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A HYBRID THEORY OF GLOBAL JUSTICE

by

Jill Baker Delston

A dissertation presented to the  
Graduate School of Arts and Sciences  
of Washington University in  
partial fulfillment of the  
requirements for the degree  
of Doctor of Philosophy

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## **Chapter 1**

### ***Introduction***

On September 11<sup>th</sup>, 2001, terrorists attacked the United States, killing nearly 3,000 victims and first responders. Seventeen days later, at an 11pm meeting on September 28<sup>th</sup>, the United Nations Security Council unanimously passed Resolution 1373. (U.N. 2001) Resolution 1373 called for the prevention, suppression, and criminalization of terrorist financing. As a response to 9/11, it was swift, powerful, and tackled issues central to the ability of terrorists to carry out attacks. It also called for more broadly for all United Nations participatory states to, “Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism...” (U.N. 2001, 3. d). The United States had a vested national interest in gaining the consent and compliance of all states worldwide in preventing and suppressing the financing of terrorism. Was there also an international interest in pursuing those same goals? What are the obligations of global actors in preventing terrorism? Was their consent required to coercively implement these practices, or was the justice of its goals sufficient to ground their obligation? In this dissertation, I tackle these real world problems from a theoretical perspective to answer questions pertaining to international political norms. Although international legal institutions are already in place implementing law either through coercion or suggestion, we can still ask about the correctness and legitimacy of such institutions. A theoretical groundwork is needed to evaluate these global actors and their actions.

Although we have obligations to address global problems at a political level, we disagree on the source, justification, and content of these norms.<sup>1</sup> For example, what kinds of obligations exist across national borders and why? What international actions are right and wrong? Who is required to perform these actions? When is it permissible to use coercion at the global level?

There is a clear need for a theory answer these questions, to provide the source, justification, and content of global political norms. First, without a theory of global justice, we cannot know our obligations, understand them, or act on them except coincidentally or insufficiently. A theory of global justice also articulates what the norms for evaluating, compelling, and restricting global actors are. An incomplete or inconsistent theory would lead us astray in fulfilling our obligations. For example, it might lead us to misidentify what is required of us, misattribute responsibility, miscalculate the strength of these requirements, unsuccessfully apply it to problems we face, or some combination of the above. On the other hand, a successful theory not only avoids these problems, but might also uncover inconsistencies in the way we pursue justice at the global level. Is there cognitive dissonance in our pursuit of justice, or do we follow conflicting norms? Identifying the correct theory of justice answers these questions and insofar as we follow it, corrects our behavior.

Furthermore, as I argue in this dissertation, the source and justification of global political norms are inextricably tied to the content of these norms. Just as the nature of God might dictate the content of religious devotion, the nature of political norms may also dictate the content of those norms. This connection does not hold by necessity. There

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<sup>1</sup> The claim that we do have obligations to non-compatriots may be a controversial one, but it is the starting point of this dissertation.



may be some theories for which this connection does not hold. However, as I argue in Chapter 3, a successful theory of global justice includes human construction of political norms. Although this feature of the theory I defend does not require a complete and coherent theory of the norms' content per se, it can nevertheless give us the tools to fill in that content. Therefore, the source and justification of these norms also influences their content. Pre-theoretically, then, we cannot dismiss the connection between source, justification, and content. Unless we know that the content of our norms is not tied to their source, we have good reason to identify and discover that source. In other words, we face both practical and theoretical problems in identifying a theory of global justice.

Similarly, the content of such a theory plays a foundational role in the creation and continuation of global institutions. For example, the formulation of human rights has played a large role in the creation of international institutions including the European Court of Human Rights, International Criminal Court, and United Nations commissions, treaties, courts, and councils. A successful theory of international justice should revise and alter existing institutions as they continue to shape our globalized world.

