies need are scarce. This argument for redistribution is strengthened by the fact that natural resources do not give rise to any of the complications of natural talents: talents are inherent in a person, which might give rise to a potential objection against treating persons' talents as common goods since it involves treating persons as common goods, but natural resources have to be appropriated first through a process of extraction and therefore untapped natural resources can unproblematically

⁸⁶ BEITZ, *supra* note 51, at 136–137 *et seq.*

⁸⁷ BEITZ, *supra* note 51, at 139.

be considered part of a common pool; likewise, talents may be a source of one's personal identity, and their free development might be fundamental to one's sense of self and self-respect, but natural resources do not constitute a reasonable basis for a personal identity.⁸⁸

We do not, however, live in a Divided World. Instead, we are well aware of the existence of other societies in our world, and in fact our way of life today depends on interactions with them politically and economically. This opens the possibility of grounds of justice based on the existence of these interactions. It is to this category of grounds of justice that we now turn.

3. Social cooperation as a relational ground

The basic argument of one relational approach is as follows: The subject of justice is the basic structure of society; therefore the existence of a basic structure is essential for the question of justice to arise. Because the international community has no basic structure that is recognizable as such, the question of justice does not arise internationally. More sophisticated versions of this argument substitute different conceptions of the basic structure considered essential for grounds of justice, but this basic argument remains the starting point.⁸⁹

a. *The existence of social cooperation*

One way to frame the basic argument is to think of the basic structure as the entity within which social cooperation is made possible. After all, the basic structure denotes a set of social

⁸⁸ BEITZ, *supra* note 51, at 139–140.

I recognize that it is not *strictly* speaking impossible for ownership of natural resources to constitute part of one's sense of self, given an account of agency that links the self with one's external relations in the world (see e.g. Jiwei Ci, *supra* note 39). But to have such a relationship with *untapped* natural resources would be esoteric to say the least; and in any case even if such persons do exist, they are unlikely to have those inclinations in a world where the background social conditions gave persons entitlements according to the difference principle.

⁸⁹ Rawls appears to suggest, but does not actually make, an argument along these lines. See BEITZ, *supra* note 51, at 131. The closest he appears to come to addressing the grounds of justice is in THEORY §22, which is tantalizingly titled 'The Circumstances of Justice', but in fact contains no discussion of grounds of justice. Instead, what he describes as "the circumstances of justice" are the facts about life that make human cooperation "both possible and necessary," including objective facts such as the moderate scarcity of resources, and subjective circumstances such as having sufficiently similar, but nevertheless differing, plans of life and conceptions of the good. THEORY 109–10. However, there are potentially infinitely many conceivable sets of persons for whom mutual cooperation is possible and necessary (and in fact occurs) in order for each to get what they want, thereby leaving open the question of which such sets, if not all of them, are relevant for the question of justice. Indeed, if we were to consider only one such group, it would be natural to consider the largest possible set, and the nation-state is certainly not this set.

institutions, and institutions are constituted by a public system of rules, or more broadly speaking, a social practice.⁹⁰ In Rawls's words, this is "a cooperative venture for mutual advantage"; the basic structure "leads men to act together so as to produce a greater sum of benefits and assigns to each certain recognized claims to a share in the proceeds."⁹¹ If justice is the virtue of giving each person their due, then it is here that the question of justice arises.

In one sense, this idea plays upon a basic intuition: that the pattern of social and economic interactions under the basic structure of domestic society is the focal point of social cooperation as we know it; through the basic structure, therefore, members of society are all linked to each other in social cooperation. The question, however, is how realistic this image of social cooperation is. On the one hand, it cannot possibly be the case that there is actual cooperation, conceived pairwise, between all the members of a society. As Benedict Anderson famously argued, all societies too large for each person to sustain face-to-face contact with every other person are 'imagined communities', in that "the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion."⁹² In fact, in most domestic societies, any given individual can imagine groups of individuals with whom she has so little contact, direct or indirect, that perhaps the only link between them is their imagined communion and the transfers they receive to and from their shared government (and for groups that give or receive very little, or which live under federal systems of government, even this connection may be tenuous). On the other hand, it seems that it is precisely this distance – a distance created through borders, markets, and rhetoric – that allows us to relegate foreigners to the sidelines of social cooperation as conceived through the basic structure. To put it in terms of Rawls's description of society, the circumstances of justice that make social cooperation possible and necessary do not require that every single person cooperate with every single other person, but include a transitive property in which persons are linked with all other persons through chains of social cooperation.

Disabused of this communitarian image of social cooperation, I see little reason not to conclude that social cooperation occurs across the world. Claims of justice or injustice seem

⁹⁰ THEORY 47–48.

⁹¹ THEORY 74.

⁹² BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 5–6 (1982).

clearly plausible if the interactions that we are considering form part of a system in which we can speak of entitlements deriving from institutional rules or practices.⁹³ For example, even in an international system in which there is a minimally developed system of interaction between states, there may be rules that determine when states are allowed to interfere with the property or other rights of entities or individuals that are subject to the jurisdiction of other states – such as the laws that one state imposes, and must inevitably impose, on commerce occurring in that state conducted with foreign parties. A system that is able to perpetuate or modify entitlements in this manner will thereby perpetuate either justice or injustice. So to say that I have no power to address the injustice of my indirect and extenuated interactions with the sweatshop workers producing my consumer goods is not to say that the question of justice does not arise as between me and them, or my society and theirs; it is on the contrary to say that the justice or injustice in those interactions is a *systemic*, not a local, feature, and therefore beyond my capability to change. The fact that this chain of social cooperation that connects me with the sweatshop workers passes through a national boundary should not distract from the fact of the social cooperation itself.

In light of this, to describe a society as “a cooperative venture for mutual advantage” may be to put it too high. Although we should like to think that living in societies of any kind is at a bare minimum preferable to living under the state of nature (however that is conceived), it is not clear that this means that the societies we live in must therefore be to our mutual advantage, relative to either possible alternative societies, or actually existing societies in other territories. To put it most starkly, as Beitz does, it is imaginable, however unlikely, that a society could exist in which practically every member could have done better for himself or herself in a different society.⁹⁴ Yet we would not think that in such a society there was no social cooperation or basic structure, and therefore no question of justice or injustice. Similarly, and much more likely, we might think that in the societies that trade with each other today, some members have gained large advantages, at the cost of other members being subject to large disadvantages – and that this remains a cooperative venture, although perhaps not to mutual advantage.

⁹³ See generally THEORY §48.

⁹⁴ BEITZ, *supra* note 51, at 131.

In fact, taking this line of reasoning to its logical conclusion, claims of justice seem to be possible just when there are transactions between people: when social activity occurs between two or more individuals, and this social activity produces benefits or burdens which would not exist but for some such social activity.⁹⁵ This conclusion seems sound, because in every imaginable case where there is some kind of transaction between two individuals, it appears to me possible to say ultimately whether that transaction is just or unjust, even if we cannot say so immediately because we need more information about the transaction or the background against which it took place (such as the basic structure of society). Even if the transaction occurred in a context in which it might be said that there is ‘no basic structure’, such as where two members of two isolated tribes meet by chance on a neutral territory and decide to make a barter trade, it seems to me possible to adjudicate the justice of that transaction, except that given the lack of a system of rules that govern the interactions between the two individuals, we might conclude that there is a vast range of possible exchanges which may be just.

b. *A heightened standard of social cooperation*

Some critics will argue, however, that to conceive of the basic structure as the mere existence of social cooperation is to misconceive the basic argument of relationism. Instead, a basic structure only exists in the relevant sense when social cooperation exists at a level at which the apparatus of a state is the necessary institutional framework to sustain social cooperation – such that if the state did not exist, it would be necessary to create it. Thomas Nagel adopts a version of this argument, which says that what gives rise to the question of justice is the need for coercion backed by a monopoly of force in order to coordinate the conduct of persons:⁹⁶

A sovereign state is not just a cooperative enterprise for mutual advantage. The societal rules determining its basic structure are coercively imposed: it is not a voluntary association. I submit that it is this complex fact—that we are both putative joint authors of the coercively imposed system, and subject to its norms, i.e., expected to accept their authority even when the collective decision diverges from our personal preferences—that

⁹⁵ See BEITZ, *supra* note 51, at 131.

⁹⁶ Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113, 115 (2005).

creates the special presumption against arbitrary inequalities in our treatment by the system.

Without being given a choice, we are assigned a role in the collective life of a particular society. The society makes us responsible for its acts, which are taken in our name ... ; and it holds us responsible for obeying its laws and conforming to its norms, thereby supporting the institutions through which advantages and disadvantages are created and distributed. Insofar as those institutions admit arbitrary inequalities, we are, even though the responsibility has been simply handed to us, responsible for them, and we therefore have standing to ask why we should accept them. This request for justification has moral weight even if we have in practice no choice but to live under the existing regime. The reason is that its requirements claim our active cooperation, and this cannot be legitimately done without justification—otherwise it is pure coercion.⁹⁷

Nagel's view is what might be called 'coercion-based statism',⁹⁸ because he suggests that coercion is what makes the state uniquely relevant from the viewpoint of justice. But insofar as we use the idea of coercion to describe Nagel's statism, it does not seem to quite get off the ground. For increasingly, international arrangements and institutions do coerce, and they have the potential to coerce more directly than ever before.⁹⁹ The most prominent example might be that of the WTO, which regulates the intellectual property rights of persons across the world, and whose measures in other areas have a direct effect on economic activity in many markets.¹⁰⁰ Less commonly pointed to is the obviously coercive power of the United Nations Security Council to call for both military operations and economic sanctions against certain territories,¹⁰¹ but which is also clearly coercive against the persons living in the territories in which these operations occur.

However, to limit Nagel's argument to the idea of coercion does not give it sufficient credit. After acknowledging that international governance is the thin end of the coercive wedge, he adds:

⁹⁷ *Id.* 128–29.

⁹⁸ RISSE, *supra* note 78, at 44.

⁹⁹ See a similar argument made against Nagel at RISSE, *supra* note 78, at 44–45.

¹⁰⁰ RISSE, *supra* note 78, at 50; *see also id.* ch. 18.

¹⁰¹ U.N. Charter art. 42.

It is true that such operations depend for their support on contributions by member states, but this does not diminish the coercive power of the Security Council. Indeed, in any case it was originally anticipated that the Security Council would have its own standing forces to deploy without depending on *ad hoc* contributions. U.N. Charter arts. 43, 45–47.

[F]or the moment they lack something that according to the political conception is crucial for the application and implementation of standards of justice: They are not collectively enacted and coercively imposed in the name of all the individuals whose lives they affect; and they do not ask for the kind of authorization by individuals that carries with it a responsibility to treat all those individuals in some sense equally. Instead, they are set up by bargaining among mutually self-interested sovereign parties. International institutions act not in the name of individuals, but in the name of the states or state instruments and agencies that have created them. Hence the responsibility of those institutions toward individuals is filtered through the states that represent and bear primary responsibility for those individuals.¹⁰²

In other words, what is normatively unique about the state is the “*unmediated* nature of the interaction of individuals with their government,” which we might call ‘immediacy’, as Risse puts it.¹⁰³ It states that possess the unmediated capacity of law enforcement (‘legal immediacy’), and states which provide the total environment within which the exercise of individual rights is possible (‘political immediacy’).¹⁰⁴ In addition, to capture the “pairwise justificatory demands”¹⁰⁵ that are posed by Nagel in these passages, we must conceive of the coercion of states as not merely immediate, but also accepted by each of its members as a matter of reciprocity – as the “joint authors” of the coercive system of the state, we must impose only those coercive schemes that each member of the state has reason to accept.

However, even this immediacy- and reciprocity-based statism, which represents the high-water mark of statism based on social cooperation under the basic structure, misses the mark. There are two levels on which we can explain why this is so.

The first level involves considerations which are internal to the argument from immediacy and reciprocity. Nagel’s point is that grounds of justice arise only where individuals are both the makers and the subjects of the basic structure of society. To begin with, it is simply untrue that

¹⁰² Nagel, *supra* note 96, at 138.

¹⁰³ RISSE, *supra* note 78, at 25.

¹⁰⁴ RISSE, *supra* note 78, at 26–27.

¹⁰⁵ Julius, *supra* note 78, at 181 (“Each person’s action invites the demand that she be able to justify the terms to others even as she is the source of a similar demand for justification. It’s an old and profound theme of Nagel’s writing on equality that this sort of a totally connected network of pairwise justificatory demands that run in two directions is the home ground of a strong form of equal consideration of others’ interests that leads to egalitarian justice.”).

international institutions do not act in the name of individuals. A long time ago, it may have been the case that individuals were a matter of irrelevance to international law,¹⁰⁶ and that even where international law provided tools for the protection of individuals, it did so in the name of states which had an interest in protecting their subjects.¹⁰⁷ But this is hardly true any longer, when the international legal order today takes as one of its priorities the protection of individuals from harm *qua* individuals. In this regard, individuals have standing to make complaints about states, including the state of which they are citizens, before international institutions such as the UN Human Rights Committee;¹⁰⁸ and individuals are also capable of being held to account before international tribunals for their criminal acts.¹⁰⁹

In addition, even where individuals do not have standing in international law, it is wrong to reason that “[i]nternational institutions act not in the name of individuals, but in the name of the states ... that have created them. Hence the responsibility of those institutions toward individuals is filtered through the states... ”¹¹⁰ It is wrong because we might well make a parallel argument about the various executive agencies of the United States created by Congress: “The EPA (the Environmental Protection Agency) acts not in the name of individuals, but in the name of the legislators that have created it. Hence the responsibility of the EPA toward individuals is filtered through Congress.” This statement is true in a literal sense, but no one will suggest that the EPA is therefore a stranger to justice. Of course, we might say that legislators have agency-creating powers only to the extent that the people they represent have delegated these powers to them, but this is neither here nor there: once elected to office these legislators are not bound to represent the

¹⁰⁶ See, e.g., JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 126 n.58 (8th ed. 2013) (pointing out that the first edition of Oppenheim’s classic international law textbook in 1905 classified individuals as ‘objects’ of international law, alongside rivers, canals, lakes, etc.).

¹⁰⁷ The doctrine of diplomatic protection is a prime example of the state-centric position of international law. See, e.g., *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 4, 45 (Feb. 5) (“[A] State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law.”).

¹⁰⁸ Provided their state has ratified the Optional Protocol to the International Covenant on Civil and Political Rights.

¹⁰⁹ At first the international criminal tribunals were *ad hoc* – the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY), etc. – but now there is the International Criminal Court (ICC), which is a permanent international criminal court.

¹¹⁰ See note 102 above.

interests of the people they represent in the sense that they can vote whichever way they want, and even if they are thrown out of office at the next elections, their acts are not thereby invalidated; this is akin to states at the international level, which are similarly able as a matter of law and practice to act contrary to their citizens' interests with impunity, and are only directed otherwise by principles of justice or of morality – just like we would expect (or hope) of legislators.

Nagel's defenders may accuse me of having pulled a fast one, because although we think that just domestic societies, however dysfunctional they in fact are, ought to be representative of their members, we cannot presuppose that states in the international community are properly functioning only when they act in the names of their citizens. Again, this criticism is neither here nor there, because our belief in the representative nature of just domestic societies may be partly a premise, but is at least also partly the conclusion reached from our thinking about justice. Before embarking on a similar exercise with respect to international justice, we should not jump to the conclusion that we ought not pass judgment on the internal governance of states.

At the same time, it is simply not true that our intuitions about justice presuppose that considerations about justice apply only to institutions of which we are the collective authors. On the contrary, it seems to be one type of particularly grave injustice, and not a question beyond justice, if institutions that purport to coerce us are not institutions that act in our name: for example, we would not say that slaves in the 1800s United States have no claims of injustice, properly understood.¹¹¹ In addition, if we lived under such a non-representative basic structure, any other kinds of injustices that arise within it, such as massive economic inequalities, should not thereby be rendered beyond the scope of justice.¹¹²

But to truly understand the scale of coercion in our modern global system, we have to appreciate that we can also be implicated in coercion transitively – and that we are in fact implicated in chains of coercion stretching across borders. On Nagel's account, the basic structure coerces persons living under it such that they must operate within certain boundaries. If factory workers want to increase their level of welfare, they must seek this benefit through legally permitted channels – by working longer hours, by looking for other lawful employment, through public advocacy

¹¹¹ Julius, *supra* note 78, at 183.

