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THE INCOHERENCE BETWEEN RAWLS'S THEORIES OF JUSTICE

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Would it be desirable to reform the global institutional order in conformity with the principles Rawls defends in *A Theory of Justice*? Rawls himself denies this and proposes a different moral theory (*The Law of Peoples*) for the relations among self-governing peoples. While sharing a questionable, purely recipient-oriented approach, his two theories differ importantly in substance and structure. The former gives weight only to the interests of individual persons, yet the latter gives no weight to these interests at all. The former theory is three-tiered and institutional, centering on a public criterion of justice that is justified through a contractualist thought experiment and in turn justifies particular institutional arrangements and reforms under variable empirical circumstances. Yet, the latter theory is two-tiered and interactional, deploying a contractualist thought experiment to justify rigid rules of good conduct for peoples. Poorly motivated, these asymmetries help Rawls's anti-cosmopolitan case. But they fail to vindicate his claim that global economic justice demands only a modest "duty of assistance."

INTRODUCTION

In *A Theory of Justice*, John Rawls offers his account of domestic justice, meant to provide moral guidance for the assessment, design, and reform of the institutional order ("basic structure") of one society. Twenty-eight years later, he published a work on international justice: *The Law of Peoples*, which he presents as an extension of his domestic theory.

Central to both texts are thought experiments involving a fictional deliberative forum, the "original position," composed of rational deliberators, or "parties." In the domestic case, the parties represent individual persons. As each prospective citizen has his or her own representative, this original position is said to model the freedom and fundamental equality of all persons. The parties have the task to agree on a public criterion of justice for assessing alternative feasible

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basic structures for a society. The parties aim to protect the interests of their respective clients. All distinguishing features of these prospective citizens are, however, concealed by a "veil of ignorance" from the parties, who must reach agreement on a public criterion of social justice without knowing their clients' particular creeds, values, tastes, desires, and endowments, or even the natural and historical context of their clients' society. On the basis of a highly complex array of rigorous arguments, Rawls tries to demonstrate that the parties would select his liberal public criterion: the two principles of justice with the two priority rules.¹

In the international case, the thought experiment of the original position is deployed rather differently. Four divergences spring to mind. The rational deliberators are conceived as representing *peoples* rather than persons, and the international original position is thus said to model the freedom and equality of peoples. Representation is selectively granted only to peoples who are well-ordered by having either a liberal or a decent domestic institutional order, while the remainder ("outlaw states," "burdened societies," and "benevolent absolutisms") are not accepted as equals and thus denied equal respect and tolerance.² The veil of ignorance is thin enough to allow the parties to know whether they are representing a liberal or a decent people; and Rawls therefore conducts his international thought experiment twice to show separately that representatives of liberal peoples and representatives of decent peoples would independently join the same agreement. And the task assigned to the parties in the international original position is importantly disanalogous; they are *not*, as one might have expected, charged with agreeing on a public criterion for the assessment, design, and reform of the global institutional order, but charged with agreeing on a set of rules of good conduct that cooperating peoples should (expect one another to) obey.

I will discuss the first and the last of these more obvious divergences as well as a less obvious one that is also of some importance. First, however, let me comment briefly on the general approach that both theories share in common.

I. THE PURELY RECIPIENT-ORIENTED APPROACH EXEMPLIFIED BY BOTH THEORIES

However diverse in various respects, contractualist thought experiments of the kind Rawls is conducting express a purely recipient-oriented ("PRO") approach to moral questions. The PRO approach can best be defined informationally: Those who advocate a PRO approach to some moral question believe that its correct

1. John Rawls, *A Theory of Justice* 266-67 (rev. ed. 1999).

2. John Rawls, *The Law of Peoples* 4, 63 (1999).

solution is found and justified by comparing how the feasible alternative solutions would affect those relevantly affected by the choice of solution—the “recipients” of the choice. One solution is better than another if and only if it is better for these recipients. All other information is deemed irrelevant.

Any PRO theory is triadic, involving:

- 1) A *iudicandum*, that which is to be judged morally;
- 2) *Recipients*, whose perspective informs the judgment; and
- 3) *Interests* that characterize these recipients, identifying what counts as goods or ills for them and how such goods and ills are to be aggregated both within and across recipients.

The General Triadic Structure of PRO Moral Theories	Rawls’s Domestic Theory	Rawls’s International Theory
<p><u>Iudicandum:</u></p> <p>What is the moral question? What is to be judged in moral terms?</p>	<p>What is the morally best public criterion of justice for the comparative assessment of alternative feasible designs for the institutional order (“basic structure”) of a self-contained (national) society?</p>	<p>What are the morally best rules of conduct that states (peoples) should (expect one another to) honor?</p>
<p><u>Recipients:</u></p> <p>Who are the affected parties by reference to whose interests the judgment is to be made?</p>	<p>The individual citizens of the society in question</p>	<p>Liberal and decent peoples</p>
<p><u>Interests:</u></p> <p>Which (goods and ills)?</p> <p>Intra-recipient aggregation</p> <p>Inter-recipient aggregation</p>	<p>three “higher-order interests”</p> <p><i>left unspecified</i></p> <p>maximin (and averaging)</p>	<p>Interests in its independence, equality, and the stability of its liberal or decent domestic order</p> <p><i>left unspecified</i></p> <p><i>left unspecified</i></p>

I reject the PRO approach in general—mainly, though not exclusively, because it considers only how recipients are *affected* by a particular iudicandum, as opposed to how they are *being treated* by this iudicandum. PRO theorizing considers merely how recipients are *faring* and thereby ignores the particular causal pathways on which goods and ills arrive at particular recipients. That this is implausible is easy to see in the assessment of persons and their conduct, where it often matters morally whether the agent's conduct was a bringing-about or a failing-to-prevent. Less obviously, the PRO approach is implausible also in the assessment of social rules by giving no more weight, for instance, to harms these rules mandate or authorize than to equivalent harms these rules merely fail to prevent or to mitigate.