Over the course of the dissertation, I make certain presuppositions that narrow the scope of my project. I assume the existence of norms for global justice. I assume, that is, that we have some duties to justice. This assumption motivates the necessity of providing the source, justification, and content of those international political norms. I also take for granted certain goods, such as that stability and freedom are good, for example. Although my argument does not rest on an exact list of goods or norms, I make certain basic assumptions that allow me to discuss the specifics of a global justice theory rather than talk in abstract terms. However, this theory is not all-encompassing. We might need an

entirely different sort of theory to account for the source and justification of other sorts of moral norms. In other words, although I make some meta-ethical claims, I narrow the scope of my project to include only global justice norms.

The last way in which I narrow the scope of my project is to focus on one particular set of international political norms. The theory I defend in this dissertation can and should be applied to a range of different global justice problems including war, poverty, hunger, immigration, and environmental standards. Although a theory of global justice is not required to provide a level of specificity akin to positive law, it is required to be comprehensive, specific, and action-guiding. In this dissertation, I provide a theory that can meet these requirements. However, it is beyond the scope of this project to apply it in all cases. For this reason, when I apply the theory to a practical issue in Chapter 7, I focus in particular on terrorism as a problem of global justice and anti-money laundering and combating the finance of terrorism (AML/CFT) as a method of addressing it. There, I apply the theory of global justice I defend to this set of global legal institutions. In so doing, I evaluate the current institutions as well as suggest changes as required by my proposed theory. I suspect that attempts to apply the view to other problems in global justice will lead to new theoretical and practical obstacles and plan to pursue this vein in future work. I leave open possible avenues for future work not only in applying the theory to other global dilemmas but also in revising the theory through this process of application. For example, applying the hybrid theory to issues like international environmental standards or global immigration problems might lead to further revisions of the theory. Thus, although I chose AML/CFT in part because it comprises international institutions largely ignored by the philosophical community but extremely powerful in

their reach, I also maintain that this hybrid theory can offer new and interesting solutions to problems more commonly addressed by international justice theorists.

Having delineated the need for a theory of global justice and the assumptions I make, it remains to be shown that a successful theory does not already exist. This project is the aim of Chapters 2 and 3. There, I identify two standard theories often thought to fill this gap. The first standard theory is what I call “non-constructivist.” Non-constructivism is an umbrella term that covers a range of different theories, all of which, at essence, take global justice to be primarily response-independent, objective, and universal. I divide non-constructivism into two types: derived and underived non-constructivism. Derived non-constructivism takes global political norms to be derivative of certain objective moral facts about what is good about human beings. Underived non-constructivism, which I call natural law theories, takes norms to be brute. Norms are not dependent on any basic facts or goods. In Chapter 2, I offer a two-pronged argument against this two-pronged definition. I argue that non-constructivism is incomplete and thus cannot fill the need for a theory of global justice. The other standard theory of global justice is constructivist and I focus on this type of theory in Chapter 3. I consider social contract theories in particular and argue that they, too, are incomplete.

If the two standard theories of global justice are conceptually flawed, then the need for a theory of global justice persists. However, the source of our problem is also the solution. Although each theory fails on its own to provide the grounding for a theory of global justice, each theory also provides valuable insights into what a good theory should look like. In fact, in Chapters 2 and 3, I also identify both intrinsic and instrumental reasons for retaining non-constructivism and social contract theory. What is needed, I

argue, is a synthesis of these two powerful theories. A hybrid theory of global justice is needed.

In Chapters 4-6, I offer a two-stage defense of hybrid theory. The first stage is a general defense of hybrid theory in which I argue that non-constructivism and social contract theory complete each other. The nature of the problems I pose to each theory in Chapters 2 and 3 explains the necessity of this combination I defend in Chapter 4. Social contract theory best solves the problems we find in non-constructivism and non-constructivism best solves the problems we find in social contract theory. They are individually necessary but also jointly sufficient for a theory of global justice.