¹¹² *Id.*

or lobbying for legislation, or through collective action such as strikes within the limits set by the law. They are coercively prevented from doing so in other ways – by taking property belonging to others, by running a cartel, by autonomously purporting to change legislation, or by taking unlawful collective action. It is this coercion – which the state exercises in all our names – that creates, for Nagel, the grounds of justice. But this coercion also has a special directedness where we are also the consumers of the goods produced by these workers, because there are two intertwined senses in which this coercion works for our especial benefit in such a case: first, the coercive powers of the state, exercised to maintain the status quo of the factory, are what permit the goods to be produced and sold at the price they are, with the producer gaining the property right in the good that is transferred to us upon purchase, such that we are able to obtain the goods at a lower price than if the factory workers had not been coerced; second, the coercive powers of the state, exercised to maintain a certain scheme of property rights and a scheme of taxation and a corresponding scheme of transfer payments, are what permit us to gain from what the factory workers have lost without having to pay anything additional in return. What is important to stress here is that coercion is prior to justice – so even if the factory workers were making entirely unreasonable demands, what matters is that state coercion works to our favor to prevent them from prevailing; the view that state coercion has been employed legitimately in such a case is a separate judgment of justice, justifying the coercion, not eliminating it – and as long as coercion *exists*, the burden arises for it to either be justified or eliminated. Now, if sweatshop workers in a faraway country want to increase their level of welfare, they are similarly limited by the basic structure of their society. The two sides of the coin are in this case separated – it is the foreign state where the workers are located that maintains the status quo of the sweatshop, whereas it is the consumers' states that maintain the status quo of the property rights thereby gained by the consumers. The difference here is that their state does not exercise its coercive powers in *our* names – the foreign consumers of the goods produced by these workers – but as consumers we are nevertheless the beneficiaries of coercion in this especial sense. I suggest that here, the transitive property of coercion applies, and alongside it the question of justice. By putting the question in this light, we can understand the basic structure of domestic society for what it is – relevant to the question of the ease with which injustice can be dealt with, but not a prerequisite for the question arising in the first place.

Once we abandon the requirement of reciprocity, the arguments about the coerciveness of the international order return in full force. To these we can add two further, structural, complaints. The first is historical. It is generally acknowledged that patterns of international action, such as the slave trade, colonialism, and political and economic imperialism, even if they can be entirely confined to history, have had persistent and pervasive effects on the life chances of those in different states of the world today.¹¹³ Many find it objectionable to be held to account for the injustices perpetrated by their ancestors or predecessors, but the question here is not one of accountability. On the one hand, under historical principles of justice, such as Nozick's principles of acquisition and transfer, it is not possible to decide the justice of the transfer of property unless we know about the justice of its acquisition.¹¹⁴ On the other hand, even if we reject this idea of just acquisition, under a theory of justice such as Rawls's, we must at a bare minimum accept that the privileged starting point in life enjoyed by those in developed states compared to those in developing states are equally arbitrary as the privileged starting point enjoyed by the well-off in a state compared to the worst-off within that state. By the same logic, we ought to accept that the material advantages that constitute the privileged starting point of those born in developed states are equally subject to redistribution.

The second structural complaint depends not on history, but on the reality of a connected world. As AJ Julius puts it:

[M]any terms of cross-border interaction are coercively imposed by states on foreign nationals. If you try to enter the United States without the right papers, you will be seized and returned to where you lived before. If you plan to distribute anti-retroviral drugs to HIV carriers in your country, you will be deterred by liability in U.S. courts from using formulas patented by U.S. manufacturers. If you want to nationalize your country's foreign-owned productive assets, the long list of occasions on which the United States reversed such assertions of sovereignty ... will dissuade you from risking similar disruptions now. ... [E]ach ... involves a program of coercion by which U.S. policymakers have

¹¹³ See THOMAS W. POGGE, *REALIZING RAWLS* 262 (1989).

¹¹⁴ See generally NOZICK, *Distributive Justice*, *supra* note 27, at 149.

tried to change or preserve the terms on which U.S. citizens do business with people in other countries.¹¹⁵

4. Ideal theory and the grounds of justice

The second level on which we can reject the arguments from immediacy and reciprocity, and more broadly the basic argument that grounds of justice derive from social cooperation, follows from a broader exploration of the question of justice. The concern flows from the structure of the basic argument that I described above, which asserts the centrality of the existence of a basic structure for the salience of justice.¹¹⁶ This wrongly assumes a linear argument running from the existence of the basic structure to the grounds of justice, to reasoning about the principles of justice. According to Rawls, the basic structure of society is the subject of justice because “its effects are so profound and present from the start.”¹¹⁷ First of all, it must be noted that this justification pertains to the choice of the basic structure of society as opposed to other sets of features of society (such as the set of all possible features, including individual distributions of social goods); it does not explain the choice of the domestic society as opposed to a different scope of justice.

The focus of the argument shifts when we look to a thicker conception of the basic structure, which models the basic structure as a set of institutions that exhibit immediacy and reciprocity. Conceived in this way, the basic structure is said to exist only at one level – there is no basic structure below that of an entire state, nor is there a basic structure larger than that of the state. I have suggested above that this argument is simply unsound – that there is no need for this thick conception of the basic structure. But there is a further reason to object to the lines of reasoning that we have considered so far. I think it is a mistake to suppose, as theorists like Risse and Nagel appear to, that the grounds of justice are static and are to be determined *before* we begin theorizing about justice. It must be remembered that ideal theory refers to a theory that operates in a world not identical to our present world in important ways.¹¹⁸ Since the relationist grounds of justice depend by definition on the existence of some features of our social world, they, too, constitute

¹¹⁵ Julius, *supra* note 78, at 184–85.

¹¹⁶ See *supra* the introduction to Part II.A.3 before II.A.3.a.

¹¹⁷ THEORY 7.

¹¹⁸ That is, unless the real world meets the demands of ideal theory, which it clearly does not.

what we have conceived of as contingent constraints. Working in the field of ideal theory therefore behoves a different attitude towards the grounds of justice. In what follows, I will explain two key features of this attitude: the priority of global justice over domestic justice; and the duty of creating the conditions for justice.

a. *The priority of global justice*

First, suppose we accept that at least some grounds of justice are global in nature. I think we have convincingly established at least some such grounds thus far. Theorists such as Risse have also accepted that there are some such grounds.¹¹⁹ If so, then an approach such as Rawls's in which the original position is first situated within a domestic society cannot be fully adequate for ideal theory.

Under Rawls's approach, which he has sustained across his works, principles of justice are first derived for domestic society; only then will the question of justice be extended to the international community so as to obtain principles of international justice. The problem with this approach is that by the time the question of international justice is broached, the principles of domestic justice are already fixed, and simply taken as given. This causes two kinds of problems.

Firstly, the principles of international justice that are optimal *in light of* the fixed domestic principles, and which fit with their dictates, may not be the principles that best vindicate the grounds of global justice all things considered.¹²⁰ For example, if we consider that global justice requires a certain degree of equality of starting points across the world, and would like to establish a principle of justice to this effect, how can we reconcile this principle with the principles of domestic justice already chosen? The best way to achieve fair equality of opportunity across the world's population may involve compromises in the degree of equality of opportunity (or the degree of compliance with the difference principle) that can be achieved in a given society. If the principles of domestic justice have already been decided, then our answer to global fair equality of opportunity can only be of a comparable magnitude and ambition as those expenditures of government permitted within a just basic structure that serve interests other than justice – such as

¹¹⁹ See *supra* note 83.

¹²⁰ See POGGE, *supra* note 113, at 254.

beautifying cityscapes or saving the dolphins.¹²¹ In other words, we might get a principle of assistance of a timidity comparable to the humanitarian budgets of developed states today.

Secondly, given that theorizing about international justice is what produces a vision of the ideal international community in which ideal states exist, it seems unrealistic to expect that we can reach an ideal theory of domestic justice ignorant of the international conditions under which this domestic society will exist.¹²² In particular, a domestic society conceived of in an international vacuum may not have the tools of social and political coordination needed under a theory of international justice, and conversely a just international society depends for its existence on the necessary sense of international justice engendered in states and their populations.¹²³

In fact, beyond the problems generated by this multi-step theorizing about justice, we have good reason to consider global and domestic justice in a single stage so long as we do not think that claims of global justice are always subordinate to claims of domestic justice, even if we do think that the grounds of domestic justice are signally more comprehensive or stronger. Such a single stage is equally capable of generating the outcomes supported by pluralists such as Risse, but it is also capable of generating a statist theory of justice if it is in fact true that claims of justice are irrelevant across states. The difference is that when this conclusion is reached, we will know that the principles thereby generated are fully supported from the viewpoint of justice, and not because we have artificially limited its scope. To put it another way, principles of justice could be narrower in scope than the theory of justice in which they are generated, whereas they could not possibly be broader.

b. *The duty of creating the conditions for justice*

The second argument, however, applies even if we agree with Nagel that there are no grounds of justice currently existing in the world – that although the global state of affairs is morally objectionable in many ways, these are not objections of justice. All that is necessary for this argument is the acceptance that some grounds of justice may arise in some future world in which global social

¹²¹ See THEORY 249–50 (proposing an exchange branch of government which makes decisions about public expenditures without affecting the justice of distributions).

¹²² See POGGE, *supra* note 113, at 255.

¹²³ See *id.*

cooperation and political institutions are strengthened. If so, then it becomes clear that the absence of global grounds of justice is properly a contingent feature of justice, not a fixed feature. The presence or absence of relationist grounds of justice are patterns of human action, and therefore subject to the demand of change under ideal theory. If on reflection we consider that some morally objectionable conditions of the world can be made less objectionable if a particular system of global justice existed, then it would be incompatible with the idea of ideal theory to hold that nothing needs to be done about this.

So, for example, if we are convinced by Beitz's suggestion that the distribution of natural resources is morally arbitrary, but we reject non-relationism, what should we do? Ideal theory suggests that if we believe that a global institution responsible for regulating the extraction and ownership of natural resources will not violate any principles of justice to which we have deeper commitments (such as the basic liberties, which might oppose a similar scheme for natural *talents*), and which will sit coherently with the rest of our ideas about justice, then ideal theory ought to pursue such an institutional setup. Presumably, for such an institution to be functional, it will have to be coercive either directly or indirectly, in the way existing institutions like the WTO and state welfare systems are. Provided we can conceive of a path that will lead us to a system of justice in which such an institution plays a part, and that this is the best system of justice that we can contemplate, then it will become a requirement of ideal theory, like any other ideal principle of justice. It will not be possible to complain that this principle of justice exceeds the scope justified by the grounds of justice, because when implemented, the coercive and other characteristics that give rise to grounds of justice will in fact have arisen.

Although this suggestion might smack of idle utopianism, it can in fact be reconciled to Rawls's approach relatively easily. This is because Rawls's approach does not presuppose a certain state of affairs to exist prior to the original position. As an abstract matter, the device of the original position does not exemplify a temporal point of view at all; rather, it is "a certain form of thought and feeling that rational persons can adopt within the world" – it is the position that we ourselves adopt, whoever we are, when we want to think about justice.¹²⁴ From the perspective of

¹²⁴ THEORY 514; and see LIBERALISM 273 ("The explanation is that the agreement in the original position represents the outcome of a rational process of deliberation under ideal and nonhistorical conditions that express certain reasonable constraints.").

ideal theory, we should not understand the original position as therefore resigned to the contingent circumstances that prevail at whichever point we carry out our theorizing; rather, the strength of an ideal theory of justice, coupled with the necessary non-ideal theory, is that it permits us to see what kind of justice we ought to aspire towards. In that regard, even if the basic structure of international society is thin at present, we may still conclude that under ideal theory its basic structure *ought* to be thick; likewise, nothing prevents us from deciding that although the present global order does not exhibit immediacy and reciprocity, the world will be more just if the global order were to have those features. I do not think that this position is as radical as it might sound: after all, if we lived in a society in which democracy were highly imperfect and therefore our society did not exhibit the appropriate degree of reciprocity, we should not think that we are therefore strangers to a full-bodied conception of justice like Justice as Fairness. Such unfortunate circumstances would only suggest that we might need a non-ideal theory so that we might have a better idea of what is needed in order for us to get on the road to justice.

B. Getting to ideal theory

Having concluded that Rawls's theory of justice should be a global theory of justice, even if we are not committed to thinking that all claims of justice are global in nature, we now have a sense of the starting point for ideal theory. To summarize it briefly, the position is as follows: There are some non-relational grounds of justice, one particularly compelling one being the distribution of untapped natural resources across the world. But even if we set non-relationism aside, there are also strong relational grounds of justice arising from the fact that social cooperation already exists across the world, as does the protection of its outcomes through coercion. Those who believe that justice would nevertheless turn out to demand more within states than between them, furthermore, should have no objection to a theory of justice with a global scope, since the scope of the theory does not predetermine the scope of all its constituent principles. Ultimately, though, even the mere possibility that this kind of social cooperation could arise on a global level should be enough, because contingencies like the state of global affairs are not fixed constraints to be assumed in ideal theory; instead, ideal theory tells us what kind of society justice demands, and our task in the long run is to achieve that kind of society.

Before I turn to sketch out briefly how we might develop ideal theory in this direction in Part IV, we should first tend to a different consideration. As I argued earlier, when we look to ideal theory we are in the business of searching for a realistic utopia – one that is as utopian as we can plausibly make it within the bounds of reality.¹²⁵ In my view, Justice as Fairness can supply the necessary utopian vision. It approaches the limits of realism in a theory of justice, but this is precisely what makes it sufficiently utopian to command our ideological allegiance; any less, and it will cease to serve as a benchmark for our sense of justice. But under my analysis, I would push the limits even further, such that Justice as Fairness is transformed into a global theory of justice. In this regard, however, I would suggest that my changes do not all push against the envelope: rather, they also serve to systematize our existing intuitions about justice, many of which are no doubt international in nature, and some of which are captured unwieldily and incompletely in extensions such as *Peoples*; to neglect them helps simplify Justice as Fairness but does not make the intuitions go away. In this transitional section, I will look at the other aspect of a realistic utopia: non-ideal theory. I argue that Justice as Fairness, and therefore *a fortiori* its modified global version that I advocate, is squarely in the realm of ideal theory, and therefore cannot be the target of our enterprise of justice without the help of a non-ideal theory to lead the way. Having shown this, in Part III I will then discuss the theory of international justice Rawls presents in *Peoples* and where that theory might fit in our revised approach to justice: I suggest that we could adopt it as our missing non-ideal theory.

1. The need for a new non-ideal theory

Some ideal theories might be adapted incrementally to provide action-guidance even under non-ideal situations. However, most situations of imperfect justice are too complex to be amenable to such solutions. Instead, to get us on the road to ideal theory, we need to adopt a second- or third-best solution.¹²⁶ I suggest that Justice as Fairness requires such a separate non-ideal theory. One argument in favor of developing a separate non-ideal theory can be made at the most basic level. It is possible for a vision to be empirically possible, but nevertheless far into the future – and indeed a realistic utopia is likely to be distant to our reality. Given the degree of flexibility in the

¹²⁵ See *supra* Part I.B.2.

¹²⁶ The preceding is a summary of passages in Part I.A.3.

paths that have the potential to lead us to our ultimate goal when it is so far in distance and in time, it does not appear that we can justifiably ignore what we can achieve now by choosing carefully between variations of non-ideal theory between which we might be indifferent if our goal is only to attain ideal theory. Instead, the non-ideal theory that is likely to be effective in bringing us as close as possible to justice in the short term as well as the long term will be more choiceworthy, without compromising on ideal theory.¹²⁷

2. Transitional justice

One of the arguments famously made by Robert Nozick in *Anarchy, State, and Utopia* criticizes Rawls for pretending that “things fell from heaven like manna, and no one had any special entitlement to any portion of it”¹²⁸ Instead, says Nozick, “[t]hings come into the world already attached to people having entitlements over them.”¹²⁹ This means that we should not seek to distribute social goods according to some preferred pattern; instead, we should pay attention to how people actually come to get things – through acquisition (from nature) and transfers (from someone else). Furthermore, provided that we accept principles of transfer that are not entirely totalitarian, then it would seem that people’s exercise of their preferences in validly transferring their goods to others would result in constant changes in their pattern of distribution, and so to maintain any preferred pattern would require constant interference.¹³⁰ Nozick says that Rawls’s difference principle is objectionable because it is an example of a patterned principle of justice.¹³¹

Now, this attack appears to miss its mark, because Rawls’s difference principle is not in fact patterned; on the contrary, it is somewhat akin to the kind of historical principle that Nozick identifies his own theory with.¹³² Rawls suggests that his principles of distributive justice are an example of pure procedural justice, whereby the outcomes of a procedure are fair just if the procedure itself is fair. The idea is that the principles of justice govern the basic structure of society, and people’s entitlements are simply the institutional entitlements that derive from the rules of the

¹²⁷ See Stemplowska & Swift, *supra* note 10, at 120.