The problem is well exemplified in Rawls's domestic theory by the first priority rule³ and the examples he gives to illustrate its meaning and application. The first priority rule permits restricting the basic liberties for the sake of making them effectively exercisable and more secure. Thus Rawls writes that liberty of conscience may be restricted by the state insofar as this is the only way to avoid disruptions of public order that would endanger the liberty of all—decisive in this case is “the interest of the representative equal citizen” in her basic liberties.⁴ He shows that the freedom of intolerant sects may be restricted “when the tolerant sincerely and with reason believe that their own security and that of the institutions of liberty are in danger.”⁵ And he affirms that extra votes may be given to intelligent and well-educated citizens when doing so, through better government, sufficiently enhances the security of the non-political basic liberties of the uneducated: “Admitting these assumptions, plural voting may be perfectly just.”⁶

The greatest paradoxes appear when Rawls applies his PRO approach to the design of the penal system and endorses, for instance, strict liability criminal statutes for contexts where the restriction of basic liberties they involve is outweighed by the reduction they achieve in the danger to the basic liberties from non-compliance: “Citizens may affirm the law as the lesser of two evils, resigning themselves to the fact that while they may be held guilty for things they have not done, the risks to their liberty on any other course would be worse.”⁷ With analogous reasoning, one could justify relaxing the constraints on the pursuit and interrogation of suspects, lowering standards of evidence in criminal trials, and imposing Draconian punishments for offenses (like drunk driving) that, though

3. Rawls, *A Theory of Justice*, *supra* note 1, at 266.

4. *Id.* at 187.

5. *Id.* at 193.

6. *Id.* at 205.

7. *Id.* at 213.

non-malicious, are quite harmful and can be substantially cut back through deterrence.

Reflection on the penal system makes evident how the PRO approach is defective: As *recipients*, we may indeed not care whether our basic liberties are endangered by harms that are mandated or authorized by our institutional order and inflicted by state officials or by harms that are insufficiently prevented and deterred by our institutional order and inflicted by criminals and private persons. But as politically responsible *citizens*, who participate in imposing this institutional order on others, we do give greater weight to harms that are officially inflicted (“in the name of the people”)—such as punishments of the innocent under strict-liability criminal statutes or Draconian punishments—than to harms that are thereby avoidable. The PRO approach reflects only the first of these perspectives. An adequate conception of social justice must balance both.

Having briefly expressed my reservations about the PRO approach,⁸ which Rawls’s domestic and international theories share in common, let me now turn to some of the divergences. For Rawls, these differences between his two PRO theories demonstrate the “versatility” and “flexibility” of his original position.⁹ I see them as unexplained asymmetries that further damage the credibility of his international theory.

II. THE EXCLUSIVE CONCERN FOR THE INTERESTS OF PEOPLES

Much attention has already been paid to the fact that Rawls puts so much moral weight on the notion of a people. This notion is marred by a double vagueness. First, it is unclear what groups are to count as peoples. Does Rawls want to count any group of persons residing together within the territorial boundaries of a state? What about the Kurds, the Jews, the Chechens, the Maori, the Sami, and hundreds of other traditional and aboriginal nations, which often transcend state borders or are nested within one another? Secondly, it is unclear how each of the recognized peoples is delimited. Is this decided by passport, culture, descent, choice, or any combination of these and perhaps other criteria? Can persons belong to several peoples or to one at most? All these questions would assume considerable importance in any attempt to realize the “Society of Peoples” Rawls envisions as his “realistic utopia.” And yet, he pays no attention to them at all.

8. These reservations are more fully stated in Thomas W. Pogge, *Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions*, Soc. Phil. & Pol’y, Summer 1995, at 241, and in *The Just Society* 241, 241-66 (Ellen Frankel Paul et al. eds., 1995); Thomas W. Pogge, *Responsibilities for Poverty-Related Ill Health*, Ethics & Int’l Aff., Nov. 13, 2002, at 71-79; Thomas W. Pogge, *Equal Freedom for All?*, 28 *Midwest Stud. in Phil.* (forthcoming 2004).

9. Rawls, *The Law of Peoples*, *supra* note 2, at 40, 86.

It has also been frequently noted that Rawls endorses normative individualism domestically but rejects it internationally. (Normative individualism is the view that, in settling moral questions, only the interests of individual human beings should count.) This is an asymmetry insofar as, in Rawls's domestic theory, the interests of collectives (e.g., associations) are given *no* independent weight—are considered only insofar as individuals choose and identify with them. In Rawls's international theory, by contrast, peoples are recognized as ultimate units of moral concern, that is, as collectives with interests that are *not* reducible to interests of individual persons.

More remarkable than this divergence of Rawls's international theory from its cosmopolitan competitors is his insistence that the interests of individuals *should not count at all* for purposes of selecting and justifying a particular set of rules governing state conduct. The only thing that counts is each *people's* interest "to preserve [its] equality and independence"¹⁰ as a stable well-ordered (i.e., liberal or decent) society.¹¹ What matters then is that any people ready and willing to constitute itself as a well-ordered society should have the economic means to do so. This may favor "provisions for ensuring that in all reasonable liberal (and decent) societies people's basic needs are met"¹²—though the basic needs of members of the remaining peoples (pointedly excluded by Rawls¹³) are a different matter. But beyond this, Rawls's international deliberators do not care to what extent alternative plausible formulations of the laws of peoples would result in individuals suffering from being very poor—either absolutely or relative to the citizens of other countries.