In addition to defending hybrid theory generally, I also have a second stage in the defense of hybrid theory. In this second stage, I defend a particular hybrid theory. To identify a particular successful hybrid theory I first look to history in Chapter 5, where I find three compelling and instructive hybrid theories of justice in the works of Epicurus, Grotius, and Hobbes. My project in Chapter 5 is twofold. I have an interpretive project in which I identify the three theories as hybrid theories that each incorporates a non-constructivist and social contract strain. I also have a second, broader project in which I consider the strengths and weaknesses of these three theories in the hopes of supplying a historical solution to the need for a hybrid theory. Ultimately, I argue that while none of these theories can do the necessary work, they are all instructive for a better solution.

In Chapter 6, I continue the work of the second stage by offering an original hybrid theory of global justice that fills out the details previously unnecessary for the general defense of hybridity. Here, I fill out the two components of the hybrid theory by defending derived non-constructivism, tacit contractarianism, and individuals as parties

to the contract. I also show how these theories can be combined without incurring further problems. In particular, I explain how to evaluate actors and actions that fall short of meeting the two criteria in a hybrid theory of global justice.

In this two-stage defense of hybrid theory, I am more committed to the general defense than the particular one. The characteristics of the particular hybrid theory I defend in Chapter 6 could be changed or altered without undermining the larger project of defending hybrid theory generally. Nevertheless, it is crucial to my goals not only to explain the necessity of hybrid theory for global justice, but also to identify a successful version of it.

In the Chapter 7 of this dissertation, as stated above, I apply the particular tacit contractarian hybrid theory to a particular problem in global justice, namely, AML/CFT international legal institutions. By evaluating this exemplary problem, I not only demonstrate how to apply the theory, but also offer recommendations for changing and improving current practice. While I do not endorse the status quo, I do argue that some aspects of current institutions should be retained. This chapter shows not only that the particular hybrid theory I defend is theoretically possible, but also that it is practically achievable. Thus, while not all political norms currently in use can be justified by my theory, a clear way forward is demonstrated by application to terrorist financing.

In this dissertation, I criticize existing theory and practice regarding global political norms. Although these norms have been the subject of increasing academic debate, a theory of justice that successfully identifies global political norms, explains their justification, and pinpoints their source remains to be found. Similarly, although states, corporations, groups, and individuals all perform actions with global effects, we

lack a consistent and justifiable way of evaluating, compelling, and restricting these global actors. I seek to address both of these gaps.

## Chapter 2

### *Non-constructivist theory is necessary but not sufficient to ground a theory of global justice*

#### I. Introduction

Theories of global justice that ground sovereignty, political obligation, and legitimacy in objective, universal norms are common. Natural law, natural duty, and human rights theories are all examples of non-constructivist global justice theories. I argue that the non-constructed norms contribute to the way we should properly understand the norms governing global justice, but that they do not by themselves ground a complete set of political norms for the global realm. Thus, non-constructivist accounts are necessary, but insufficient by themselves to ground a theory of global justice.

In section II, I divide non-constructivist theories into two types. This disjunction is exhaustive; I take all non-constructivist theories to fall into one of the two camps. One version of non-constructivism takes objective goods to ground norms. I call these types of non-constructivist views “derived” theories of norms. The other version takes norms as brute; I call these underived versions of non-constructivism “natural law theories.” Next, I define each version of non-constructivism and offer tokens of each type including the capabilities approach as an example of the former and natural rights theory as an example of the latter. In sections III and IV, I level a two-pronged objection against the two-pronged theories to explain why non-constructivism is insufficient to ground a theory of justice the uses of coercion in the global realm. The objection I level against derived theories in section III I call *the choice problem* because these views are insufficient to choose among the various conflicting norms that follow from non-constructed goods. The

objection I level against underived theories in section IV I call *the specification problem* because these theories are insufficient to determine which specification of norms is privileged. However, some parts of non-constructivism emerge unscathed. In section V, I argue that a theory of global justice should retain these parts, including the assertion of goods for human beings and responsiveness to these non-constructed goods.

## **II. Defining non-constructivist theories**

I call response-independent, universal norms “non-constructed” because they do not come about as a result of any contract, association, or transaction. Non-constructivist theories of global justice explain justice wholly by non-constructed features. However, theorists can explain these non-constructivist components in two ways, necessitating a two-pronged definition. One type of view takes norms to follow directly from non-constructed goods about human beings, whereas the other type of view takes norms to be brute. I define each in turn.