¹²⁸ NOZICK, *supra* note 27, at 198.

¹²⁹ *Id.* 160.

¹³⁰ This is the famous Wilt Chamberlain example. *Id.* 160–62.

¹³¹ See *id.* 167, 208.

¹³² See Nelson, *supra* note 45, at 511.

basic structure. If so, then “[a] distribution cannot be judged in isolation from the system of which it is the outcome or from what individuals have done in good faith in the light of established expectations. If it is asked in the abstract whether one distribution of a given stock of things to definite individuals with known desires and preferences is better than another, then there is simply no answer to this question.”¹³³

However, even if we accept Rawls’s claim that Justice as Fairness is a system of pure procedural justice, we can only be certain of its nature when it operates in a society where the basic structure is already just. Under the logic of pure procedural justice, since it is the rules of the game, and only those rules, that make the outcome just, unjust rules are fatal to justice.¹³⁴ One difficulty with a conception of justice built on procedure and not on outcomes lies in the transition. When starting from a position that does not accord with a *patterned* principle of distributive justice, we are *prima facie* permitted to do whatever it takes to adjust the pattern of distribution to match its requirements. This process might be tempered by the need not to cause too much disruption to people’s lives and expectations, but in the end we will not be too anguished by any compromises that have to be made: after all, under a patterned principle, individuals do not in the first instance have rights to social goods that fall outside the required pattern. It is an improvement on the part of Justice as Fairness that it does not give any primacy to patterns. But what is lost in this move is certainty about what transitional principles we ought to adopt. Although Rawls is clear that people acquire legitimate expectations to those social goods promised to them by just institutions, what is never made clear is whether it is *only* under just institutions that legitimate expectations arise¹³⁵ – and perhaps unsurprisingly so, given his focus on ideal theory.

However, the logic of legitimate expectations, although it applies with its fullest force only to just institutions, does not appear to be seriously weakened in every situation that falls short of

¹³³ THEORY 76.

¹³⁴ To be sure, the logic of pure procedural justice is also an uncertain one: it seems unlikely that there is a particular normative underpinning behind the very idea of pure procedural justice for its claim to just outcomes, other than what reasons we have for believing that a theory produces just outcomes independent of that label – it is more likely that pure procedural justice is a name for a category of theories. See Nelson, *supra* note 45, at 502–08. However, it is clear enough that whatever we call it, the idea of institutional entitlements runs deep in Rawls’s theory. See THEORY 88–89; THEORY §48.

¹³⁵ See note 136, *infra*; see also THEORY 88 (“[G]iven a just system of cooperation ... those who, with the prospect of improving their condition, have done what the system announces it will reward are entitled to have their expectations met.”).

justice.¹³⁶ It seems that those who live under unjust institutions may have “little choice but to rely on the future being like the past,” or may even be forced to follow certain arrangements.¹³⁷ When such choices actively result in the perpetuation of injustice, we may feel less sympathy for the persons involved, but since it is difficult for a society to be thoroughly unjust in every way, in most situations following the rules of unjust institutions does not produce any particular culpability for those portions that are most flagrantly unjust.¹³⁸ Indeed, our intuition that the response to injustice is not to invalidate every outcome flowing from unjust institutions might be thought of as analogous to the restraint that is called for when contemplating civil disobedience as a response to injustice.¹³⁹ Unjust institutions may diminish legitimate expectations – but perhaps in some cases not by much, and probably in no case are they extinguished entirely.

To return to Nozick’s critique, however, we can see that it gains some purchase in the transitional scenario. A theory of justice that is not already reflected in the arrangements of society will have to be implemented at some temporal point. At this point, social goods do not fall from the sky, but are pre-existing and usually already connected to people through institutional entitlements. To attempt to ‘insert’ new principles of distributive justice into the basic structure of society will produce several kinds of problems: First, changes to the basic structure that take effect by adjusting the rules of property-holding and the holding of other entitlements will disturb the at-least-partially-legitimate expectations of persons who already hold entitlements. Second, if the changes instead take effect by adjusting the rules that *give rise* to entitlements, then the result of the changes will not affect the distribution of entitlements which already exist; but pure procedur-

¹³⁶ So Rawls says:

In a well-ordered society individuals acquire claims to a share of the social product by doing certain things encouraged by the existing arrangements [S]o a person who has complied with the scheme and done his share has a right to be treated accordingly by others. They are bound to meet his legitimate expectations. Thus when just economic arrangements exist, the claims of individuals are properly settled by reference to the rules and precepts . . . which these practices take as relevant.

THEORY 275.

¹³⁷ See Simmons, *supra* note 21, at 20–21.

¹³⁸ As a mark of how deeply our thinking is traditionally influenced by the idea of patterned distributions, we might think that even under rules that are not fully just, we might achieve results that are ‘not too far’ from just, or perhaps sometimes even reach a reasonably just result by happenstance; but Rawls’s commitment to the idea of entitlements as deriving entirely from institutions means that we cannot properly have any such recourse. The degree to which institutions conform to the principles of justice is all that we have to go by.

¹³⁹ See THEORY §55.

al justice only seems to hold if the just procedure has been in use since the beginning of time for the entitlements it relates to, such that the existing entitlements which remain untouched will disrupt the justice of the outcome that follows. Third, since the processes by which legitimate expectations are generated take time, and since life in society requires a constant stream of activity that generates legitimate expectations, it is likely that everyone at any given time will be in the process of generating various legitimate expectations, and changing the rules mid-course will disturb the elements of expectation that have already formed.

I do not suggest that it is impossible to answer the problems raised by existing entitlements in society – that would be to suggest that improving on distributive injustice is impossible. At a preliminary level, it is conceivable that at least one kind of idea can capably deal with the problem of legitimate expectations: the idea that changes in the basic structure that occur over a long frame of time can be individually sufficient mild as to resemble the regular changes to institutional rules that form part and parcel of normal changes to laws and policies and which we do not think impermissibly impinge on legitimate expectations. However, such ideas are outside the scope of Justice as Fairness as ideal theory, since ideal theory addresses the operation of a perfectly just society as an ongoing concern.

3. Historical continuity

Some might think that the price of transitional injustice is a price that we should be willing to pay to reach a state of affairs in which an ideal theory of justice can be realized. Others might think that it is also a necessary price to pay. We do not need to enter into this question, however, because we can dispute the premise that ideal theory can be realized through the kind of quick-fire transition that is likely to violate transitional justice. Instead, it seems likely that the realization of a theory of justice which does not highly resemble our current social and political system and which does not already enjoy a wide degree of support in society must be a multi-generational affair in order for the transition to have any chance of success.

The idea of transitional justice can thus be expanded into a more diverse kind of concern for implementing a theory of justice. There is a distinction between principles of justice which are historical insofar as they relate to how entitlements are generated, and the historicity of a theory of justice as a whole. A historical principle of justice pays attention to the processes that give rise

to a certain entitlement because we recognize that the relationship justice conceives of between people and their attachments must reflect the way people actually relate to their attachments – through a temporal narrative. One important aspect of such a narrative is the sense in which a person’s attachments derive from projects that are relevantly *his*, rather than objects that are imposed upon him by external forces, such as the calculus of justice.¹⁴⁰

On the other hand, when it comes to a theory of justice as a whole, a similar relationship exists between people and their moral and political commitments. These too are conceived of in a temporal narrative, in the sense that when a particular person holds differing normative commitments at various points in his life, it matters greatly to that person how those commitments are linked and explained in a coherent temporal narrative by causes and effects, both internal and external. Although it is possible for us to take a time-slice and simply descriptive view of his commitments, this would be mere sociology and fail to explain why he believes in a certain conception of justice.¹⁴¹ This is what I mean when I say that any theory of justice must take into account the historicity of justice. Given that persons have a certain history (and a certain culture, and a certain understanding of themselves within that culture, and so on), principles of justice that fall out of the sky are unlikely to command the allegiance of those who do not believe in some variation of them already. In short, Justice as Fairness, like most theories of justice, is ahistorical – and therefore is unable to explain how it can come to fruition in a society where it is not presently accepted.

¹⁴⁰ Cf. BERNARD WILLIAMS, *A Critique of Utilitarianism*, in UTILITARIANISM: FOR AND AGAINST 77, 116–17 (Bernard Williams & J.J.C. Smart, 1973):

The point is that [the agent] is identified with his actions as flowing from projects and attitudes which in some cases he takes seriously at the deepest level, as what his life is about It is absurd to demand of such a man, when the sums come in from the utility network ... that he should just step aside from his own project and decision and acknowledge the decision which utilitarian calculation requires. It is to alienate him in a real sense from his actions and the source of his action in his own convictions. It is to make him into a channel between the input of everyone’s projects, including his own, and an output of optimistic decision; but this is to neglect the extent to which *his* actions and *his* decisions have to be seen as the actions and decisions which flow from the projects and attitudes with which he is most closely identified. It is thus, in the most literal sense, an attack on his integrity.

For ‘utility network’ and ‘utilitarian’ we could substitute any patterned principle.

¹⁴¹ Cf. THEORY 418:

Ross holds that the sense of right is a desire for a distinct (and unanalyzable) object, since a specific (and unanalyzable) property characterizes actions that are our duty But on this interpretation the sense of right lacks any apparent reason; it resembles a preference for tea rather than coffee. Although such a preference might exist, to make it regulative of the basic structure of society is utterly capricious

One of the central planks of Justice as Fairness is Rawls's presupposition that people can come to possess a 'sense of justice', which is "the capacity to understand, to apply, and to act from the public conception of justice which characterizes the fair terms of social cooperation," and "a willingness ... to act in relation to others on terms that they also can publicly endorse."¹⁴² In sketching how a sense of justice might come about in a person, Rawls emphasizes the link between justice and our moral sentiments and affections.¹⁴³ Nevertheless, this account of the sense of justice still presupposes a well-ordered society under ideal theory – it is an account of how persons who live under such a theory of justice will acquire the moral sentiments required for its stability in the long run.¹⁴⁴ A related but clearly distinct question is how, given a certain theory of justice which we are convinced represents a realistic utopia as far as justice is concerned, a sense of justice can be cultivated in all citizens over time such that the vision of justice in question might become a reality. This is a tall order even if 'we' are a large proportion of the population in a given society, because such a society will not have the qualities presupposed by Rawls's account of the sense of justice, and it is an even taller order if 'we' are a small minority – as we have every reason to believe that we are in the world today.

Here it is relevant to amplify the point made by Rawls about the importance of connecting justice with moral sentiment. Societies are not simply held together by bonds of justice and reciprocity; they are also held together by bonds of history, and bonds of community that can be explained on a historical basis. As I have attempted to explain, it is not merely the *community* that is the subject of these bonds; it is the individual persons living and growing up in it, on whose beliefs and intuitions these relations have a constitutive effect.¹⁴⁵

¹⁴² LIBERALISM 19.

¹⁴³ See THEORY §72.

¹⁴⁴ See, e.g., LIBERALISM 141 ("Stability ... is whether people who grow up under just institutions ... acquire a normally sufficient sense of justice ...").

¹⁴⁵ Cf. PAUL CONNERTON, HOW SOCIETIES REMEMBER 21 (1989):

Thus we identify a particular action by recalling at least two types of context for that action. We situate the agents' behaviour with reference to its place in their life history; and we situate that behaviour also with reference to its place in the history of the social settings to which they belong. The narrative of one life is part of an interconnecting set of narratives; it is embedded in the story of those groups from which individuals derive their identity.

Any system of justice that cannot be explained by a society's past and present is unlikely to simply be accepted by that society. The only way to achieve this acceptance appears to be through a long period of societal change that builds the premises of the two principles of justice into the bedrock of our social norms and historical narrative.¹⁴⁶

III. Rawls's Law of Peoples: from ideal to non-ideal theory

In the last section, we looked at the theory of justice Rawls advanced in *Theory and Liberalism* – what was originally considered his theory of domestic justice, and which we called Justice as Fairness. We concluded that it should in fact be a theory of global justice. In this section, I will discuss the theory that Rawls actually considered to be his theory of global justice – that set out in *Peoples*. In light of our conclusions so far, should we dismiss this theory as obsolete and imperfect? Insofar as the Law of Peoples¹⁴⁷ is intended to serve as ideal theory in the international sphere, it would appear to have failed: it falls far short of the degree of adequacy that we seek and expect in an ideal theory of justice. I demonstrate that in this section by tracing the lines of argument that lead us from Justice as Fairness to the Law of Peoples, and showing that they result in deviations from the approach to Justice as Fairness that represent deviations from features of ideal theory. However, in doing so I set the stage for the idea that the limitations that are built into the Law of Peoples – contingent constraints in our parlance – lend the Law of Peoples a plausibility and practicability that means it would serve well as non-ideal theory.

A. The Law of Peoples

Rawls embarks on the Law of Peoples with Justice as Fairness as the starting point. The theory that he attempts to set out is intended to be an extension of the approach of Justice as Fairness to the international society of peoples.¹⁴⁸ First, Justice as Fairness, in the form it takes in *Liberal-*

¹⁴⁶ For more on this point, see *infra* Part IV.C.

¹⁴⁷ The Law of Peoples is the term that I will use to describe the theory Rawls set out in *Peoples*.

¹⁴⁸ See, e.g., PEOPLES 4 (“The account of the *extension* of a general social contract idea to a Society of Peoples ... ” (emphasis added)).

ism, is worked out for a domestic society ('the *first* original position').¹⁴⁹ Such a society is a *liberal people*. Then, Rawls considers what the foreign policy of liberal peoples would be – how they would conceive of their mutual relations in the Society of Peoples ('the *second* original position').¹⁵⁰ This is the 'first *step*' of the extension, and in this second original position, the parties are not representatives of individuals, but instead representatives of liberal peoples. The principles worked out at this stage are the content of the Law of Peoples. The 'second *step*' of the extension seeks to show that the Law of Peoples thus conceived is acceptable not merely to liberal peoples, but also to peoples who are decent albeit non-liberal.¹⁵¹

Because the Law of Peoples is a logical extension of the ideal theory of justice that is Justice as Fairness, Rawls supposes that it, too, would be in the realm of ideal theory.¹⁵² The first reason to think that this no longer holds true is our conclusion so far that for Justice as Fairness to be the kind of reasonably adequate ideal theory that Rawls calls a realistic utopia, it would look very different – it would have to start with the premise that the scope of justice is the world. Having made such a shift, we no longer have reason to think that a Law of Peoples developed as an extension of the justice of liberal peoples acquires its ideality *mutatis mutandis*.

However, I suggest that we have another set of reasons to believe that the Law of Peoples cannot be regarded as ideal theory. The transformations applied to the theoretical firmament of Justice as Fairness as *Peoples* moves from domestic to international justice are, on closer scrutiny, not merely '*mutatis mutandis*' transformations; rather, they alter the substance of the theory itself. And in fact, they move the Law of Peoples further away from ideality.

B. The idea of public reason

Perhaps the most pronounced shift that occurs when Rawls sets out the Law of Peoples is the change in the category and scope of reasoning about justice. In *Liberalism*, Rawls had recognized

¹⁴⁹ PEOPLES 30–31.

¹⁵⁰ PEOPLES 32–33.

¹⁵¹ PEOPLES 62–63.

¹⁵² See, e.g., PEOPLES 4–5 ("The first part of ideal theory in Part I concerns the extension of the general social contract idea to the society of liberal democratic peoples. The second part of ideal theory in Part II concerns the extension of the same idea to the society of decent peoples ...").

that reasonable persons are likely to affirm a variety of reasonable comprehensive doctrines – views that cover the “major religious, philosophical, and moral aspects of human life in a more or less consistent and coherent manner.”¹⁵³ Owing to the inability of even conscientious reasonable persons to agree on a single comprehensive doctrine,¹⁵⁴ each of us must accept that there are a multitude of reasonable comprehensive doctrines, most of which we cannot seriously entertain ourselves.¹⁵⁵ This is the fact, and problem, of *reasonable pluralism*: how can people holding multiple comprehensive doctrines endorse a single, coherent conception of justice?