Rawls reaches his egalitarian conclusions about international justice, then, by means of an undefended and dramatic asymmetry: While the interests of individual human beings are the only ones that count within Rawls's domestic theory, such interests of individuals do not count at all within his international theory. Rawls acknowledges this point, at least in general terms, when he characterizes his international original position as one "that is fair to peoples and not to individual persons."¹⁴ But his later attempt to defend the exclusion of individual interests by appeal to the desirability of accommodating decent hierarchical societies¹⁵ fails: Just as liberal societies are said to be concerned for "the well-being of their citizens,"¹⁶ so decent hierarchical societies are said to be committed to a common good idea

10. *Id.* at 41; *see id.* at 70.

11. *Id.* at 33, 69.

12. *Id.* at 38.

13. *See* Thomas W. Pogge, *An Egalitarian Law of Peoples*, 23 *Phil. & Pub. Aff.* 195, 209 (1994).

14. Rawls, *The Law of Peoples*, *supra* note 2, at 17 n.9.

15. *Id.* at 82-85.

16. *Id.* at 34.

of justice that involves a concern for “the human rights and the good of the people they represent.”¹⁷ If both types of domestic regime manifest a concern for the interests of individuals, then why doesn’t the international original position incorporate a concern for at least the jointly recognized individual interests, alongside the interest of each people in maintaining a stable well-ordered domestic regime? If the deliberators in the international original position gave even just a little weight, for example, to the interest of individuals in the absolute and relative socio-economic position they have an opportunity to attain (an interest that is recognized in societies of both kinds), then they would have reason to prefer global economic rules that tend to moderate rather than aggravate international economic inequality.¹⁸

III. THE STRUCTURAL ASYMMETRIES BETWEEN THE TWO THEORIES

Let me turn to what I consider the most important asymmetries, which have received little scholarly attention thus far. While the domestic theory is *three-tiered* and *institutional*, the international theory is *two-tiered* and *interaccional*. What exactly are these asymmetries, and what impact do they have on the conclusions Rawls claims the parties would reach in the two cases?

Domestic Theory	International Theory
Parties in the original position <u>who select</u>	Parties in the original position <u>who select</u>
a public criterion of social justice (Rawls’s two principles and two priority rules) <u>which selects</u>	a scheme of international rules (Rawls’s eight laws of peoples)
a basic-structure design for any specific empirical context	

17. *Id.* at 69.

18. I have raised this point in Section 3 of *An Egalitarian Law of Peoples*, Pogge, *supra* note 13, at 208-11, and so have subsequent commentators. But we are still missing a plausible defense of Rawls on this point.

In the domestic case, the parties are to adopt a public criterion of justice which is to guide the design, reform, and adjustment of the domestic institutional order within variable natural, historical, cultural, and economic-technological circumstances. In the international case, the parties are asked to endorse particular international rules directly.

The former, three-tier construction provides more flexibility for adapting to diverse circumstances. It leaves important features of the basic structure open while prescribing only the grounds on which they should be settled in a given concrete context. Whether and to what extent there should be private ownership in means of production, for example, is to be settled pursuant to the difference principle by examining which solution (satisfying the first and opportunity principles) would engender the best socioeconomic floor. Circumstances may change, of course, and citizens may then have reason to re-organize the basic rules of their legal and political system in order to maintain the security of the basic liberties or they may have reason to re-organize the basic rules of their economic order so as to keep the difference principle satisfied.

The latter, two-tier construction provides no such flexibility. The members of Rawls's Society of Peoples are locked into a particular set of rules which may well prove too rigid to fulfill their interests as peoples under changing global circumstances. Perhaps there are reasons favoring a two-tier construction. It could be said, for instance, that the probability of errors and corrupt judgments is reduced when political actors are constrained by rigid rules rather than by rules that are to be adjusted, under the guidance of a public criterion of social justice, to changing natural, historical, cultural, and economic-technological circumstances. But one would like to be told what these reasons are and, especially, why they should be decisive in the international, but not in the domestic, case.

The structural disanalogy leads to important substantive differences. Consider the question to what extent members of one generation should be made to bear the economic costs of decisions made by their predecessors. Rawls's domestic theory rules out some such costs completely, through the first and opportunity principles: All members of society, no matter how irresponsibly their parents may have behaved, have an equal claim to a fully adequate scheme of equal basic liberties as well as to fair equality of opportunity. Beyond this, Rawls's domestic theory gives a flexible response: Social institutions may allow persons to be selectively penalized for their parents' failure to save, or for their parents' high fertility, only if and insofar as such selective penalization—mainly through the greater incentives it gives parents to behave responsibly—tends to raise the socio-economic floor. The degree of such selective penalization embodied in social rules may then need to be adjusted over time so as

to track changes in parental dispositions. Social rules or institutions are viewed as mere means, to be adjusted so as optimally to achieve the ends specified in Rawls's criterion, which here is the end prescribed by the difference principle.

Internationally, the same issue arises with regard to societies that have a low rate of savings or a high birth rate. In this case, however, Rawls asks *directly* what the rules should be and asserts that the costs of decisions made by former members of a society should be borne entirely by its present members. To impose any of these costs on other societies "seems unacceptable."¹⁹ Here, again, one would like to be told why a different response should be appropriate in the international case. As it is, the difference in moral content is a byproduct of an unexplained variation in the parties' task description, which prevents them from adopting a flexible solution that would be sensitive to empirical information about how much loss through moral hazard would actually occur under global economic institutions designed to have a moderating effect on international inequality.