### **A. Derived theories**

What I call derived non-constructivist accounts of the norms that guide and justify global action are unified four key respects. All such views take there to be certain facts about human beings that underlie and ground our normative judgments about political institutions. Specifically, non-constructivists proceed on the notion that there are non-constructed facts about what is good for human beings. These accounts develop some view of norms that follow from such facts. The first aspect of this view, then, is the derivability of norms from goods. However, the fact that norms are derivable from non-



constructed goods should not be confused with human beings playing a role in their construction. This derivation of norms is independent of human contribution.

Second, derived non-constructivists fill out this derivation of norms from goods with some content. The reliance on non-constructed goods often appeals to basic or minimalist conceptions of goods, such as the facts that make health a good for human beings. Third, this set of norms that follows from the non-constructed facts binds human beings; it obligates human beings to act in certain ways. Justice, then, requires compatibility with these norms. Fourth, the non-constructed norms are epistemically accessible to the human mind, either through rational reflection, intuition, divine revelation, scientific investigation, or some other process. Insofar as governing institutions comply with these norms, they are just and legitimate, and insofar as they violate these norms, they are unjust and illegitimate.

Several views take non-constructed facts about human beings to establish legitimacy for global political institutions. For example, Nussbaum's capabilities approach could be considered an example of this view.<sup>2</sup> The capabilities approach offers a finite list of human capabilities.<sup>3</sup> This list constitutes a series of non-constructed, natural facts about human beings. Based on this list, the capabilities approach offers a series of norms governing international institutions. For example, Nussbaum sets out ten principles governing the global structure aimed at individuals, (especially the elderly,

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<sup>2</sup> Especially as she sets out this view in (Nussbaum 2005).

<sup>3</sup> For example, as she defines the list in (Nussbaum 2002).

infirm, and disabled), families, multinational corporations, nations, and non-governmental organizations.<sup>4</sup>

Non-constructed facts also play a role in the goals that the capabilities approach seeks to achieve. According to Nussbaum, capabilities appeal to natural facts in the sense that, “The capabilities approach is an outcome-oriented approach. It says that a world in which people have all the capabilities on the list is a minimally just and decent world” (Nussbaum 2002, 210). Another example of this feature is Nussbaum’s statement that, “The capabilities approach aims at giving people the necessary conditions of a life with human dignity” (Nussbaum 2002, 212). In other words, the capabilities approach relies on natural facts about human beings both in the grounding of norms and in the measure of their success.

The capabilities approach as Nussbaum defines it exemplifies one non-constructivist account of the norms that define international justice. According to Nussbaum’s theory, nothing beyond the principles established by the non-constructed facts about human capabilities is required to determine whether international institutions are just or unjust. For this reason, her view constitutes one type of theory I argue against; not because it is wrong, but because it is incomplete.

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<sup>4</sup> See (Nussbaum 2002, 215-217). The principles range from principles governing the contribution of international aid to a prohibition of a world state in favor of a “thin, decentralized, and yet forceful global public sphere” (Nussbaum 2002, 216). This list is not meant to comprise a complete list, but rather to exemplify the way natural human capabilities can contribute to the construction of a just global society. However, Nussbaum includes several caveats to her ten principles including the admission that, “One might have had a list of twenty principles, rather than ten” (Nussbaum 2002, 217) and the assertion that the list “help[s] us think about how capabilities can be promoted in a world of inequalities” (Nussbaum 2002, 214) rather than establish the only possible norms that arise out of capabilities to govern the global structure. These qualifications foreshadow the choice problem I argue creates problems for this type of view.

## B. Natural law theories

The second subset of non-constructivist theories of justice I call natural law theories. They include some of the most common versions of non-constructed norms. I use the term “natural law theory” in part because this view has historically been associated and combined with social contract theory in a way that has added importance for my dissertation.