In view of this, they need to consider what kinds of reasons they may reasonably give one another when fundamental political questions are at stake. I propose that in public reason comprehensive doctrines of truth or right be replaced by an idea of the politically reasonable addressed to citizens as citizens.¹⁵⁶

Citizens are reasonable when, viewing one another as free and equal in a system of social cooperation ... they are prepared to offer one another fair terms of cooperation according to what they consider the most reasonable conception of political justice ... [T]hose proposing them must also think it at least reasonable for others to accept them, as free and equal citizens¹⁵⁷

In moving from domestic to international justice, the content of public reason shifts to reflect the change in the context. Rawls argues that there are a number of changes to be accounted for; amongst them, a liberal people espouses no comprehensive doctrine of the good.¹⁵⁸ This follows from reasonable pluralism, since each individual in a liberal society may have a differing conception of the good. Between peoples, the diversity of comprehensive doctrines will therefore be even greater than within a single people.¹⁵⁹ According to Rawls, this will result in a radical narrowing of what is permissible as public reason in the Society of Peoples: “a classical, or average, utilitarian principle would not be accepted by peoples, since no people organized by its government is prepared to count, *as a first principle*, the benefits for another people as outweighing the hardships

¹⁵³ LIBERALISM 59.

¹⁵⁴ LIBERALISM 58. These are the ‘burdens of judgment’.

¹⁵⁵ LIBERALISM 59.

¹⁵⁶ JOHN RAWLS, *The Idea of Public Reason Revisited*, in PEOPLES 129, 132 [hereinafter *Idea*].

¹⁵⁷ *Idea*, *supra* note 156, at 136–37.

¹⁵⁸ PEOPLES 40.

¹⁵⁹ PEOPLES 40.

imposed on itself. Well-ordered peoples insist on an *equality* among themselves as peoples, and this insistence rules out any form of the principle of utility.”¹⁶⁰

Rawls concludes from this that the content of public reason can only include the list of principles that he regards as the “familiar and traditional principles of justice among free and democratic peoples.”¹⁶¹ Accordingly, he confines the discussion of the Law of Peoples in *Peoples* to his list of eight principles. In summary, they are:

1. Peoples are free and independent, and this is 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 non-intervention.
5. Peoples have the right of self-defense but no right to instigate war.
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 regime.

This differs from the approach in *Liberalism*, which follows *Theory* in providing the parties in the original position with “a menu of alternative principles and ideals from which to select. Rather, the representatives of well-ordered peoples simply reflect on the advantages of these principles of equality among peoples and see no reason to depart from them or to propose alternatives.”¹⁶² Since the Law of Peoples refers only to the ‘eight principles’, the content of public reason contains only a singular political conception of justice.¹⁶³ The only thing in contention is the *interpretations* of the ‘eight principles’, some of which are indeterminate in their content.¹⁶⁴

¹⁶⁰ PEOPLES 40.

¹⁶¹ PEOPLES 37. The eight principles are then listed.

¹⁶² PEOPLES 41.

¹⁶³ See, e.g., PEOPLES 57 (“Our task in developing the public reason of the Society of Peoples was to specify its content... And this we did... when I considered the merits of the eight principles of the Law of Peoples listed in §4...”).

¹⁶⁴ PEOPLES 41–42.

1. Reasonable pluralism and toleration

Given the above, it might be plausible to claim that while public reason in domestic and international society “do not have the same content, the role of public reason among free and equal peoples is *analogous* to its role in a constitutional democratic regime among free and equal citizens.”¹⁶⁵ So we could restate the passage explaining the nature of public reason above, with the appropriate substitutions:

Peoples are reasonable when, viewing one another as free and equal in a system of social cooperation, they are prepared to offer one another fair terms of cooperation according to what they consider the most reasonable conception of political justice. Those proposing them must also think it at least reasonable for others to accept them, as free and equal *peoples*.

This line of reasoning leads us to the idea of *toleration* that Rawls proposes in *Peoples*. Toleration is the explanation for why liberal societies should accept decent societies as *bona fide* members of the Society of Peoples, despite the latter not being committed to political liberalism in their internal affairs. Once again, Rawls considers this idea of toleration to be analogous to the ‘toleration’ of variations in principles of justice between liberal peoples.¹⁶⁶ An elaboration of the reasoning might run like this: individuals may regulate their own affairs using principles that would be objectionable if applied to justice, such as utilitarianism or hedonism, but under Justice as Fairness we do not preclude the participation of such persons, so long as they accept the principles of justice as they apply to the basic structure of society; similarly, in the Society of Peoples, peoples may regulate their own affairs unacceptably, but they can still accept the Law of Peoples internationally. Such an argument, however, seems to run into trouble at the critical juncture. We generally consider it justified to think that *individuals*, and not their constituent interests, are the relevant moral unit for the purposes of justice. If a person decides to sacrifice his craving for ice cream now in order to lose weight, his taste buds do not have a complaint in terms of justice against his adipose cells. But to say that a *people* can have a moral character,¹⁶⁷ and therefore can

¹⁶⁵ PEOPLES 55 (emphasis added).

¹⁶⁶ Cf. PEOPLES 84 (“Liberal societies may differ widely in many ways... Yet these differences are tolerated in the society of liberal peoples. Might not the institutions of some kinds of hierarchical societies also be *similarly tolerable*?” (emphasis added)).

¹⁶⁷ PEOPLES 25.

be constituted as a corporate moral agent,¹⁶⁸ does not seem to conclusively occlude the underlying individuals and thereby make them irrelevant to justice. In other words, by bringing decent peoples into the Society of Peoples, Rawls attempts to rehabilitate them as societies which can be regarded as just in at least one respect – at the international level. But what we know about ideal theory and global justice does not accept the salience of this claim to justice – so long as justice has not been achieved for each person, justice cannot be fully achieved.

We can press this idea by examining the justifications Rawls provides for the idea of toleration. Amongst liberal peoples, since they must by definition be reasonable, differences in their basic structure can only arise within the scope of reasonable pluralism – these must be differences the assessment of which is clouded by the burdens of judgment. This seems to be an accurately analogous use of the fact of reasonable pluralism.¹⁶⁹ Conversely, when it comes to the toleration of *decent* peoples, Rawls instead argues that intolerance is *normatively* bad: that while we know decent societies are to some extent unjust,¹⁷⁰ we consider the imposition of political liberalism on decent peoples as unjustifiably denying their self-respect,¹⁷¹ when, what is more, decent peoples do have institutional features worthy of respect.¹⁷² Rawls also notes that we do not know, until we have completed our formulation of the Law of Peoples, whether a just Law of Peoples will find decent peoples acceptable or not, and that we should therefore withhold judgment.¹⁷³ Note that by hedging what counts as valid principles of international justice upon normative reasons for their not being overly intrusive, this approach is clearly different from Justice as Fairness, in which “persons accept in advance a principle of equal liberty, and ... implicitly agree ... to conform their conceptions of their good to what the principles of justice require”¹⁷⁴ It is these novel normative justifications which support the toleration of decent peoples, marking a departure from the concept of toleration as it is said to apply in political liberalism.

¹⁶⁸ See David A. Reidy, *Rawls on International Justice – A Defense*, 32 POL. THEORY 291, 294 *et seq* (2004).

¹⁶⁹ See note 166, where Rawls makes this observation.

¹⁷⁰ PEOPLES 83.

¹⁷¹ PEOPLES 61.

¹⁷² PEOPLES 83–84.

¹⁷³ See PEOPLES 60, 82–83.

¹⁷⁴ THEORY 27.

Here, we may make two observations about the ideality of the Law of Peoples: First, even if we assume that the fact of reasonable pluralism is a feature of ideal theory in Justice as Fairness, we have not been given reason to believe that the Law of Peoples is by simple extension also ideal; by pressing on the justifications given, we have seen that they are unsound. Second, not only is such reason lacking, but those actual justifications provided by Rawls for the idea of toleration in *Peoples* appear to expand the scope of reasonable pluralism to pluralism about *unreasonable* comprehensive doctrines,¹⁷⁵ and furthermore to pluralism about unreasonable political conceptions of justice. Such unreasonable pluralism is one kind of contingent feature that we are precisely hoping to eliminate when we attain ideality. We are at best in the realm of non-ideal theory.

2. The content of public reason

Besides the concept of reasonable pluralism that underlies the original idea of public reason, there is a further dimension of its extension in *Peoples* that we should question: the claim that only the eight principles are within the content of public reason, and in particular not the principle of utility. But the account of how peoples will reject utilitarianism from the outset in the second original position, which we saw Rawls make above, is suspect. It does not follow from the fact that utilitarianism will be rejected by any liberal people *as a first principle*, that they will therefore reject *any* form of the principle of utility. Within our individual political conceptions, we can be pluralists about justice: we can both adopt justice as fairness, and think that so long as the demands of justice as fairness are met,¹⁷⁶ we should adopt a utilitarian approach that maximizes our other ends. One way this is corroborated is by Rawls's claim that public reason ought to contain political conceptions that are 'complete' – such that they can by themselves give a reasonable answer to all or nearly all questions within the domain of public reason.¹⁷⁷

A further reason to think that the eight principles do not exhaust the content of public reason is their specificity. The basic structure was chosen as the subject of justice because its effects are

¹⁷⁵ Note that unlike with liberal peoples, it may be accurate to describe decent peoples as holding a comprehensive doctrine. See PEOPLES 71, 74–75. Rawls calls them, cryptically, “*not fully unreasonable*.” *Id.*

¹⁷⁶ And they are designed to be demands capable of being exhausted – most notably by the fact that they apply only to the basic structure of society, not to all human conduct. See also THEORY §43 (the idea of the ‘exchange branch’).

¹⁷⁷ *Idea*, *supra* note 156, at 144–45.

“pervasive” and “affect men’s initial chances in life.”¹⁷⁸ Rawls’s two principles of domestic justice are of such a nature that when applied to the basic structure, *their* effects, too, are likely to be pervasive and influential. At the very least, as far as distributive shares are concerned, it seems to be the case that the two principles, with the difference principle as the backstop, exhaust the question of *justice* (there being possibly other questions outstanding within the domain of public reason). We do not have reason to be as confident when it comes to the eight principles. At the very least, we should be concerned that none of the eight principles contains a principle dealing with distributive shares, when we have seen that questions of distributive justice are central to international justice. For the eight principles to govern the justice of the Society of Peoples is akin to having a principle of formal equality of liberties alone deciding the justice of domestic society – it is unlikely to be fully just.¹⁷⁹ If I am right, then it is premature to conclude that the ‘eight principles’ are exhaustive of public reason in the Society of Peoples.

Implicit in Rawls’s account of the idea of public reason for the Society of Peoples recounted above is one potential answer to this objection: public reason for the Society of Peoples is not connected to the political conceptions of persons; instead, it is invoked by and addressed to (representatives of) peoples. But this simply amounts to an assertion of the trite point that the Society of Peoples is different in context from domestic justice. Whether it is an effective retort depends on whether it is true that the Law of Peoples must have the scope that Rawls attributes to it, and therefore follow the ‘eight principles’ – which is what we have been challenging in the first place.

C. The basic structure

The conception of justice that emerges from *Peoples* – as exemplified by the eight principles making up the Law of Peoples – validates and entrenches the key aspects of how actual states conduct themselves in the real world today. This seems disappointing, even from a perspective within the Rawlsian framework. Instinctively, this disappointment might stem from the concern that Rawls’s account of the Law of Peoples is less imaginative in its content, and therefore less

¹⁷⁸ THEORY 7.

¹⁷⁹ For the consequences of such a principle of formal equality of liberties, see, e.g., Norman Daniels, *Equal Liberty and Unequal Worth of Liberty*, in *READING RAWLS*, *supra* note 47, at 253.

likely to disrupt the conventional understandings of the international order today, than the approach taken under Justice as Fairness was likely to do for domestic justice. But while it is true that developing a fully adequate ideal theory takes imagination, that is not all there is to ideal theory. Instead, I think that the sense of disappointment is more edifyingly explained by looking at how the content of public reason is allowed to affect the content of the basic structure through the original position. We can, without much recourse to imagination, see that the concepts of the basic structure and the original position are not fully instantiated in *Peoples*: on the one hand, the concept of the basic structure is doing double duty in the Law of Peoples; on the other, the conception of the original position in the Law of Peoples unjustifiably fixes critical questions of justice by taking the status quo of the present international order as a fixed feature of the basic structure.

1. The foreign policy of a liberal people

In *Peoples*, Rawls says that to deliberate about the right subject in international justice is to deliberate about “the basic structure of the relations between peoples.”¹⁸⁰ However, no definition of the basic structure of the Society of Peoples is to be found.¹⁸¹ Instead, if we look to the earlier ‘The Law of Peoples’, the predecessor to *Peoples* in article form, we find a minimalistic definition in an introductory footnote: “the law and practices of the society of political peoples.”¹⁸² We can elaborate the concept of the international basic structure by drawing upon its definition in domestic society, which we looked at earlier. The basic structure of the Society of Peoples can be understood to refer to the way in which, at the international level, “fundamental rights and duties” and the “advantages from social cooperation” are distributed.¹⁸³ To give a sense of what this entails, we can try to sketch the key elements of the basic structure in the present international order. They certainly include the rules of international law and the institutions of the UN, the World Trade Organization, the World Bank, and the International Monetary Fund. They also

¹⁸⁰ PEOPLES 33.

¹⁸¹ In *Peoples*, the basic structure of the Society of Peoples is usually mentioned in passing – or not at all, such as where Rawls states that fair background conditions are essential in preventing unjustified inequalities from developing between peoples through international cooperation, and says that such background conditions “have a role *analogous to* that of the basic structure in domestic society.” PEOPLES 42 n.52.

¹⁸² John Rawls, *The Law of Peoples*, 20 CRITICAL INQUIRY 36, 36 n.2 (1993).

¹⁸³ Cf. THEORY 6.

include international conferences that are convened from time to time where states draft multilateral treaties. These conferences are significant because the treaties they produce set out fundamental principles of international law, such as the way international law is made (e.g. the Vienna Convention on the Law of Treaties¹⁸⁴), and obligations of states (e.g. a duty to reduce carbon emissions).¹⁸⁵

However, in *Peoples* Rawls then makes an additional adaptation: he clarifies that the concern of the Law of Peoples is to work out the “ideals and principles of the *foreign policy* of a reasonably just *liberal* people.”¹⁸⁶ This adaptation has an unclear valence. If the Law of Peoples is fundamentally really about the foreign policy of a people that accepts political liberalism domestically, the concept of the basic structure must do double duty – it is at once the basic structure of the Society of Peoples, and the basic structure of a state *qua* its foreign policy, attempting to foresee or influence the basic structure of the Society of Peoples. Under the former understanding, the basic structure refers to the kinds of international institutions that we have just discussed; with the latter understanding, it refers to those *domestic* laws and practices of a society that relate to its international conduct. These are very clearly distinct aspects of the international sphere – the latter corresponds closely to individual maxims of action under Justice as Fairness, to which the principles of justice certainly do not directly apply.¹⁸⁷

Two additional considerations suggest that the adaptation of ‘the foreign policy of a liberal people’ is ill-conceived and unsustainable. First, it is significant that what Rawls purports to seek

¹⁸⁴ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

¹⁸⁵ One might argue that this understanding does not correspond to the definition of the basic structure for domestic justice: it might be questioned whether any of these elements constitute ‘major social institutions’, whether they concern ‘*fundamental* rights and duties’, whether the ‘advantages from social cooperation’ in international law are significant, and whether they ‘fit together into one unified system of cooperation’. Some who echo these concerns conclude that the present international system has no basic structure. As I have argued in Part II.A.3, *supra*, I do not take this position. First, the function of the concept of the basic structure is to identify those elements of a political community that are relevant for the purposes of justice, and exclude those elements that are not relevant in this way. Second, the fact that a community in question is (at present) minimal in its impact does not prevent the application of Rawls’s approach, and does not prevent the conclusion that certain demanding principles of justice ought to apply to that community and that its basic structure should consequently be a thick one.