In pressing this point, I am not dismissing Rawls's concern for the moral significance of collective self-governance, which Stephen Macedo stresses in his contribution to this volume. Nor am I denying that collective self-governance plausibly requires the self-governing collective to receive a disproportionate share of the benefits and burdens deriving from its decisions. Rather, I am adding two thoughts.

First, even in Rawls's ideal world of exclusively well-ordered and self-governing peoples, there may still be reasons to favor *some* burden sharing so that especially poorer and weaker societies²⁰ bear not the full consequences of their unfortunate decisions but only a disproportionate share thereof. One such reason comes into play when the consequences of crucial decisions made for a society would be borne by persons who had no role in this decision—by later generations, for instance, or by persons living at the bottom of a decent hierarchical society and hence excluded from political participation. Another reason comes into play when the consequences of crucial decisions made for a society are heavily influenced by luck or other unforeseeable intervening causes. The force of these reasons is widely recognized with regard to the decisions of autonomous families, so why should they not be applicable to societal decisions as well? And even where neither of these reasons applies, our domestic institutions often mitigate even

19. Rawls, *The Law of Peoples*, *supra* note 2, at 117, 118.

20. In first approximation, we may think of the poorer societies as the ones with lower gross national income per capita. Poverty contributes to weakness, but there are other factors besides, such as low population, meager resources, inhospitable climate, remote location (e.g., land-locked), feeble military potential and dominant neighbors.

self-caused hardships and disadvantages, for example through the tax system or the personal bankruptcy law. (A person who is seriously hurt through his own reckless conduct, for example, can claim some of his medical expenses as an itemized deduction and, if he was blinded by the accident, he can also claim a somewhat higher standard deduction in future years.) As we have seen, Rawls's domestic theory gives general support to such mitigation of costs that poor households must bear as a result of their decisions and provides guidance for how such mitigation should be structured in the light of empirical knowledge about the actual impact of moral hazards. Why should the international analogue to such mitigation be incompatible with self-governance or otherwise be unacceptable?

The second thought deepens and corrects the first by pointing out that how great the costs of an unfortunate decision are, and what sorts of burdens it might result in, depend importantly on the larger institutional context in which this decision is made. Society can be organized to recognize and enforce slavery or debt bondage. If it is, then unfortunate decisions by parents can result in their children growing up as slaves or virtual slaves, chained to looms or laboring in underground mines. Or society can be so organized that no parental decisions can deprive children of equal access to the national health and education systems and hence of the opportunity to compete for employment on nearly equal terms later in life. This contrast shows that the burdens typically arising from unfortunate decisions are much larger under some designs of the institutional order than under others, even when the latter involve no quantifiable burden sharing or regrettable loss in family autonomy.

The same holds also for the international realm, where the collective self-governance Macedo celebrates is not seen as diminished, for instance, by the fact that international lending rules do not enable states to put up their historical treasures (let alone their children) as loan collateral. Here is a more relevant contrast: The international order can be so structured that the rules of the world economy reflect the bargaining power of the various states, effectively preventing poorer societies from achieving the rates of economic growth that are easily available to richer ones; or this order can be structured so that it, regardless of the distribution of power, maintains fair and open markets that actually make it easier for poorer than for richer societies to achieve high rates of economic growth. Even if (my first thought notwithstanding) we accept the principle that national populations ought to bear the "full consequences" of decisions they or their ancestors had made, we can still opt for either of these two contrasting institutional designs. Our choice of global order thus co-determines what the full consequences of national decisions are. The latter design, when combined with the principle of full consequences,

would clearly engender much less hardship and inequality than would the former.

The structural difference between the tasks Rawls assigns to the parties in his domestic and international original positions is associated with two distinct conceptions of economic justice. When we reflect upon social rules directly, as Rawls does in the international case, it may seem plausible to let participants themselves negotiate the terms of their economic interactions: "2. Peoples are to observe treaties and undertakings. 3. Peoples are equal and are parties to the agreements that bind them."²¹ To block the danger of excessive poverty arising from such libertarian rule making, Rawls adds the rule that "8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime."²²

But Rawls himself finds strong reason to reject such a mildly constrained libertarianism in the domestic case. When a society's economic order arises from free bargaining among its members, the rich can use their greater bargaining power to shape and reshape this order in their own favor, which enables them to expand their advantage by capturing a disproportionate share of the social product. As Rawls writes eloquently:

suppose we begin with the initially attractive idea that social circumstances and people's relationships to one another should develop over time in accordance with free agreements fairly arrived at and fully honored. Straightaway we need an account of when agreements are free and the social circumstances under which they are reached are fair. In addition, while these conditions may be fair at an earlier time, the accumulated results of many separate and ostensibly fair agreements, together with social trends and historical contingencies, are likely in the course of time to alter citizens' relationships and opportunities so that the conditions for free and fair agreements no longer hold.²³

He warns of:

the tendency . . . for background justice to be eroded even when individuals act fairly: the overall result of separate and independent transactions is away from and not toward background justice. We might say: in this case the invisible hand guides things in the wrong direction and favors an oligopolistic configuration of accumulations that succeeds in maintaining unjustified inequalities and restrictions on fair opportunity.²⁴

In the domestic case, Rawls demands that the rules of economic

21. Rawls, *The Law of Peoples*, *supra* note 2, at 37.

22. *Id.*

23. John Rawls, *Political Liberalism* 265-66 (1996).

24. *Id.* at 267.

interaction must not be shaped by free bargaining, but must rather be designed and adjusted so as to minimize hardships and inequalities and to preserve background justice.