There are four defining characteristics of natural law theory and four corresponding sources of variation.<sup>5</sup> First, these views take norms as brute. Rather than deriving norms from facts, these theories posit natural or supernatural norms. For this reason, we may call such views “underived” non-constructivist theories. Second, they fill out the laws with content; third, compatibility with the natural laws compels and justifies action, and finally, the laws are accessible to the human mind.

The first feature I define in opposition to non-constructivist theories that take norms as derivable from objective facts about human beings. Not all theories make this jump from facts to norms and thus characterizing all non-constructivist views this way would be misleading. Furthermore, the character of the choice problem I level against derived non-constructivist accounts makes necessary this distinction, because the choice problem does not apply to natural law theories. However, as I argue in Section III, natural

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<sup>5</sup> Natural law theory, as a theory about norms, need not be implicated to the norms being natural. For example, some divine command theorists will explain the norms they endorse by arguing that they are divinely created, thus asserting the non-naturalism (that is, the supernaturalism) of the norms. Nevertheless, the laws are brute, obligate human beings, and are epistemically discoverable through nature, making the view a natural law view. If the theory endorses the supernaturalism of the laws *and* the view that the laws are discoverable only by divine revelation, there is some sense in which the view is not naturalist at any level. Some commonly conceived natural law theories like some versions of theological voluntarism might not be natural law theories in this view.

law theories are insufficient by themselves to clearly obligate human beings due to the specification problem.

The second feature of natural law theories is the content of the law, about which natural law theorists disagree. However, these laws tend to be basic, minimal, and general. A common natural law is, “Do not harm others.” For example, Grotius third law of nature is, “*Let no one inflict injury upon his fellow*” (Grotius 2005, 13). Hobbes’ fundamental law of nature is to “seek peace.” Locke says, “The *State of Nature* has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions” (Locke 1988, 271). Although all natural law theorists will devise a list of a dozen or so natural laws, and although there may be significant overlap on these laws, the content of those laws will remain a source of variation. Furthermore, central to natural law theory is the fact that the norms take the shape of laws or are law-like. Natural law theorists must in some sense endorse laws. Norms can be law-like in many ways. For example, you can get a law when you put together a natural right with its corresponding duty. The content of the laws bears out that the norms are either laws or are law-like.

The aspect of natural law theory that makes it a theory of justice is the third feature, that compatibility with the natural laws confers legitimacy for institutions, governments, or actions. All natural law theories, if they are theories of justice, take natural laws to ground legitimacy. According to these views, political coercion is justified by the compatibility with these laws. For example, natural rights views take political coercion to be justified only when it respects human rights. Natural law theory entails

that human beings are bound by natural moral norms or laws; natural laws obligate human beings essentially. In other words, no natural law theorist argues for the existence of brute moral laws, the epistemic availability of those laws, but does not take those moral facts or laws to obligate human beings.

The last unifying feature of natural law theory and a feature that is a defining characteristic is that there are epistemically accessible norms in nature. These natural laws exist as norms discoverable by the human mind. I call these laws epistemically natural because they are discoverable through investigation of nature alone, regardless of their existence conditions. Philosophers may not agree on how those natural facts are epistemically accessible, meaning that some think our knowledge is innate, some think our knowledge is derived from intuition, others think that our knowledge comes from the light of reason, and still others think that knowledge comes through scientific investigation. Disagreement on the previous two sources of variation among natural law theorists is not taken as evidence against the epistemic availability of knowledge about natural laws. Epistemic availability, then, is one of the central tenets of natural law theory.