¹⁸⁶ PEOPLES 10.

¹⁸⁷ See THEORY 93 (“[S]o far I have considered the principles which apply to ... the basic structure of society. It is clear, however, that principles of another kind must also be chosen, since a complete theory of right includes principles for individuals as well.”).

is the foreign policy of *a* liberal people. When we draw a distinction between the question ‘what principles of justice apply to one actor in society’, and the question ‘what principles apply to all the (reasonable) actors in that society’, the purpose and outcome of the original position is surely not identical between the two. For example, if the original position is directed towards discovering the principles governing a single actor in a society, then depending on the strength of commitment of that actor towards the ideals he endorses, he may be willing to endorse principles that direct him to do more than his reciprocally fair share in fulfilling those ideals.¹⁸⁸ This seems particularly relevant in light of the lack of redistributive principles of justice in Rawls’s Law of Peoples. The apparent symmetry between liberal and decent peoples’ commitments to international justice is unfounded if, as I suggest, the demands of justice mean that liberal peoples acquit their liberal values only if they are willing to unilaterally commit to a far stronger duty of assistance.¹⁸⁹

Second, even if we correct our focus to ‘the foreign policy of *each* liberal people’, thereby reintroducing the idea of reciprocity, the problem is not entirely resolved.¹⁹⁰ In the first place, it is worth noting why such a correction has any relevance at all. In the context of domestic justice, we noted that the question ‘what principles of justice apply to one actor in society’ is simply the wrong question to ask, since principles of justice apply only to the basic structure. However, to the extent that the basic structure is composed of institutions, and an institution is instantiated just when the actions it specifies are carried out as a matter of social practice under a public understanding of its rules,¹⁹¹ correcting the question to ‘what principles apply to all the (reasonable) actors in that society’ can have the effect in practice of returning the question of justice to the basic structure. Of course, this would still get things the wrong way round: what Justice as Fairness requires is not that persons act autonomously to realize the principles of justice in their

¹⁸⁸ Cf. the idea of civil disobedience in THEORY §55 (an example of the justified willingness of actors to act in extraordinary ways when they feel sufficiently compelled, when such strategies are clearly not sustainable if they are frequently resorted to).

¹⁸⁹ To take a present-day example, if Norway asks itself what its foreign policy ought to be as a liberal people, it might conclude that even if other peoples considered it just to give limited foreign aid to burdened societies, it will still adopt as its foreign policy an extensive aid program.

¹⁹⁰ Nevertheless, this correction seems necessary in order to reflect Rawls’s discussion of the second original position, in which he imagines the representatives as representatives of *different* liberal peoples. See PEOPLES 32 n.35. The conclusions of the original position are then necessarily identical for all liberal peoples.

¹⁹¹ See THEORY 48.

conduct, but only that persons follow and accept the rules set by institutions *qua* rules, which rules conform to the basic structure as a prior matter.¹⁹²

In order to partially rescue the idea of foreign policy as the subject of justice, we can raise one of the many salient differences between the domestic and international orders *as we know it*. This requires us to abandon ideal theory, and embrace this contingent difference as a starting point for the Law of Peoples. Unlike in the domestic order, where the distinction that has just been drawn almost always holds, in the international legal order a large proportion of legal institutions are in the first place directly constituted by the practice of international actors, without the intervention of a legislature. Such rules are known as *customary international law* – laws whose existence is determined by the combination of a widespread practice of states and widespread *opinio juris* (the subjective opinion of states that the practice in question is required by international law).¹⁹³ Where norms of customary international law are concerned, the law is in fact generated by peoples’ recognition of the practice in question as a necessary part of each of their foreign policies.¹⁹⁴ Nevertheless, the correction that we have granted Rawls does not entirely save the idea of foreign policy as subject of justice, even under this non-ideal approach: elements of the basic structure other than customary international law are still missing from the foreign policy of liberal peoples.

2. Fixed points in the original position

As we saw earlier,¹⁹⁵ it counts against the ideality of a theory of justice for it to recognize contingent constraints. In particular, for a theory to represent a realistic utopia, the kind of ideal theory that we seek, we ought to consider the features of the world that are assumed to be fixed at the starting point of the theory, and if on reflection those features are not required by its justifications, but in fact produce results which are questionable on the basis of those justifications, then we ought to seek to improve the theory by considering how we might remove those contingent

¹⁹² See, e.g., THEORY 274 (a sense of justice defined as “an effective desire to comply with the existing rules”), 275 (“In a well-ordered society individuals acquire claims to a share of the social product by doing certain things encouraged by the existing arrangements.”).

¹⁹³ See, e.g., North Sea Continental Shelf Case (F.R. Germany v. Netherlands, F.R. Germany v. Denmark), 1969 I.C.J. 3, 44 (Feb. 20).

¹⁹⁴ Customary international law will be further discussed in Part IV.B.2.

¹⁹⁵ See *supra* Part I.A.2.a.

constraints. In Rawls's theory, constraints are especially significant to the extent that they set the stage for the original position – wherein they represent fixed points in the original position. In the earlier discussion, we looked at what Rawls calls the general facts about society, such as the laws of psychology and of economics, as potentially questionable fixed points in the original position. But perhaps the most central fixed point of the original position is its conception of persons as free and equal, a conception which seems relatively uncontroversial in Justice as Fairness. However, I suggest that this idea, when transplanted into the Law of Peoples, becomes an example of the kind of fixed points of the international original position that represent a departure from ideal theory into the realm of non-ideal theory, because they incorrectly regard contingent constraints as fixed constraints.

The argument can be briefly presented as follows. In Justice as Fairness, parties in the original position are representatives of persons, who are considered free and equal. Since Rawls's approach to justice is built upon the idea of justification to individuals, and premised upon their equality as individuals, it seems difficult to deny without denying the value of equality in the first place.¹⁹⁶ In the Law of Peoples, the second original position takes parties in the original position as representatives of *peoples*, who are, *mutatis mutandis*, considered free and equal – an assumption that leads directly and ineluctably to many of the eight principles taken to be the content of the Law of Peoples. Although the idea of equality certainly has a superficial appeal here, it is by no means as fundamental as the idea of equality embodied by the first original position. What it presupposes is the existence of a people, which Rawls assumes to be coextensive with a state, and the freedom and equality of that people with regards to other peoples. To be sure, this may represent the best interpretation of the international order as we know it today, but there is no warrant for thinking it to be the best possible international order for all time. Under our understanding of ideal theory, if we can develop a different conception of global justice that we can plausibly strive towards with the help of non-ideal theory, then we are committed to abandoning the system of states in the long run, even if as a matter of non-ideal theory it is the best system we can have today and tomorrow.

¹⁹⁶ See, e.g., Dworkin, *supra* note 47, at 533: "Rawls's most basic assumption ... cannot be denied in the name of any more radical concept of equality, because none exists."

To make good on this argument, let us also consider what it means for a people to be *free*. The starting point, as always, is the description of *persons* as free. Rawls's explanation generally covers three features:

1. Free persons do not regard themselves as tied to any particular end, whether in relation to their conception of the good, or their conception of justice, but rather regard their moral capacity for having and reconsidering these conceptions as fundamental.
2. Free persons are self-authenticating sources of claims, the validity of which does not depend on external duties and obligations.
3. Free persons are responsible for their ends, which includes the ability to revise their wants and desires where the circumstances warrant doing so.¹⁹⁷

It is clear that “free and equal persons are not *defined as* those whose social relations answer to the very principles that would be agreed to in the original position,”¹⁹⁸ since those principles are adopted on the basis and presupposition of their freedom. “*But* once the parties are described in terms that have an institutional expression, then, given the role of the basic structure, it is no accident that the first principles of justice apply directly to the basic structure. The freedom and equality of moral persons requires some public form, and the content of the two principles fulfills this expectation.”¹⁹⁹ In this rather difficult passage, I understand Rawls as pointing out that if persons are to be free in the moral sense as described, their freedom must be cultivated and sustained. Nothing is more important for this cultivation than the background conditions of society in which persons grow up and live – the basic structure. If the basic structure does not contain basic liberties and opportunities, and regulate social and economic inequalities, the persons living in them, we suspect, will not be the same persons that we would like to think of ourselves as being today – they will lack the basic features of freedom described above.²⁰⁰ Herein lies the ‘*but*’: because “free and equal persons” are *defined by* such “social relations.”

¹⁹⁷ See, e.g., LIBERALISM 30–34.

¹⁹⁸ LIBERALISM 280–81 (emphasis added).

¹⁹⁹ LIBERALISM 281 (emphasis added).

²⁰⁰ Cf. CHARLES TAYLOR, *The Nature and Scope of Distributive Justice*, in PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 2 289 (1985).

Even more so than individuals, peoples in *Peoples* are “described in terms that have an institutional expression.” In any international order which is composed first and foremost of societal units rather than individuals, many of the rules that make up its basic structure must concern the composition or definition of the relevant societal unit. One aspect of this institutional dimension in the Law of Peoples is that it is the content of the basic structure that constitutes the very concept of a ‘people’. Although Rawls is at pains to explain that the Law of Peoples is derived by peoples and not states,²⁰¹ it is clear from the exposition that peoples refer to essentially the same societies that constitute states.²⁰² Unless we are to go to great lengths to draw a new distinction – and there is no reason to think that we can succeed in redefining ‘people’ for Rawls’s purposes – a people is therefore defined indirectly but precisely by the rules of international law that concern statehood, and when states split or merge we can only assume that the underlying peoples split or merge with them.²⁰³

This is particularly relevant when it comes to the concept of self-determination in international law, in which ‘peoples’ is used as a term of art.²⁰⁴ One of the central problems that arises is this: in the Society of Peoples, self-determination is largely a *fait accompli* – this is a prerequisite for reaching the original position, for otherwise we would not know what entities the parties represent. At this point, it remains possible that some non-decent peoples have repressed the right to self-determination of other peoples, and therefore the right to self-determination is not a dead letter. But if the right to self-determination is to have any coherence, it must be able to account for the existence of the peoples that are presupposed under the original position. If so, the important

²⁰¹ See PEOPLES 25; *see generally* PEOPLES §2.

²⁰² *See, e.g.*, PEOPLES 26 (where Rawls talks of “a government as the political organization of its people” and its “war powers”).

²⁰³ This is necessarily true because the rules of international law must conform to the eight principles. Since ‘peoples’ in international law are known as states, and international law protects the freedom and equality of states, the principles of the Law of Peoples that deal with the freedom and equality of peoples, implemented through the basic structure, must protect the freedom and equality of states.

²⁰⁴ The paradigmatic example is art. 1(1) of the International Covenant on Civil and Political Rights: “All peoples have the right of self-determination” Mar. 23, 1976, 999 U.N.T.S. 171. The point, though, does not turn on the fact that ‘peoples’ is a term of art in international law; what is important is that the idea of ‘peoples’ as Rawls uses it presupposes some definition of what a people is – and in international law it simply happens that this definition also refers to them as ‘peoples’.

and contentious principle of self-determination is a fixed point in the basic structure of the Society of Peoples merely by virtue of the Law of Peoples approach to justice setting up shop.²⁰⁵

This is not to deny what we have discussed at length earlier, which is that the basic structure of domestic society plays a fundamental role in defining the persons that grow up and live under it. But it seems clear that even so the contingency of individuals is much less than that of peoples – most obviously, the delineation of individuals in physical terms is a fixed constraint of justice we can be confident about, and there are strong moral reasons for assuming their individuality that are fundamental to our views about justice.

Taken together, the use and misuse of the concepts of the basic structure and the original position in *Peoples* means that instead of seriously considering all comers and finally adopting ideal principles of justice as the most compelling political conception of justice to aspire towards and live by, the Law of Peoples simply constructs itself around the long-standing international order that currently exists, with the stated goal of seeing in the first instance if it can be endorsed. This approach sets it clearly at odds against ideal theory, and against the kind of ideal theory that a realistic utopia seeks. The only way to rescue the Law of Peoples, I suggest, is by reconceiving it as non-ideal theory.

IV. Constructing a realistic utopia – the two-theory approach

The idea of a realistic utopia that I have sought to present can be conceived of as a two-theory approach to justice – a non-ideal theory, which provides us with guidance on the best ways to meet the demands of justice in a world that is less than just, and an ideal theory, which we hold in our minds as the ultimate aspiration of non-ideal theory in the very long run. If the non-ideal

²⁰⁵ One objection is that while the principle of self-determination may be fixed, its application to the cases where self-determination is denied by a colonial or other oppressive power involves specific principles that only arise under non-ideal theory, and therefore do not have to be part of the Law of Peoples.

This objection seems to run into many obstacles: it seems inevitable that these specific principles, if they exist, will form part of the basic structure of the Society of Peoples, in which case they are properly the subject of the original position; an essential part of these specific principles involves the question, ‘what is a people?’, for this determines whether they can access the right to self-determination in the first place; and surely the source of these special principles includes the way liberal peoples have behaved – or were created – in the past (we cannot assume that liberal peoples just appeared fully formed in the world).

theory that we have constructed is successful, in this very long run we ought to arrive in a historical context where the ideal assumptions of ideal theory correspond to a large degree to reality. This, I have suggested, is the only way to arrive at a sustainable implementation of ideal theory while avoiding transitional injustice, if we believe in ideal theory at all.

In this section, I can only skim the surface of what the kind of two-theory approach that I have been advocating might look like. I will provide a brief sketch of how, starting with a Rawlsian frame of mind, we can lay out the ideal and non-ideal theories that provide us with an account of a realistic utopia, starting first with an ideal theory based on Justice as Fairness, and then with a non-ideal theory, based on the Law of Peoples, that can plausibly lead us there. Much of this sketch builds upon and explores the conclusions about these two Rawlsian theories that we reached above. I am also concerned with two kinds of objections to this approach: one that questions the normative attractiveness of the ideal theory presented thereby, and another that questions the normative permissibility of arriving at ideal theory in this way. In addressing these concerns I hope to show that ideal theory is not only attainable *only* through a two-theory approach, but also something worth striving for in the first place.

A. Ideal theory

Among the many dimensions of an ideal theory of justice, the one which I have been most concerned with in the course of this paper is its scope. In Section II.A above, I concluded that an ideal theory of justice has to be global in scope. More specifically, for a theory like Justice as Fairness to be ideal, it must be global in scope from the very beginning – there is only one original position that matters, and it must be a global original position with parties as representatives of individuals across the world.²⁰⁶ In other respects, therefore, our theorizing about ideal theory need not differ too radically from what we are already familiar with in Justice as Fairness. The primary change that we must make relates to the scope of the original position, without requiring other modifications to its conception, and to the scope of the basic structure, which is no longer the basic structure of a domestic society, but of the global society. Ultimately, from the perspective of ideal theory, these changes are no more than what is required to justify what had previously

²⁰⁶ See *supra* Part II.A.4.

been an uncritical contingent constraint: “I assume that the basic structure is that of a closed society: that is, we are to regard it as self-contained and as having no relations with other societies. Its members enter it only by birth and leave it only by death.”²⁰⁷ With our modifications, the new conception of the basic structure becomes a perfectly serviceable basis for conceiving a realistic utopia.

At a minimum, the implications of this approach will require us to exceed Rawls’s conclusions on the Law of Peoples, and look both to a principle of distributive justice that applies across the world, and a thick conception of human rights. This would be necessary for such a theory to fulfill Rawls’s own understanding of the three necessary principles of all reasonable liberal conceptions of justice:

1. Enumerates basic rights and liberties of the kind familiar from a constitutional regime
2. Assigns these rights, liberties, and opportunities a special priority, especially with respect to the claims of the general good
3. Assures for all citizens the requisite primary goods to enable them to make intelligent and effective use of their freedoms²⁰⁸

Indeed, it seems plausible that parties in the global original position will accept the same principles of justice that apply under Justice as Fairness. Without undertaking in full the task of proposing and defending an actual global theory of justice along these lines, I will point towards its implications by discussing two specific questions around which there is already a rich debate. The first is the kind of distributive justice that is demanded by a global theory of justice. A strong case can be made for a global difference principle. The second kind of question is about the shape of the world under such a global theory of justice. I suggest that states are unlikely to exist in the form that we know them now, and that this will not produce the kind of uncertainty or instability that some critics fear.

²⁰⁷ PEOPLES 12.

²⁰⁸ PEOPLES 14.