Rawls seems to recognize that allowing the terms of economic interaction to be shaped by free bargaining poses a threat to background justice also in the international case.²⁵ And it certainly does. Consider a world, not unlike ours, in which 15% of humankind live in developed countries, with average per capita GDP around \$30,000, and 85% live in underdeveloped countries, with average per capita GDP around \$1,200. Assume that all societies are either liberal or decent and that the affluent societies honor their duty of assistance whenever poverty threatens the well-orderedness of any society. In this world, conventions and treaties are negotiated about trade, investments, loans, patents, copyrights, trademarks, double taxation, labor standards, environmental protection, use of seabed resources, and much else. In many ways, all these agreements can be shaped to be more or less favorable to various affected parties and, in particular, shaped to be more favorable to affluent societies (and their citizens and corporations) or to poor societies, whose respective interests will tend to be closely aligned in regard to most issues. Here the affluent societies, together controlling 82% of the global product and access to the world's most lucrative markets, enjoy great superiority in bargaining power, information, and expertise over the poor societies as a group. Able and eager to exploit this superiority, they shape the global economic order as much as possible to their own advantage and capture the lion's share of the benefits from economic interaction. The invisible hand guides things in the wrong direction, allowing the affluent societies to achieve higher rates of growth in per capita GDP, thereby further aggravating the discrepancy in bargaining power. All this is amply familiar from the actual world: Between 1975 and 1997, real per capita GDP increased 53% on average in the industrialized countries and decreased 15% in the poorest countries.²⁶ "The income gap between the fifth of the world's people living in the richest countries and the fifth in the poorest was 74 to 1 in 1997, up from 60 to 1 in 1990 and 30 to 1 in 1960."²⁷ Earlier estimates are 11 to 1 for 1913, 7 to 1 for 1870, and 3 to 1 for 1820.²⁸

25. Rawls, *The Law of Peoples*, *supra* note 2, at 42-43.

26. United Nations Development Program, *Human Development Report 154* (1999).

27. *Id.* at 3.

28. *Id.*; *see id.* at 38. For disturbing evidence about the rise of interpersonal inequality worldwide, see Branko Milanovic, *True World Income Distribution, 1988 and 1993: First Calculation Based on Household Surveys Alone*, 112 *Econ. J.* 51 (2002). Milanovic reports that, over the studied five-year period, "the bottom 5% of the world grew poorer, as their real incomes decreased between 1988 and 1993 by ¼ [25 percent!], while the richest quintile grew richer. It gained 12% in real terms, that

Securing merely a fixed minimum, Rawls's duty of assistance does not protect poor societies against skewed and deteriorating international terms of economic interaction exacted from them through the greater and increasing bargaining power of the affluent. Rawls seems to see the problem when he writes that any "unjustified distributive effects" of cooperative organizations need to be corrected²⁹ and even suggests that the international parties, going beyond his official eight laws of peoples,³⁰ "would agree to fair standards of trade to keep the market free and competitive."³¹ But how are we to judge whether distributive effects are "unjustified" or trading arrangements "unfair"? To answer this question, Rawls would need to provide a principle that assesses and adjusts the global economic order in light of its distributive effects in the way his difference principle assesses and adjusts the domestic economic order. But Rawls specifically rejects any such principle without "a target and a cutoff point" in the international case.³² He also rejects any international analogue to a democratic process, which allows a majority of citizens in a liberal society to restructure its economic order if it favors the rich too much. The global economic order of Rawls's utopia is then shaped by free bargaining and thus reflects, and tends continuously to augment, the advantaged position of the wealthier societies. The imposition of such an economic order is not made right by the fact that those advantaged by it keep the disadvantaged from falling below some minimum.

IV. DO THE ASYMMETRIES GET RAWLS THE RESULT HE WANTS?

We have seen that Rawls greatly helps his case against egalitarian and/or cosmopolitan critics of his scheme of eight rules³³ through three important and unexplained departures from his domestic theory. Let me recapitulate.

By conceiving his international theory *interactionally*, as seeking rules of good conduct, Rawls sidelines what he correctly identifies, within the domestic context, as the most important moral topic: the design of the institutional order, which crucially shapes the character of the relevant actors as well as the options and incentives they face. It is undeniable that, today and in the foreseeable future, there is a global institutional order that importantly affects the options and incentives societies and their rulers face in their relations with one another and even affects profoundly the domestic institutions and

is it grew more than twice as much as mean world income (5.7%)." *Id.* at 88. Per capita incomes declined in all other quintiles. *Id.* at 75.

29. Rawls, *The Law of Peoples*, *supra* note 2, at 43, 115.

30. *Id.* at 37.

31. *Id.* at 43.

32. *Id.* at 115-19.

33. *Id.* at 37.

cultures of especially the smaller and weaker societies. By allowing this global order to be shaped and adjusted through free bargaining among states, Rawls puts it almost entirely beyond moral assessment.

While Rawls's domestic theory gives weight *only* to individuals and their interests, his international theory gives *no* weight to individuals and their interests. To be sure, the recognized interest of peoples—to preserve their equality and independence as a well-ordered (i.e., liberal or decent) society—may accord with the interest of individuals to live in a well-ordered society whose equality and independence are preserved. But individuals do have other interests as well, many of which are relevant to formulating rules for the good conduct of states. For example, individuals have an interest in avoiding severe poverty (which they may well suffer even if their society is at or above Rawls's assistance threshold). And the citizens of a society also have an interest in being able to avoid very large discrepancies between their own socio-economic level and that prevailing in more affluent societies.