Several versions of natural law theory are useful for my purposes: strict natural law, natural rights, and natural duty approaches. Strict natural law approaches are theories that conform to the above four defining characteristics with the added feature that the norms take the form of laws as opposed to merely being law-like. Thomas Aquinas is an example of this view. According to Thomas, "Law is nothing else than an ordinance of reasons for the common good, promulgated by him who has the care of the community. The natural law is promulgated by the very fact that God instilled it into

man's mind so as to be known by him naturally" (Q.90 Art. 4).<sup>6</sup> This passage explains both the existence conditions of the law<sup>7</sup> (based on God's decree), how human beings can know it<sup>8</sup> (instilled in human reason or "imprinted" on human beings), and implicitly shows that natural laws take the form of laws.<sup>9</sup>

Natural rights and natural duty theories are also examples of natural law theory in that they take rights or duties to be norms existing in nature and conforming to the four features defined above, but the content of the norms are law-like rather than taking the form of laws. Natural rights approaches—or human rights approaches as they are more often called—are sometimes described as civil, constitutional, or rights based in treaty. For obvious reasons, such versions of human rights theory do not fall under the purview of this definition. However, the majority of rights-talk centers on rights as God-given or existing in nature. For example, the Declaration of Independence takes rights to be God-given, stating that "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." That famous sentence fills in the four features of a natural law theory: it asserts the rights as brute, it lists the content of the rights, it explains the epistemic accessibility of the rights (self-evidence), it takes the rights to be binding (as is borne out in the document), and takes political coercion to be

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<sup>6</sup> (Thomas 1997, 868)

<sup>7</sup> "...All laws proceed from the eternal law" (Q. 93Art. 3).

<sup>8</sup> Also: "Accordingly, the, in speculative matters truth is the same in all men, both as to principles and conclusions; although the truth is not known to all as regards the conclusions, but only as regards the principles which are called *common notions*" (Q.94 Art.4) and "But the law which is written in men's hearts is the natural law. Therefore the natural law cannot be blotted out" (Q.94 Art. 6).

<sup>9</sup> "For natural law, above all, has the character of law" (Q. 90 Art. 4). This passage is in *Objection 1* but it is clear what is being objected is that natural law need not be promulgated and not that natural law has the character of law.

legitimate only if it respects the rights. According to the document, governments enforce these non-constructed rights rather than create them.

The Universal Declaration of Human Rights (UDHR) is another example of a natural rights view. Its preamble states, “[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” (U.N. 1948). According to the UDHR, then, rights are brute, inalienable norms, the content is specified in the ensuing list, the rights provide the foundation of justice, and they are epistemically accessible to the human mind, thus meeting the criteria for the natural law view as I define it above.

So far, the examples I have considered do not explicitly apply to global justice. However, examples of such views are common.<sup>10</sup> For example, Allen Buchanan argues human rights norms are central to international justice in his book, *Justice, Legitimacy, and Self-Determination*. According to Buchanan, the international legal system should be “...grounded in the ideal of protecting the basic human rights of all persons” (Buchanan 2004, 290). That is, commitment to and protection of human rights can explain both the legitimate use of power and an individual’s duty to comply with political institutions.

Says Buchanan,

What morally justifies efforts to wield political power through the institutions of international law is what justifies the exercise of political power generally; not consent, but rather a credible commitment to achieving justices, understood primarily as the protection of basic human rights, and doing so in ways that do not violate those same human rights. (Buchanan 2004, 292)

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<sup>10</sup> For example, Pogge articulates one such view “Any institutional order is to be assessed and reformed principally by reference to its relative impact on the fulfillment of the human rights of those on whom it is imposed” (Pogge 2000, 53). Caney defends a cosmopolitan theory of global politics by way of well-being based theories of rights, which “...defend civil and political human rights on the grounds that they are necessary if human beings are to flourish” (Caney 2005, 72). It can also be found in Nagel’s account of rights as normative status (Nagel 1995, 85).

Applying these norms to the international legal order, he argues that human rights can explain and justify our political institutions at the global level. Buchanan bases human rights in humanity,<sup>11</sup> dignity,<sup>12</sup> and human interests.<sup>13</sup> In so doing, he argues that non-constructed norms (human rights) are based in facts about human beings (like the interest in not suffering).<sup>14</sup>

In this section, I set out a two-pronged definition of non-constructivist theories of global justice to set the stage for my two-pronged argument against these theories. Insofar my criticism is aimed at those theories that embody this definition, I need not show every theory of global norms shares these features.