1. Distributive justice across the world

As we saw above, Charles Beitz argued that the distribution of untapped natural resources around the globe gives rise to a ground of justice regardless of whether there is any social cooperation between states.²⁰⁹ According to Beitz, the natural endowments of resources in various parts of the Earth's surface are morally arbitrary in the same way that Rawls considers the natural endowments of talents to be "arbitrary from a moral point of view."²¹⁰ The fact that a people exists in and controls a territory within which there are abundant natural resources therefore does not give them an entitlement to all those resources. On the contrary, every person ought *prima facie* to have an equal share in the untapped natural resources of the Earth, subject to the difference principle that inequalities in such entitlements can be justified if they are to the benefit of the worst-off.²¹¹

One objection to this redistribution of natural resources is that it puts the cart before the horse: peoples and individuals claim ownership over natural resources just as they claim ownership over other kinds of property, and how a just basic structure deals with such property rights is a consequence, not a premise, of applying the difference principle.²¹² Moreover, just as under the difference principle in Justice as Fairness, individuals' talents are not literally commandeered by society, but only tapped upon (through taxation, for example) to the extent that they are actually developed and exercised, it might be argued that natural resources, likewise, are subject to the difference principle only after they are extracted.²¹³

This line of objection is right insofar as in the case where we have a difference principle which applies to the global basic structure, it would seem to swallow Beitz's resource redistribution principle within its scope. After all, the difference principle speaks to the distribution of all primary social goods, which includes natural resources, and the system of rights over natural resources forms part of the global basic structure subject to the difference principle. In this way, however, Beitz's resource redistribution principle is fulfilled as part of a larger consideration of

²⁰⁹ BEITZ, *supra* note 51, at 136–37 et seq.

²¹⁰ BEITZ, *supra* note 51, at 138; THEORY 63.

²¹¹ BEITZ, *supra* note 51, at 141–42.

²¹² POGGE, *supra* note 113, at 252.

²¹³ *Id.* 251.

distributive justice. Beitz's principle might therefore be seen as a difference principle *lite* which would be considered if the difference principle in general did not form part of the global theory of justice; it also focuses our attention on how a general difference principle might regard the distribution of natural resources. Given this, the portion of the objection that rests upon the fact that Justice as Fairness does not apply to people's natural talents unless they are developed and exercised is misplaced for precisely the reasons that Beitz gives – since natural resources are not inherently attached to persons, they are no different from any other form of property, to which the difference principle applies whatever form that property takes.

Taking into account what we can learn from this line of objection, we can regard Beitz's resource redistribution principle as a special case of the difference principle that applies even where there is no social cooperation across the world and no other grounds of justice exist. In a world where social cooperation does exist, the same arguments that Beitz and Rawls share about morally arbitrary differences will in fact give rise to a global difference principle, applying to the distribution of all social goods.²¹⁴ On this broader point, we have an unlikely ally in Friedrich Hayek:

There is clearly no merit in being born into a particular community, and no argument of justice can be based on the accident of a particular individual's being born in one place rather than another. A relatively wealthy community in fact regularly confers advantages on its poorest members unknown to those born in poor communities.²¹⁵

Having clarified the nature of Beitz's resource redistribution principle and its relationship with the global difference principle, we are now in a position to consider Rawls's objections against them in *Peoples*. First, in response to the resource redistribution principle, he says that the crucial determinant of the material circumstances of a country is its political and civic culture, not its natural distribution of resources; second, in response to the global difference principle, he argues that that a redistributive principle that applies 'without end' has questionable appeal.²¹⁶

²¹⁴ BEITZ, *supra* note 51, at 153–63.

²¹⁵ FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 100 (1960).

²¹⁶ PEOPLES 117.

The first argument refers to Rawls's earlier discussion of the duty of assistance to burdened societies.²¹⁷ Burdened societies "lack the political and cultural traditions, the human capital and know-know, and ... the material and technological resources needed to be well-ordered."²¹⁸ Rawls argues that well-ordered peoples have a duty to assist burdened societies in order that they gain the conditions necessary to become well-ordered, but he does not think that the burdened societies that we find today are burdened because of their lack of material resources.²¹⁹ Instead, Rawls claims that the key ingredient that is likely to be lacking in these burdened societies is having the right kind of political culture:

[T]he causes of the wealth of a people and the forms it takes lie in their political culture and in the religious, philosophical, and moral traditions that support the basic structure of their political and social institutions, as well as in the industriousness and cooperative talents of its members, all supported by their political virtues. ... What must be realized is that merely dispensing funds will not suffice to rectify basic political and social injustices (though money is often essential). But an emphasis on human rights may work to change ineffective regimes and the conduct of the rulers who have been callous about the well-being of their own people.²²⁰

We should note that to accept this discussion is only to accept that political culture is more important than resources in achieving well-orderedness; it is not to accept that resources are irrelevant to either political culture or well-orderedness, or that an improvement in material resources can have no effect on the likelihood that a society will accept more liberal principles of justice.

The more important point, however, is that the demands of justice are not exhausted by the existence of conditions necessary to sustain a well-ordered society. First, we must ask what 'well-ordered society' refers to. In *Peoples*, 'well-ordered societies' is the term Rawls uses to refer to lib-

²¹⁷ It is also worth noting that in turn the duty of assistance is partly based on the just savings principle from *Theory*. PEOPLES 106. A duty of global redistribution and the just savings principle are similar in that the just savings principle is also a principle about transfers 'out of' the society as it currently exists. However, an important distinction is that when the transfers are meant for future generations of the same society as opposed to other societies existing in the same time, (1) the means of transfer are limited, or else we may have a broader principle than the just savings principle, and (2) we may have different expectations about what transfers are needed to preserve liberal democracy in the future of our own society than in respect of different societies.

²¹⁸ PEOPLES 106.

²¹⁹ PEOPLES 108; *see generally* PEOPLES 108–11.

²²⁰ PEOPLES 108–09.

eral and decent peoples.²²¹ We know that decent societies do not in fact satisfy the demands of Justice as Fairness, since decent societies do not guarantee a just distribution of social goods, amongst other shortcomings.²²² This is an instance of the broader point we saw earlier, which is that a society that is well-ordered can still be deeply unjust.²²³ Second, even when burdened societies turn into liberal peoples, and internally satisfy Justice as Fairness, they do not thereby satisfy the principles of global justice. In fact, they *will* probably still violate them. This is because both a society with a low level of total resources and one with a high level of total resources may be internally just, but the disparities between them will violate the resource redistribution principle, and *a fortiori* the global difference principle. Neither absolute levels of wealth nor the achievement of just circumstances within a society are sufficient in themselves to satisfy the demands of global justice.

Meanwhile, Rawls argues against Beitz's global difference principle on the basis that it is "meant to apply continuously without end"²²⁴ – a move which is peculiarly evocative of the famous argument against redistribution found in *Anarchy, State, and Utopia*.²²⁵ Rawls posits the example of two otherwise identical peoples, but which develop different political and civic cultures – one preferring a more 'pastoral' and 'leisurely' society, while the other does not – and therefore experience different rates of economic growth as a result. Rawls implies that the resulting differences in distributions of primary goods are the result of free and responsible decisions by

²²¹ See, e.g., PEOPLES 4.

It is unclear why this is so given the original and widely-understood definition of well-orderedness from *Theory* that we saw earlier: A society is well-ordered if "it is a society in which (1) everyone accepts and knows that the others accept the same principles of justice, and (2) the basic social institutions generally satisfy and are generally known to satisfy these principles." See *supra* note 8. We are not told that decent peoples are well-ordered, nor do we have any reason to believe that they must be: see the list of criteria for a people to be a decent hierarchical society, which is the only kind of decent people that Rawls discusses; the list contains nothing to suggest that such a society must be well-ordered. PEOPLES 64–67.

²²² See PEOPLES 64–67.

So a burdened society which becomes a decent people, and therefore a 'well-ordered' one, does not thereby exhaust the demands of justice. The Law of Peoples has no problem with this, because it considers decent peoples as having features worthy of respect by liberal peoples. See *infra* Part III.B.1. However, as we saw earlier, we do not actually have good reason to think this to be the case, not at any rate on the basis of Rawls's approach to justice, even when taking into account the fact of reasonable pluralism. See *id.*

²²³ See *supra* Part I.A.2.

²²⁴ PEOPLES 117.

²²⁵ See, e.g., NOZICK, *supra* note 27, at 163 ("[N]o end-state principle or distributional patterned principle of justice can be continuously realized without continuous interference with people's lives.").

the peoples in question, and are therefore just.²²⁶ For this conclusion to be reasonable, one must also make the claim that political and civic cultures are sources of justice – in other words, that they are not merely arbitrary (i.e. at best neutral) from a moral point of view.²²⁷ But it is not obvious that culture is such a source. If it is part of one’s culture to be pastoral and leisurely, can it really be said that the individuals that make up that people were “free and responsible” in relation to their behavior, and “decide[d]” to take one path (down the road of pastoral poverty) instead of another?²²⁸

The only reason that Rawls’s reasoning has any plausibility in its context stems from his desire to preserve the political autonomy of peoples.²²⁹ Redistribution between peoples under the Law of Peoples is limited to a duty of assistance because it is important for peoples to “be able to determine the path of their own future for themselves.”²³⁰ Once we have established that the original position ought to occur *ab initio* at the global level, and that the parties that matter are *individuals*, however, this line of reasoning must be discarded. A moral concern for individuals is not compatible with thinking that their distributive shares ought to depend on the preferences for leisure of those around them in the same way that one’s distributive shares can properly depend on one’s own preferences for leisure.²³¹ What is more, under the Law of Peoples individuals are rendered beholden to the ‘culture’ prevailing in their state of residence at any particular time, even though individuals may have no part to play in the culture that is attributed to their social unit, and are likely to have no degree of control over it.

Under our approach to ideal theory, we can only support the contingencies by which states have arrived at their present-day boundaries, and therefore the normative peculiarity attached to

²²⁶ PEOPLES 117–18.

²²⁷ I refer to ‘sources of justice’ in the sense that, for example, if distributions resulting from transactions in the market are considered just on the basis that those transactions were freely entered into, that freedom is the source of the justice of those distributions; likewise, if distributions resulting from differing patterns of behavior are considered just on the basis that those behavioral differences stemmed from differences in culture, then culture is the source of the justice of those distributions.

²²⁸ Cf. POGGE, *supra* note 113, at 253.

²²⁹ PEOPLES 118.

²³⁰ PEOPLES 118.

²³¹ See POGGE, *supra* note 113, at 252–53.

the imagined communities within them that form the basis for the Law of Peoples, if the system of states emerges from the global original position. But as we will now see, this appears unlikely.

2. States as we know them

What are states? In today's world,²³² the simple answer might be phrased in terms of the manifestations of statehood – boundaries in physical space and relations of power in normative space. What distinguishes states as normative entities from mere facts about the physical world, however, is how they are constituted. In that regard, states are like property rights: while they are manifested through facts, patterns and predictions about the physical world, these are merely the consequences of the bundles of rights and other Hohfeldian relationships²³³ that truly tell us what a property right comprises. Since, in the context of property rights, these bundles are the product of a system of rules which form the basic structure, they are subsequent to, and therefore dependent upon, the principles of justice that govern the basic structure. For that reason, it is no objection to Justice as Fairness that it violates property rights: property rights are a consequence of the basic structure under Justice as Fairness, and the question of what they ought to be is simply the question of what is just and unjust.²³⁴ States are somewhat more complicated, because they can be conceived of as having two aspects: internal and external. Externally, the system of states is constituted by the rules of international law on statehood,²³⁵ which, in turn, are formed through the actions and beliefs of existing states.²³⁶ Internally, the state is constituted by the bundles of Hohfeldian relationships it holds with the persons and groups that exist within the territory over which it has control. In Rawls's terms, these bundles constitute the basic structure of domestic society; Justice as Fairness presents one vision of such a relationship, in which it is the citizens who ultimately shape the state. A state can thus be identified by the confluence of these internal and external dimensions. We saw *Peoples* run into trouble precisely for having regarded this confluence of dimensions as an identity between them: because in a liberal people, the state is the

²³² As contrasted with older ways of thinking about control over territory – see ANDERSON, *supra* note 92, at 174–82.

²³³ See Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning* 23 YALE L.J. 16 (1913).

²³⁴ See *supra* text accompanying notes 135, 136.

²³⁵ See *infra* Part III.C.2.

²³⁶ See *infra* Part III.C.1.

expression of the freedom and equality of *persons* within it, *Peoples* assumed that the Law of Peoples must necessarily treat *peoples* as free and equal between themselves in order to respect the underlying freedom and equality of persons. The bundle of rights of states that are protected by the principles of the Law of Peoples are what is commonly known as ‘sovereignty’.

The question of the global original position, placed in this context, is whether persons under this original position would accept the existence of bundles of rights that constitute sovereignty, and which would thereby constitute the state system in the global theory of justice. Given other pieces of what I have suggested will result from the global original position, we have good reason to think that states so understood will not be justified. For example, an important right that forms part of the sovereignty of states in the present international order is the right to control flows of resources across their borders, and, more fundamentally, to exercise control over those resources that are extracted or created within their borders. Indeed, we can see such a right arise if Justice as Fairness were realized in domestic societies, since the difference principle through the basic structure (i.e. the state in its internal aspect) would control distributive shares within that society. At the same time, the lack of a redistributive principle in the Law of Peoples cements state control over domestic distributive shares in this vision of the world. In our revised Rawlsian vision, there exists a global difference principle, which acts through the global basic structure. The global basic structure might make provision for localized institutions, organized by geographical region, to perform the actual distributive work, just as a domestic basic structure might contain regional or local government institutions, but there is no reason for the global basic structure to allow localized institutions to block transfers across regions when this runs against the grain of the global difference principle. That part of the state in its internal aspect which serves as the ultimate authority coordinating the distribution of primary social goods would therefore cease to exist.

One of the reasons why a global difference principle will be unsustainable in the current world as we know it is because the necessary sense of justice, in Rawls’s terms, cannot be sustained: persons living in states usually do not see good reason to have equal concern for those who live beyond their borders as for those who live within their state. In other words, we might say that although citizens of the same state might conceive of each other as members of a ‘social union’, they look at other states in the world as separate entities in a ‘private society’, in which states “have their own private ends which are either competing or independent, but not in any

case complementary,” and where “institutions are not thought to have any value in themselves.”²³⁷ Just as a private society is transformed into a social union when its members affirm a shared conception of justice that mediates between their diverse interests, the disparate Society of Peoples can be transformed into one that serves global justice through the extensive social cooperation and strong political organization that marks the implementation of principles of justice like the difference principle in the global basic structure.

Although doubts may persist as to whether the international sense of justice can be cultivated and sustained, they do not have as much purchase when we are in the realm of ideal theory. This is because the concern we are faced with is not one that is unrealistic even in the long run of developments in the direction of global justice. Instead, it is an extension of a concern that must similarly be overcome for justice in a domestic society. As Rawls points out, a domestic society is a “social union of social unions.”²³⁸ The many social unions that make up a society are the many associations that persons belong to in order to cultivate their excellences and fulfill their plans of life; these are the social unions that are essential to a person’s respect for himself *qua* individual.²³⁹ However, the greater social union of society is nevertheless one that will be supported by members of these diverse associations, since, like opposing players in a game who share the common desire of making their game the best it can be, individuals with diverse ends in society all want to achieve a just society.²⁴⁰ Moreover, the greater context that the social union of society provides to each person, involving a scheme of justice to be carried out over many generations, gives their life plans a richer and more intricate structure than they would otherwise have.²⁴¹ These points can be extended to international society. Indeed, there is a sense in which they *must* be so extended: many of the problems that we face today, such as climate change, global governance, and global poverty, are of such a scale and extent that successfully cultivating an international sense of justice may be the only sustainable evolution of social unions and the interests they represent.

²³⁷ THEORY 457.

²³⁸ THEORY 462.

²³⁹ See THEORY §67.

²⁴⁰ See THEORY 461, 462.

²⁴¹ See THEORY 463, 374–75.