Rawls's domestic theory is three-tiered and, through the middle tier, systematically incorporates sensitivity to empirical information about the distributional effects of alternative feasible institutional arrangements. His criterion of social justice makes explicit the point or purpose of domestic social institutions and thus demands systematic reflection about which basic structure design offers, in the given circumstances, the best prospects in regard to that point or purpose. Rawls's international theory, by contrast, is two-tiered and so does not systematically incorporate information about the empirical (statistical) effects of alternative formulations of the "Law of Peoples."

Do these three unexplained departures from his domestic theory enable Rawls to support his eight laws as the formulation that representatives of liberal and decent peoples would agree upon behind their veil of ignorance? Perhaps they do. Yet all he actually offers in the text is the bald assurance that "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."³⁴

In fact, such representatives *do* have reasons to propose alternatives. As Rawls acknowledges, it is generally more difficult for poor societies to maintain a stable well-ordered regime. So representatives of peoples, behind a veil of ignorance, have reason to favor a more egalitarian scheme of economic cooperation under which well-ordered societies would have a better chance of being comfortably *above* the minimal threshold needed to maintain a well-ordered regime. Second, as Rawls does not concede, great

34. *Id.* at 41; *see id.* at 69.

international inequalities breed corruption in the poorer countries, where politicians and bureaucrats find that they have more to gain from catering to the interests of rich foreign governments and corporations than from promoting the interests of their own much poorer compatriots. So representatives of peoples, behind a veil of ignorance, have reason to favor a more egalitarian law of peoples that will keep *relative* poverty of societies from becoming excessive.³⁵

I think Rawls overlooks these points because he subscribes, usually at least, to what I have called the purely domestic poverty thesis ("PDPT").³⁶ The PDPT holds that peoples are masters of their own fate, that the causes of national poverty and international inequality are purely domestic:

[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 Crucial also is the country's population policy.³⁷

If a society does not want to be poor, it can curb its population growth or industrialize³⁸ and, in any case, "if it is not satisfied, it can continue to increase savings, or, if this is not feasible, borrow from other members of the Society of Peoples."³⁹

Rawls is here prone to make two interrelated mistakes. First, like many others, he infers from the great diversity in the economic and political performance of developing countries that the persistence of severe poverty is explained by domestic factors alone.⁴⁰ When societies fail to thrive, he writes, "the problem is commonly the nature of the public political culture and the religious and philosophical traditions that underlie its institutions. The great social evils in poorer societies are likely to be oppressive government and corrupt elites."⁴¹ This reasoning is fallacious. It does not follow from great diversity in

35. See Pogge, *supra* note 13, § 4.

36. See Thomas W. Pogge, "Assisting" the Global Poor, in *The Ethics of Assistance: Morality and the Distant Needy* (Deen K. Chatterjee ed., 2004).

37. Rawls, *The Law of Peoples*, *supra* note 2, at 108.

38. *Id.* at 117-18.

39. *Id.* at 114.

40. *Id.* at 108.

41. John Rawls, *The Law of Peoples* (1993 essay version), reprinted in John Rawls: *Collected Papers* 559 (Samuel Freeman ed., 1999). Rawls is here echoing Michael Walzer:

it is not the sign of some collective derangement or radical incapacity for a political community to produce an authoritarian regime. Indeed, the history, culture, and religion of the community may be such that authoritarian regimes come, as it were, naturally, reflecting a widely shared world view or way of life.

Michael Walzer, *The Moral Standing of States: A Response to Four Critics*, 9 *Phil. & Pub. Aff.* 209, 224-25 (1980).

the performance of my students that their learning success is due to local (student-specific) factors *alone*, that the “global” factor of the quality of my teaching has nothing to do with it. And the conclusion is false, as I have already illustrated by adducing the impact of global trading rules on the evolution of the international distribution of per capita GDP.

Second, again like many others, Rawls overlooks how—especially in the poorer, weaker countries—the domestic factors he cites are themselves significantly shaped by global factors. Oppression and corruption in the poor countries have been decisively encouraged and entrenched through the tax-deductibility of bribes that multinational corporations have paid to officials in the developing countries as well as through the international resource and borrowing privileges I have extensively discussed elsewhere.⁴²

So I conclude that, even if we accept the three unexplained asymmetries and conduct the international original-position thought experiment just the way Rawls wants it conducted, we still find that the rational deliberators have reason to favor a more egalitarian global order over one whose design is left to free bargaining among states. To be sure, Rawls seems to have instructed the international parties that they should aim for agreement on interactional rules of good conduct rather than on the design of the global institutional order. Even so, they can and would nonetheless adopt, as such a rule of good conduct, that peoples should advocate and support a global economic order that tends to mitigate international economic inequality by affording better opportunities to achieve high rates of economic growth to poorer than to richer societies. Whether poorer societies take advantage of these superior opportunities would be, of course, up to them.

V. ONE MORE UNEXPLAINED ASYMMETRY

I have tried to show that Rawls’s international theory is in various ways incoherent with his domestic theory of justice. There is one further, quick way of supporting this same result. Developing his domestic theory, Rawls writes: “At some level there must exist a closed background system, and it is this subject for which we want a theory.”⁴³ And so he assumes throughout, if only for purposes of “a first approximation,”⁴⁴ that the society whose institutional order he discusses is “self-contained,”⁴⁵ “more or less self-sufficient,”⁴⁶ and “a

42. See Thomas W. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* §§ V, 4.9, 6.2-4, 8.2.1 (2002).

43. Rawls, *Political Liberalism*, *supra* note 23, at 272 n.9.

44. *Id.*

45. Rawls, *A Theory of Justice*, *supra* note 1, at 401.

46. *Id.* at 4.

closed system isolated from other societies.”⁴⁷ The members of such a society ought to structure it, he concludes, according to his public criterion of justice (the two principles with the two priority rules).

Since the world at large seems to fit Rawls’s stipulations, (being self-contained, more or less self-sufficient, and a closed system isolated from other societies)—certainly better than any national societies do—how about structuring *it* in accordance with the public criterion of social justice Rawls proposes in his domestic theory? Rawls not only denies that we ought to do this, but even insists that we ought not. But what reasons can he offer?

He could adduce his opposition to a world state. Rawls writes: “Here I follow Kant’s lead in *Perpetual Peace* (1795) in thinking that a world government . . . would either be a global despotism or else would rule over a fragile empire torn by frequent civil strife as various regions and peoples tried to gain their political freedom and autonomy.”⁴⁸ Yet Kant’s view on this question may not be the best evidence one can have about whether a just world government is feasible in the twenty-first century or beyond. Moreover, if Rawls finds the view he attributes to Kant convincing, then he should have incorporated it into his domestic theory, which should then require that no society must grow beyond a certain population or area, or perhaps beyond a certain percentage of the global population or land

47. *Id.* at 7.

48. Rawls, *The Law of Peoples*, *supra* note 2, at 36. Rawls is here giving an unbalanced reading of Kant’s late essay, which has this to say about a world republic:

For states in their relation to one another, there cannot be any reasonable way out of their lawless condition which entails only war except that they, like individual human beings, should give up their savage (lawless) freedom, adjust themselves to public coercive laws, and thus establish a continuously growing international state (*civitas gentium*), which will ultimately include all the nations of the world. But under their idea of the law of nations they absolutely do not wish to do this, and so reject in practice what is correct in theory. If all is not to be lost, there can be, then, in place of the positive idea of a world republic, only the negative surrogate of an alliance which averts war, endures, spreads, and checks the force of that hostile inclination away from law, though such an alliance is in constant peril of its breaking loose again.

Immanuel Kant, *Perpetual Peace*, in *Kant’s Political Writings* 105 (H.B. Nisbet trans., Hans Reiss ed., 1995). The passage Rawls seems to have in mind says that a plurality of independent states:

is still to be preferred to their amalgamation under a single power which has overruled the rest and created a universal monarchy. For the laws progressively lose their impact as the government increases its range, and a soulless despotism, after crushing the germs of goodness, will finally lapse into anarchy.

Id. at 113.

surface area.⁴⁹ But Rawls's model of a liberal well-ordered society contains no such limitations.

Finally, even if a just world government were infeasible, this would not invalidate the application of Rawls's public criterion of social justice worldwide: This criterion does not prescribe a certain institutional order, but governs the comparative assessment of alternative feasible such orders. Applied globally, it would instruct us to design a global political order under which the basic liberties of all human beings would be secure and a global economic order that realizes fair equality of opportunity worldwide and permits inequalities among persons only insofar as they raise the socioeconomic floor. If a world government is not part of the best arrangement (because it exposes the basic liberties of people to the dangers of oppression and civil strife), then alternative institutional arrangements must be considered—perhaps a world federation like the one Kant envisioned or like the European Union.

Suppose a majority of the world's people wanted to design the global institutional order according to the criterion of social justice Rawls proposes for the domestic case, aiming for the global order that comes closest to fulfilling this criterion. Why should it be wrong for them to do this? This would be wrong, Rawls suggests, because it would impose a global order designed according to a liberal criterion of social justice upon decent peoples which may reject the normative individualism of this criterion as well as its emphasis on basic liberties. Rawls's own international theory is superior in this regard because, rejecting normative individualism, it accommodates decent peoples who are to be tolerated by liberals and welcomed as equal "members in good standing of the Society of Peoples."⁵⁰

Rawls's suggestion raises three questions. First, why should the appropriate mutual accommodation between those who endorse and those who reject normative individualism be a theory that rejects it? Seeing how Rawls's international theory of justice disregards the basic liberties of persons outside well-ordered societies, truncates the basic liberties of persons in decent societies,⁵¹ and tolerates poverty and huge inequalities worldwide, why should liberals find it appealing? This problem could be mitigated by following my earlier suggestion that the most important interests of *persons* should be represented in the international original position alongside those of peoples.

49. Kant suggests such a limit, citing his concern for avoiding "the most fearful despotism (as has indeed happened more than once with overly large states)." *Id.* at 90.

50. Rawls, *The Law of Peoples*, *supra* note 2, at 59.

51. Decent hierarchical societies, though they solicit the views of social groups through a "decent consultation hierarchy," have no democratic procedures, *id.* at 71-73, and may also, perhaps pursuant to a state religion, impose substantial and unequal restrictions on freedom of expression and liberty of conscience, *id.* at 74.

Second, why must the opponents of normative individualism be accommodated in the design of the global institutional order but not in the design of the domestic institutional order of a liberal society? If global arrangements must “express liberalism’s own principle of toleration for other reasonable ways of ordering society,”⁵² then why must not domestic arrangements also reflect such toleration by instantiating some compromise between liberal and non-liberal (communitarian) values?⁵³

This question leads naturally to the third: Is Rawls’s insistence, that the rules of good conduct for peoples must be hospitable to decent societies, a matter of principle or is this insistence contingent on historical facts, such as the existence and numerical strength of decent societies? Rawls describes a fictional decent hierarchical society, Kazanistan, in which normative individualism is rejected.⁵⁴ But is the mere possibility of such societies reason enough to accommodate them in the design of the international original position and the envisioned Society of Peoples—even if such accommodation accommodates no living persons or peoples?