As a general matter, the device of the original position demands a degree of moral imagination from those who imagine placing themselves in it – for ultimately it is not a device to be placed into operation as a real-world decision-making mechanism, but as a method of thought that we can adopt in thinking about the world. Our moral imaginations seem rather limited, however, and it is doubtful, for example, how many of us could conceive of principles of justice radically different from those that we have previously been exposed to. This might pose a problem for global justice, since it requires radical departures from commonly existing paradigms of thinking about the world. In particular, Risse suggests that the difficulty in abandoning the system of states arises not merely pragmatically, but also morally: that the possible consequences of doing so are so unclear to us at this point in time that it would be morally irresponsible to advocate it.²⁴² This is because imagining the counterfactual of a world without states is futile – we can never have a reasonably certain picture of what such a world would look like.²⁴³ Risse suggests, alarmingly, that Marx’s theory contained such a blind spot, and that the famine of the Great Leap Forward was the tragic result of implementing it.²⁴⁴

Although there is no doubt that we cannot confidently predict the future success of any global theory of justice, I am not as moved as Risse by these fears about blind spots and uncertainty. In our lives, we usually seek to make long-term plans for our future in the face of radical uncertainty about what the future would look like. In the face of such uncertainty, we would be right to include a bias in our considerations in favor of more of the same, since the effects of continuing down the same path are usually more predictable. However, this does not mean that we are forever trapped in the path of least resistance, destined to live whatever future is indicated by our past. Instead, in forging forward, we have an important tool that which we share with Rawlsian theory, and which was occluded by the politics of Mao’s China and Stalin’s Soviet Union: reflective equilibrium. Just as reflective equilibrium in *Justice as Fairness* allows us to critically assess our intuitions and our principles, we must find a kind of reflective equilibrium between non-ideal theory and ideal theory – an alignment between the way we live our lives now and our long-term hopes for the future. We can be reasonably confident in seeking out our realistic utopia because

²⁴² RISSE 304–05.

²⁴³ *Id.* 318–21.

²⁴⁴ *Id.* 316–17.

we have formulated a non-ideal theory to guide the way, but we must maintain a degree of reflective equilibrium between the present demands of justice through non-ideal theory, and the claim to our allegiance of ideal theory, such that both visions are as just as they reasonably can be, but in which neither pursuit is allowed to irrevocably jeopardize the other. The hope is that we will be able to realize well in advance when the current road to ideal theory may lead us through a catastrophe like the Great Leap Forward, and adjust both non-ideal and ideal theory to obviate its becoming a reality.

B. Non-ideal theory

In comparison with the extension of Justice as Fairness to the international level so that it can serve as ideal theory, the devising of a non-ideal theory which serves as a complement and guide to ideal theory is vastly more difficult. In respect of any conception of a realistic utopia, it seems plausible for the non-ideal component to take many different paths towards the ideal component, and any given non-ideal theory is likely to be made up of many component aspects, both to deal with different non-ideal circumstances, and to deal with different stages in our progress towards ideality. Fortunately, as we have seen, we can appeal in part to the idea of reflective equilibrium to help deal with this complex problem. In the rest of this discussion, I will concentrate on making a plausible argument for the idea that was first mooted in Section III: that the Law of Peoples, being certainly not an example of ideal theory as originally claimed, might serve well as the kind of non-ideal theory that will help us get to the vision of ideal theory that I have just presented.

As we saw earlier, non-ideal theory ought to look for courses of action that are morally permissible, politically possible, and likely to be effective.²⁴⁵ At the same time, since non-ideal theory operates on a world in which there are presumably many injustices, we should prefer one that addresses more grievous injustices before it deals with less grievous ones.²⁴⁶ The question of moral permissibility, in addition to considerations that belong to the realm of ideal theory, considers questions of transitional justice – the moral permissibility of the steps taken to move the world from a non-ideal situation to an ideal one. I will consider a question of transitional justice that is

²⁴⁵ See *supra* text accompanying note 55.

²⁴⁶ Simmons, *supra* note 21, at 12, 19.

particularly relevant to the two-theory approach in the next section. The criteria of political possibility and likely effectiveness, meanwhile, are two limbs of the central question of non-ideal theory under the two-theory approach – the question of whether non-ideal theory will in fact help us get closer to achieving ideal theory. Non-ideal theory can fail in two ways in this respect: it can be insufficiently realistic, such that its strategies cannot find a foothold to begin with, or it can be insufficiently utopian, such that its outcome does not bring us substantially closer to ideality. In the infinite universe of possible non-ideal theories for a given ideal theory, many are likely to fail in one (or both) of these ways. What is more, there appears to be no more obvious way of deciding whether we have found the best non-ideal theory other than through an intuitive application of the two criteria. Nor, it seems, should we expect to find any more precise methodology – short of resorting to a consequentialist calculus, that is.²⁴⁷

To make the case for the Law of Peoples as non-ideal theory, therefore, I will argue that its starting point is sufficiently realistic, and meets many of the features of our global theory of justice that we concluded prevented it from being realistic in the present world; at the same time, I will suggest that its outcome brings us satisfyingly closer to the ideal of global justice that we have been pursuing.

1. The Law of Peoples as sufficiently realistic

In Section II.B.3, I described the largest challenge to the implementation of ideal theory as one of historical continuity – the principles of justice that the world can be expected to have internalized and to abide by tomorrow must be identifiable in the prevailing political, social and cultural norms as well as the historical circumstances of today. The Law of Peoples therefore treats the nation-state as a pre-existing contingency of the international order which it does not seek to immediately challenge – a contingent constraint. The idea of the nation-state, after all, is central to the historical and political account of the basic structure of the world as it exists today. This recognition also means that the principles thereby recognized in the Law of Peoples will preserve the existing system of international law to a large extent, since many of the fundamental norms of international law can be explained in terms of the protection of the sovereignty of states – no less

²⁴⁷ *Id.* 20.

the law of statehood itself, which is highly conservative both of the creation of new states, and the extinction of existing states.²⁴⁸

At the same time, the Law of Peoples also permits the Society of Peoples to be well-ordered. Now, there is an element of circularity in this, since the Society of Peoples, as Rawls uses the term, is defined as those peoples who follow the principles of the Law of Peoples – liberal and decent peoples.²⁴⁹ But if we step outside this circular definition for a moment, we can appreciate the importance of concluding that the Society of Peoples is well-ordered. This is because the Law of Peoples is intended to respect the freedom and equality of peoples to the maximum extent that this is compatible with a reasonable conception of justice. It is well enough for peoples around the world to condemn a number of burdened and other illiberal peoples as pariah states that ought to be changed, but it would not do for liberal peoples to assert that all non-liberal peoples are out-laws to global justice. Yet, as we have seen, this is precisely what a realistically utopian theory of justice requires us to do. What is more, if we are to be honest with the scale of the enterprise that we are facing, it is probably the case that there are no truly liberal peoples in existence in the world today, since all existing societies fall short of Justice as Fairness in some ways. We live in a world where the best peoples are only decent, not liberal; non-ideal theory has to work with this starting point, and the Law of Peoples can do so.

The result of taking the Law of Peoples to be non-ideal theory is the acceptance, for now, of the modern principles of international law. They are likely to be more than simply the eight slightly outdated principles cited by Rawls, since there are other rules of international law at similar

²⁴⁸ For an extensive discussion of these points, see JAMES R. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 41 (2d ed. 2007) (“[I]n case of doubt an international court or tribunal will tend to decide in favour of the freedom of action of States, whether with respect to external or internal affairs, or as not having consented to a specific exercise of international jurisdiction, or to a particular derogation from equality. This presumption—rebuttable in any case—has declined in importance, but is still invoked from time to time and is still part of the hidden grammar of international legal language.”).

²⁴⁹ See PEOPLES 3 (“I shall use the term ‘Society of Peoples’ to mean all those peoples who follow the ideals and principles of the Law of Peoples in their mutual relations.”).

Rawls’s suggestion that the Society of Peoples is well-ordered (*see supra* text accompanying note 221) is particularly question-begging because well-orderedness as originally conceived was a quality of the entire society within the scope of justice, and the Society of Peoples is not in fact the entire of the scope of the question of global justice. That scope covers all of international society, including illiberal peoples such as burdened societies, which do not follow the principles of the Law of Peoples; consequently, international society is quite simply not well-ordered.

levels of generality, but they will likely contain those eight principles at their core. These existing principles of international law do not, by any stretch of the imagination, including a principle of redistribution. However, we might plausibly expect that somewhere down the line, even before the present system of states is dismantled or replaced, international politics will have come to accept that redistribution across the world is justified and necessary.

It is perhaps premature to predict precisely how this change will be realized, but at this point it is possible to speculate on the basis of existing trends, so that we can have at least a vision of what the halfway point of the transition to ideal theory might look like. Even today, socio-economic rights have become an indispensable component of the duties owed by states to the international community; and international law already places an obligation on states to achieve these socio-economic rights through “international assistance and co-operation.”²⁵⁰ Although we are yet a long way away from beginning to enforce these rights, they already form the prototype for claims by individuals on the international community for rights such as healthcare, education, and an adequate standard of living.²⁵¹ At such a point, we can accept, with Beitz, that a principle of inter-country redistribution is an acceptable second-best implementation of the global difference principle.²⁵²

Setting the ambitious global difference principle aside, it is also possible to imagine how the demands of the global resource redistribution principle may be approximately achieved in the future. Under the United Nations Convention on the Law of Sea (UNCLOS),²⁵³ a multilateral treaty described as the “constitution for the oceans,”²⁵⁴ natural resources in the seabed beyond the

²⁵⁰ International Covenant on Economic, Social and Cultural Rights art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]: “Each State Party ... undertakes to take steps, *individually and through international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means ... ” (emphasis added).

²⁵¹ The rights enumerated in ICESCR include the right to earn a living (art. 6), the right to social security (art. 9), the right to an adequate standard of living (art. 11), the right to health (art. 12), and the right to education (art. 13).

²⁵² See BEITZ, *supra* note 51, at 153.

²⁵³ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

²⁵⁴ Tommy T.B. Koh, *A Constitution for the Oceans*, in THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH INDEX AND FINAL ACT OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA XXXIII, XXXIV, U.N. Sales No. E.83.V.5 (1983).

The state most notably absent from the treaty today is the United States.

limits of the jurisdiction of any state are “the common heritage of mankind.”²⁵⁵ The International Seabed Authority (ISA) is the international organization charged by UNCLOS with the stewardship of these natural resources. The ISA can organize, carry out and control the exploitation of these natural resources “on behalf of mankind as a whole,”²⁵⁶ including by entering into contracts with states to perform this function.²⁵⁷ Obviously, the establishment of the ISA under UNCLOS is not a precursor to the creation of an international body that will be given authority over natural resources within states’ jurisdiction; no state would agree to such a scheme under the current understanding of a state’s sovereignty over the resources found in its territory. However, UNCLOS and the ISA provide a model for the common stewardship of all natural resources on Earth in a future when the popular understanding of all such resources as ‘the common heritage of mankind’ translates into political reality. Meanwhile, the seabed under the stewardship of the ISA contains vast amounts of natural resources, which remain untapped mainly because of a lack of technology and the comparative cost of extracting them on land: the deep seabed is thought, for example, to hold tens of trillions of dollars in oil deposits.²⁵⁸ As an alternative, with advances in technology, exploitation of these resources may proceed at a pace such that at least the prioritarian concern over the distribution of natural resources can be satisfied.

2. The Law of Peoples as sufficiently utopian

In the immediate aftermath of adopting the Law of Peoples, it may not be clear what difference it has made to international justice. After all, the content of the Law of Peoples is likely to be very similar to the present state of international law. Indeed, by virtue of its role as non-ideal theory, where there is some doubt or ambiguity as to which way the Law of Peoples ought to lean, the

²⁵⁵ UNCLOS art. 136. The furthest the right of a state to extract natural resources from the seabed can extend is to the edge of the continental shelf. UNCLOS art. 77, read with art. 76. Where the continental shelf extends to less than 200 nautical miles from shore (the ‘baseline’), the right extends to the 200 nautical mile mark. UNCLOS art. 76.

²⁵⁶ UNCLOS art. 153.

²⁵⁷ UNCLOS art. 153(2)(b); *see, e.g.*, UNEP, ‘Wealth in the Oceans: Deep sea mining on the horizon?’

²⁵⁸ *See, e.g.*, U.N. Env’t Program, *Wealth in the Oceans: Deep sea mining on the horizon?* (2014) http://www.unep.org/pdf/GEAS_May2014_DeepSeaMining.pdf; Doug Bandow, *Developing the Mineral Resources of the Seabed*, 2 CATO J. 793 (1982).

question should be resolved in favor of the way it is presently being resolved in the world. What, then, is the contribution of the Law of Peoples?

The answer, in the immediate aftermath, is that the Law of Peoples represents a transformation in the way that international law is conceived of and practiced. Traditionally, international relations has been thought of as involving a *modus vivendi*, an arrangement which allows parties to coexist peacefully so as to further their distinct self-interests when they have no shared values amongst them.²⁵⁹ Such an arrangement only persists to the extent that it is in the parties' self-interests, considered on the whole, to continue cooperating in them – giving rise to opportunistic defections from elements of the arrangement, and sometimes all-out conflict. Whether or not this is an accurate account of international relations as they stand, the Law of Peoples seeks to cement a different basis for international law – one based on principles and agreement, underwritten by the shared values embodied in the Rawlsian approach to justice.

One reason to believe in this potential of the Law of Peoples is that the *modus vivendi* view of international relations increasingly fails to provide an adequate account of international law – if it ever did. Returning again to the category of customary international law, traditional 'voluntarist' theories of international law sought to explain customary international law solely on the basis of the consent of states, which left it entirely up to the will of a state whether it wanted to be bound by international law. But this approach has been challenged by hybrid accounts which pay closer attention to how customary international law is formed and recognized – for example, the observation that just like in 'traditional' legal systems, customary international law is generally binding on all states, including those which took no part whatsoever in the creation of the norm.²⁶⁰ One such hybrid account, for example, suggests that the normative source of customary international law lies somewhere between consent and belief (*opinio juris*) – in a process of norm contestation in which the actions and statements of states are interpreted as normative claims about the existence and content of a particular norm.²⁶¹ Meanwhile, posing an even greater challenge to the

²⁵⁹ See, e.g., POGGE, *supra* note 113, at 222.

²⁶⁰ See Maurice Mendelson, *The Subjective Element in Customary International Law*, 66 BRIT. Y.B. INT'L. L. 177, 185 (1995).

²⁶¹ See *id.*

To take the point further, we might say that a norm of customary international law really simply means the combination of a set of state practice with its explanation as to how it evidences a legal norm. This resolves what

modus vivendi view is the existence of the idea of *jus cogens*, or peremptory norms of international law, and the increasingly widespread recognition of some norms of international law as having this character.²⁶² Norms of *jus cogens* are “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted,” and have the effect of rendering all incompatible treaties invalid.²⁶³ Like the modern approach to customary international law, international tribunals’ approach to *jus cogens* has been one of norm contestation more than strict tabulation of state practice and *opinio juris*, such that norms of *jus cogens* are considered to be established on the basis of minimal consideration of the evidence.²⁶⁴

In reconceiving of customary international law as a process of norm assertion and contestation, the behavior of states in relation to customary international law can be assimilated to the ideal of public reason in which legislative and executive officials “act from and follow the idea of public reason and explain to other citizens [*peoples*] their reasons for supporting fundamental political questions in terms of the political conception of justice that they regard as the most reasonable.”²⁶⁵ And indeed, “[i]n this way they fulfill what I shall call their duty of civility to one another”²⁶⁶

In the longer run, moreover, the Law of Peoples is also sufficiently aspirational to lead to greater ideality. Crucially, the Law of Peoples must not be taken as presenting a static vision of international justice. A commitment to shared values and principles underlying international law, when heralded and led by peoples committed to the enterprise of global justice, may also lead other peoples to recognize the value of acting by these values. As Rawls suggests, when liberal societies lead by example and demonstrate how liberal societies run their foreign policy, less-

is known in international law as the ‘Baxter paradox’, which asks how it is possible that the creation of a customary norm can require states to believe that its actions are required by that norm (*opinio juris*), when the norm is still in the process of being created. By recasting the element of *opinio juris* as including the belief that a norm *ought* to be a legal norm, we can rescue customary international law from this paradox.

²⁶² See, e.g., *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction and Admissibility (2006) ICJ Reports, 31–32, ¶64 (the first time the International Court of Justice recognized the existence of norms of *jus cogens* – in this case, the prohibition of genocide – in a majority judgment).

²⁶³ VCLT art. 53.