It is unclear how Rawls would answer this question. Either answer would reveal a gap in his reasoning. To motivate an affirmative answer, he would need to explain why an equal place should be indefinitely preserved for such societies when Rawls himself deems them morally flawed—“[a] decent hierarchical society . . . does not treat its own members reasonably or justly as free and equal citizens”⁵⁵—and defends accommodation by claiming that it encourages decent societies to develop in a liberal direction.⁵⁶

A negative answer would leave a different gap, as Rawls gives no evidence that there really are non-liberal societies that qualify as decent and reject normative individualism. Contemporary defenses of non-liberal societies often stress how happy and secure individuals feel under their more authoritarian, communal, or moralizing social institutions and how disorienting and alienating they find liberal ones. Thus, justifications of decent regimes might well take the interests of persons as morally fundamental. If actual decent regimes were so justified, or if no such regimes existed, then a liberal commitment to accommodate actual decent peoples would *not* support an

52. Rawls, *The Law of Peoples*, *supra* note 41, at 530.

53. I am here suggesting that Rawls’s proposed Society of Peoples instantiates a compromise between liberal and decent values. This suggestion may be too generous. While the proposal compromises liberal values severely (as outlined in the preceding paragraph), it is unclear whether it requires any concessions from decent hierarchical societies at all. As far as I can see, they get the rules that best accord with their values and interests.

54. Rawls, *The Law of Peoples*, *supra* note 2, at 75-78.

55. *Id.* at 83.

56. *Id.* at 61-62.

international original position that represents peoples rather than persons.

Rawls's proposed accommodation presupposes humanity's division into mutually distinct and culturally cohesive peoples. Is this presupposition meant to reflect a moral valuation or entrenched empirical facts? Again, either possibility leads into difficulty. The former answer is problematic, because *A Theory of Justice* expresses the opposite moral view. The latter answer is problematic as well, because Rawls makes no effort to show that his concept of a people reflects general and entrenched facts in the contemporary world. Many borders in Africa, Latin America, and Asia are colonial constructs that lump diverse communities together (Indonesia) while splitting others over two or more states (Kurds). In Europe, borders are rapidly losing practical significance, so that the notion of a people seems increasingly ill-fitted to the old groups (the Dutch and the Danes) and ill-fitted also to the new and still expanding population of the European Union. In the midst of globalization, we can easily imagine a broadening of this trend, leading to a world in which most borders have little political and practical significance or do not correlate with "separate languages, religions, and cultures."⁵⁷

The status of Rawls's account remains then unclear: Calling his Society of Peoples a "realistic utopia," does he propose it as the highest ideal for the indefinite future? Or is it a stopgap model meant to accommodate, so long as they are still around, some slightly backward but still basically passable societies that are best handled with tolerance and equal respect—a stopgap model to be superseded, in a hoped-for future era when nearly all societies will have become liberal, by a genuinely liberal conception of global justice? Perhaps *The Law of Peoples* is not meant to be clear on this point. The accommodation of decent societies can have its desired effects only if it is genuine and unconditional, only if decent societies feel assured that their equal place is secure indefinitely irrespective of their number or power.⁵⁸ This parallels the liberal domestic accommodation of diverse comprehensive (e.g., religious) doctrines. But there are two crucial differences: Rawls expresses no preferences within the range of reasonable comprehensive doctrines and he predicts that, barring state oppression, citizens will continue to hold and to respect doctrines throughout this range.⁵⁹ In the international case, by contrast, Rawls holds that decent societies are morally inferior and hopes that all human beings will eventually live under liberal institutions. Ought the humanity of such a happy future age

57. *Id.* at 112.

58. *See id.* at 122-23.

59. The "fact of reasonable pluralism." Rawls, *Political Liberalism*, *supra* note 23, at 36.

share his concern to maintain a global order fully acceptable and hospitable to decent regimes? It may seem wise to leave this issue unexplored.

CONCLUSION

My disagreements with Rawls's views on international justice are deep and long-standing. Still, I am most grateful to him for having worked so hard, under most adverse conditions, to give us a final and full articulation of these views. I am also very glad that he formally incorporated the duty of assistance into his *The Law of Peoples*.⁶⁰ This duty, suitably specified, supports a critique of most of the more affluent societies today for doing far too little toward enabling the poorer societies to be well-ordered. Given the magnitude of their failure and indifference, this critique might well qualify those wealthier societies as "outlaw states" in Rawls's sense.

Still, this important insight should not obscure the even more important point that these affluent societies are not merely helping too little, but also harming too much: by imposing a global institutional order under which, foreseeably and avoidably, nearly half of humankind are still living in abject poverty and about one-third of all human deaths are still from poverty-related causes.⁶¹

60. This duty was not listed in the earlier essay. Rawls, *The Law of Peoples*, *supra* note 41, at 540.

61. According to the latest figures available from the World Bank, 2.8 billion out of a total of 5.9 billion human beings were in 1998 living below the \$2/day poverty line, which corresponds to an annual income with the purchasing power that \$785.76 had in the US in 1993. See Shaohua Chen & Martin Ravallion, *How Did the World's Poorest Fare in the 1990s?*, 47 *Rev. Income & Wealth* 283, 290 (2001). These 47% of the world's population live on about 1¼% of the global social product. See World Health Organization, *The World Health Report 2002* annex tbl. 2. (2002), available at <http://www.who.int/whr/2002/en/>; see also *supra* note 36.

Notes & Observations