²⁶⁴ See DINAH SHELTON, *THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW* 544 (2013).

²⁶⁵ PEOPLES 55–56.

²⁶⁶ *Id.*

than-liberal societies may, over time, realize the advantages presented by following and endorsing the Law of Peoples, and thereby take steps to become more liberal themselves.²⁶⁷ At the same time, relatedly, such sustained practices can also lead to changes in what is seen as acceptable, choice-worthy, or praiseworthy behavior, politically, culturally, and morally speaking – subtly shifting the boundaries of international relations both for liberal peoples in their own public discourse, and across the world. The vision of the Law of Peoples is therefore a dynamic one in which we can seek greater justice over time through living its principles and ideals.

One potential wrinkle is worth addressing: given what we have seen earlier, we can no longer consider realistic the starting point for Rawls in developing the Law of Peoples – his use of the first original position and then the first step of the extension,²⁶⁸ both of which presuppose the existence of liberal peoples, when there are no such ideal peoples today. But this was a non-vital presupposition in the Law of Peoples. It was Rawls’s intention to develop a Law of Peoples which could be endorsed by both liberal and imperfectly liberal, but nevertheless decent, societies – and a significant portion of *Peoples* is dedicated to suggesting that the Law of Peoples is equally acceptable to both.²⁶⁹ There is therefore no need to think that the first original position and the first step of the extension must actually correspond to actual societies in the world where the Law of Peoples is being applied; we can go directly to the second step of the extension. The previous steps, which involve liberal peoples, are then simply theoretical devices that ensure that the principles of justice we apply in the second step of the extension are sufficiently just by our liberal lights.

C. Justifying the two-theory approach

In the sections above, I have defended the shape of the ideal and non-ideal theories of justice under a vision of a realistic utopia on the basis that the critics have underestimated the potential for persons’ conceptions of justice to be shaped by the realities and aspirations that they see embodied in the public conception of justice. A defense along these lines is a necessary part of the

²⁶⁷ See PEOPLES 61–62.

²⁶⁸ For the way these terms are used in *Peoples*, see *supra* text accompanying notes 149–151.

²⁶⁹ See PEOPLES Part II (“The Second Part of Ideal Theory”).

two-theory approach, because this approach recognizes that while the starting point is the present world in which injustice abounds and ideal circumstances are nowhere to be found, we must ultimately aspire towards an ideal conception of justice which cannot take prevailing circumstances as fixed points. The transformative effect that we hope the two-theory approach will have on persons' conception and sense of justice is essential to its eventual success, and also essential for our continued belief that the best way to systematize our intuitions about justice is to conceive of a realistic utopia as I have described it. Some, however, would consider such an approach manipulative, because it depends on subtly changing persons' deepest moral and political intuitions and beliefs over time. We must therefore defend the two-theory approach against such charges.

1. The objection of manipulation

The main objection can be outlined as follows: Principles of justice, which are common and overriding principles, have the potential to intrude uncomfortably on individuals' conceptions of the good and their ends. Rawls had initially answered this concern rather unsympathetically, on the basis that persons "implicitly agree ... to conform their conceptions of their good to what the principles of justice require";²⁷⁰ however, he has also recognized the strength of the commitments and attachments that persons hold at any one time, such that "if we suddenly lost them, we would be disoriented and unable to carry on."²⁷¹ At this point it must be recalled that the transformative process presupposed by the two-theory approach will be a slow one, likely stretching across many generations, such that persons would not all experience simultaneous and instantaneous changes in the moral and political values as though they were subject to brainwashing – which would in any case be impossible to procure.²⁷² But even if this is not as openly objectionable as the forms of brainwashing found in totalitarian states, it might still be objected to on the basis that those whose hearts and minds are being won, were this transformation brought to their attention, might have a valid objection to the practice.²⁷³

²⁷⁰ THEORY 27.

²⁷¹ LIBERALISM 31.

²⁷² The potentially related question of whether such methods of brainwashing could be used in the service of justice were they to become available, fortunately, does not fall to be answered at this point.

²⁷³ Presumably, were it brought to their attention *before* the change occurred, since they would no longer reject it after the change had occurred.

On the other hand, one's sense of justice is the result of one's experience of the circumstances of justice, the basic structure of society being the background against which individuals gain their moral capacities. It is unrealistic to suppose, therefore, that one can always justifiably complain against society on the basis that it shapes people's conceptions of justice and of the good. Even a night watchman state actively seeking to stay out of persons' development and pursuit of beliefs and aspirations thereby influences those very things, because it suggests to them a certain kind of civilization, of public/private divide, and of the political conception of justice.²⁷⁴ Rawls puts it well when he says that "the institutional form of society affects its members and determines in large part the kind of persons they want to be as well as the kind of persons they are [T]he basic structure shapes the way the social system produces and reproduces over time a certain form of culture shared by persons with certain conceptions of the good."²⁷⁵

As we have already seen, in *Peoples*, Rawls attempted to balance these competing considerations in part through the principles that he thought should govern liberal peoples' treatment of decent and non-decent peoples: In respect of decent peoples, toleration would encourage change, because "a decent society, when offered due respect by liberal peoples, may be more likely, over time, to recognize the advantages of liberal institutions and take steps toward becoming more liberal on its own."²⁷⁶ Similarly, non-decent peoples ought to be extended assistance by well-

²⁷⁴ As Charles Taylor acutely observes:

[T]he free individual with his own goals and aspirations ... is himself only possible within a certain kind of civilization; ... it took a long development of certain institutions and practices, of the rule of law, of rules of equal respect, of habits of common deliberation, of common association, of cultural self-development, and so on, to produce the modern individual; and ... without these the very sense of oneself as an individual in the modern meaning of the term would atrophy.

Atomist thought tends to assume that the individual needs society ... only for the Lockean purpose of protection; the underlying idea being that my understanding of myself as an individual, my sense that I have my own aspirations to fulfil, my own pattern of life which I must freely choose, in short the self-definition of modern individualism, is something given. In a sense, if I look only at this instant of time, there is some truth in this; since the conditions of civilization which have helped to bring this about are already behind me. I have now developed the identity of an individual, and a fascist coup tomorrow would not deprive me of it, just of the liberty to act it out in full

But over time this identity would be reduced if the conditions that sustain it were to be suppressed ... [therefore] we have not only to maintain practices and institutions which *protect* liberty, but also those which sustain the *sense* of liberty.

TAYLOR, *supra* note 200, at 309–10.

²⁷⁵ LIBERALISM 269.

²⁷⁶ PEOPLES 61–62.

ordered peoples in a way that is not paternalistic, but which instead allows those peoples to manage their own affairs and eventually become *bona fide* members of the Society of Peoples.²⁷⁷ I take it that these moves would not draw the ire of those who would object to the manipulative nature of the two-theory approach. Indeed, these principles are so mild and so close to the present state of affairs in the world that we should despair of ever finding a useful theory of global justice if these strategies are to be rejected for being too radical.

Nevertheless, these principles have significant implications for what it means for a person or a people to be free. To put it negatively, I read them as suggesting that a person's freedoms are not compromised if their social background is such that they are predisposed to a particular politics or philosophy by virtue of being brought up against its backdrop. To put it positively, under Justice as Fairness we regard it as a good thing that those who hold unreasonable comprehensive doctrines live in a society whose background conditions militate against the survival and perpetuation of those unreasonable doctrines, both through persuading them by word and by example to change their views over time, and by exercising the same influence over their children and others whom they might otherwise pass their views on to. *Mutatis mutandis*, under the Law of Peoples a people's freedom to choose its own destiny is not compromised by an international politics that favors one destiny over another, and over time through the constitutive influence of the basic structure, influences the political preferences of peoples. Notably, in the domestic context Justice as Fairness takes these implications especially to heart – it reserves judgment on persons' comprehensive doctrines only to the extent that the burdens of judgment inform us that such judgments will be unsafe.²⁷⁸ Conversely, I have argued that the Law of Peoples should be criticized for failing to take the same approach to international justice.²⁷⁹

2. The self-respect of peoples

One other objection which can be phrased in Rawls's terms uses the idea of *amour-propre* that he invokes in *Peoples*. Rawls asserts that one of the fundamental interests of all peoples is their *amour-propre*, or the "proper self-respect of themselves as a people, resting on their com-

²⁷⁷ PEOPLES 111.

²⁷⁸ See *supra* text accompanying note 154.

²⁷⁹ See *supra* Part III.B.1.

mon awareness of their trials during their history and of their culture with its accomplishments²⁸⁰ – which leads to and justifies peoples in espousing a *proper patriotism*.²⁸¹ If this is right, then it might be reasonable to exclude from the eligible list of principles of justice those that may compromise the *amour-propre* of peoples, including less-than-liberal peoples. Even if our preferred principles of justice in their implementation do not have this effect, the justifications that we have explored for them might be thought to question the correctness or primacy of certain cultural and political values, and therefore the principles that are grounded in them cannot be accepted by a properly patriotic people.

However, if this *amour-propre* is conceived of as a normative claim about the nature of peoples and justice in general, then it generates a paradox. If we have normatively compelling reasons to reject any theory of justice that directs a people down a different path from the one they are currently on, then we can never accept any theories of justice that make a difference. But such a limit on justice privileges peoples *qua* states and presumes their normative value and continued existence. We have already seen that such assumptions cannot be taken for granted. Instead, the basic unit of moral concern in a global theory of justice must remain to be individuals. In this regard, it is the original idea of self-respect – a person’s sense of his own worth and the worth of his plan of life²⁸² – that matters for global justice. Just as we hope that persons with diverse plans of life and conceptions of the good will all recognize Justice as Fairness as the best guarantee that their self-respect will be given sufficient priority, whatever it consists in, it must be our hope at the global level that (even more diverse) persons will think likewise. Just as those who hold unreasonable conceptions of the good or of justice cannot claim to be exempt from the demands of justice under Justice as Fairness, persons who hold unreasonable views cannot expect any greater latitude at the global level. After all, public reason encapsulates an overlapping consensus found through reason, not the mere geometric intersection of various comprehensive doctrines actually present in the world.²⁸³ And once we have established that free and equal persons would indeed endorse our preferred principles of global justice under the original position, there is no intelligible way,

²⁸⁰ PEOPLES 34–35.

²⁸¹ PEOPLES 44.

²⁸² THEORY 386.

²⁸³ LIBERALISM 39.

distinct from simply contesting the reasoning leading to this conclusion, to argue that their *amour-propre* would prevent such an outcome from being reached.

What is perhaps more plausible is that the claim based on *amour-propre* is an empirical claim about the world as we know it – that implementing our theory of justice would trample upon the *amour-propre* of the peoples that already exist today. This objection is much less forceful, and should not detain us for long. First of all, the claim that a people has an *amour-propre* exaggerates the degree to which the self-respect of persons, which is the real object of our moral concern, aligns within existing states to a sufficient degree for us to identify an *amour-propre* of a people with a degree of precision that it will contain beliefs about how this people should develop in the future (as opposed to merely vague consensus about generic values such as patriotism). Instead, conceived of as the ‘social union of social unions’, a people is likely to contain many different overlapping and identifiable strains of *amour-propre*, some of which pull in different directions, and others which cross state boundaries. This also reflects the failure of this way of thinking about global justice in taking into account the porosity of state boundaries and the movement of both persons and culture between peoples. One of the consequences of the fact of immigration, for example, is that culture and *amour-propre* are less fixed than they would otherwise appear.

3. Effecting the two-theory approach

Finally, we can pull together the threads of our answer to the question of how the transformative effect of the two-theory approach might take hold. As we have seen so far, what principles of justice we can achieve consensus in society around is a function of our upbringing, social experiences, and history and culture. Of these, our upbringing and social experiences clearly fall within the category of socialized reasons which, like the concepts of the state and of property rights, are clearly within the power of a theory of justice to change.²⁸⁴ But, taking up the insight of contingent constraints, in the long run, history and culture, too, are socialized reasons: they do not have the degree of permanence or justifiability that would take them outside the purview of a realistic utopia. By implementing our non-ideal theory, we shift these social relations so as to predispose future generations towards increasingly ideal intuitions about justice. Since it is unlikely that there

²⁸⁴ Cf. Cohen, *supra* note 44.

is anything about our sense of justice that is not socialized in one way or another,²⁸⁵ this is likely to be both effective *and* probably the only practicable way of reaching a society in which most persons endorse ideal theory when most of our contemporaries currently reject it.

Given that our sense of justice is socialized, it is not inherently objectionable that we attempt to systematize the social relations that lie at its roots in favor of one perspective on justice instead of leaving the various social factors to fall where they lie. In particular, it is not especially objectionable that we try to make it such that persons develop a certain sense of justice that tends towards ideal theory, and do so by influencing background features of society. This is because if we believe in the justice of our ideal theory, then we must believe that other theories are in some way flawed or wrong; if so, why should we not direct people away from them? This is simply analogous to campaigns of advocacy in which we try and persuade others around us of the appeal of certain moral views by example or by reasoning. It is not more manipulative than the simple demonstration by example supported in the Law of Peoples, and that kind of influence is an integral part of any political philosophy that is not self-defeating. As such, unless we are to think, implausibly, that we should actively try and be indiscriminate in promoting any and all manner of ways of life, why should we not – and how can we not – promote ideal theory in this way?

Conclusion

When we ask ourselves how we ought to frame the question of justice, it is difficult to do better than to remember Rawls's admonition that "[t]he social system is not an unchangeable order beyond human control but a pattern of human action."²⁸⁶ To heed this reminder, we must draw a distinction between fixed and contingent constraints and critically assess where the boundary lies. Whenever we assimilate a pattern of human action to the unchangeable facts of the world underlying it, we run the risk of perpetuating an injustice by smuggling it into the foundations of our

²⁸⁵ This is not a claim regarding objectivist or subjectivist views of morality: all that I am claiming is that one's upbringing and one's social environment can have a decisive impact on one's views about justice. Objectivists (as Rawlsians are likely to be) should not be alarmed at this claim, because it is very well possible that an entire society of people have come in this way to hold views about justice that are objectively entirely mistaken – the classical example being Nazi Germany.

²⁸⁶ THEORY 88.

approach to justice. This paper began by engaging with the contingent constraints found in Rawls's theories of justice, and proceeded to criticize their potential for obscuring injustice from scrutiny. In the end, however, what I hope to have done is not to show that Rawls's approach to justice should be abandoned, or that the enterprise of justice itself is futile. Instead, it is to show that Rawls's approach to justice contains in it the foundations and building blocks of a conception of justice that ought to command our allegiance, if only we corrected its flaws by reconceptualizing the enterprise of justice as working towards a realistic utopia in which realism and utopianism are intertwined in ideal and non-ideal theory. As the diagram below shows, we can begin exploring what this realistic utopia should look like by reinterpreting Rawls's theories of justice, making the appropriate corrections in the process, such that Justice as Fairness represents a global ideal theory of justice, and the Law of Peoples presents a global non-ideal theory of justice that has the potential to set us on track to attaining Justice as Fairness.

<i>Rawls's original approach</i>			<i>Our realistic utopia</i>		
	Ideal	Non-ideal		Ideal	Non-ideal
Global	<i>Peoples</i>	-	Global	Rawlsian ideal theory	Rawlsian non-ideal theory
Domestic	<i>Theory; Liberalism</i>	-	Domestic	-	-

In my view, this two-theory approach is the best possible interpretation of the Rawlsian project. Through it, the basic concepts that underpin Rawls's approach to justice – the original position, the basic structure, the idea of reflective equilibrium, and the idea of public reason – can be developed to their full potential. Most importantly, it is uniquely capable of delivering the promise of a realistic utopia. It accepts as a starting point an optimistic but pragmatic approximation of the world as it exists now, and points us towards an ideal theory of justice fully committed to the best possible arrangement of human affairs within the confines of our natural world.

In this limited discussion, I have no doubt left some aspects of the analysis open to question, and my approach will have included as fixed constraints features that may turn out to be properly contingent. What is more, the stakes in such mistakes are high, for they may quickly turn our enterprise dystopian. But by taking this approach, we no longer have to unjustifiably stratify the

world into states such that some societies can claim to attain justice while others starve, and we can answer this question of international justice in a way that no longer shows concern solely to states but not the individuals living in them: in these two important ways, persons in this vision of justice are no longer strangers to justice. For all its uncertainty, complexity, and onerousness, such a realistic utopia is worth striving for.