In the next two sections, I discuss the above two versions of non-constructivism with a two-pronged attack. Having divided the theoretical space, I attack both types of non-constructivism. First, I offer five difficulties in choosing between norms grounded in facts. I call this the choice problem with derived non-constructivist theories. Next, I give five reasons difficulties in specifying brute norms, which undermine their ability to successfully explain justice. I call this the specification problem with natural law theories.

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<sup>11</sup> “Assuming that the basic humanity that grounds these rights is unchanging, human rights, as moral rights, also apply to all persons regardless of when they exist” (Buchanan 2004, 122).

<sup>12</sup> “This focus on the right-holder captures the common belief, expressed in the most important human rights declarations and conventions, that to recognize human rights is to acknowledge the inherent dignity of persons” (Buchanan 2004, 124).

<sup>13</sup> “...respecting human rights means acknowledging the necessity of extremely robust protections of interests,” such as the interest in not enduring pain. (Buchanan 2004, 124) Buchanan does not, however, take human rights to be valuable only insofar as they promote interests or contribute to well-being (Buchanan 2004, 97).

<sup>14</sup> Buchanan also explicitly denies a constructivist component, as when defending the ‘Natural Duty of Justice,’ he states, “The modifier ‘Natural’ signals that this obligation attaches to us as persons, independently of any promises we make, undertakings we happen to engage in, or institutions in which we are implicated” (Buchanan 2004, 86). Other human rights views, which take human rights as brute, fall under the category I call natural law theory, which I discuss below.



Both objections show that non-constructivism is by itself insufficient to ground a theory of global political norms without some external features.

Because I discuss norms that non-constructivism endorses but that I argue are incomplete, there is some confusion with the use of the word “norm.” For this reason, I use the language of “prima facie norms” to delineate norms that non-constructivism endorses but that I argue face incompleteness. Prima facie norms are norms that meet non-constructivist criteria but are incomplete due to the problems laid out below.

For the sake of consistency, I use the term “prima facie norms” throughout this discussion. However, I do not argue (and it is not necessary to argue) that there are no norms without a further mechanism to complete prima facie norms. Non-constructivism can offer some complete norms, but they are not enough to ground a complete theory of justice. The degree to which non-constructivism is incomplete depends on the pervasiveness of the choice and specification problems. Below, I argue that that the choice and specification problems are pervasive. In other words, the gaps in the theory are too great to answer the most important questions of global justice. Nevertheless, disagreement over how pervasive these problems are will lead to disagreement on just how incomplete non-constructivism is. One could disagree on how many norms the choice and specification affects without impugning the thesis that non-constructivism is incomplete.

### **III. The choice problem**

According to the definition of the first version of non-constructivism, political norms are derivable from facts about what is good for human beings. This view posits the

existence of goods and then asserts the creation of norms from these facts. However, how norms follow from these goods remains to be seen. In this section, I make several claims which each complicate the creation of political norms from objective goods. These claims together comprise an objection against one version of non-constructivism: that this view requires a choice between the multiple various and conflicting prima facie norms that rely on non-constructed goods.

I make five related arguments in defense of this objection. First, there are multiple ways to achieve goods; second, there are multiple successful prioritizations of goods; third, these goods can sometimes conflict; fourth, incommensurability among and within goods exists; and fifth, even if the previous four objections fail and there is always exactly one right norm that appropriately responds to the facts, epistemic problems make identifying this norm difficult.<sup>15</sup> By presenting a series of connected objections, my aim is to build a presumptive case for thinking that non-constructivist theories of norms that rely on goods are not by themselves sufficient to ground norms. Thus, not all five arguments are strictly necessary to make this case.<sup>16</sup>

Of course, theorists disagree about the proper norms that follow from these facts. For example, some think that the non-constructed facts are things we need to maximize or promote while others think that we should protect them. However, theorists also

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<sup>15</sup> All of these objections apply to the value pluralist, but only objections one, two, five, and six apply to the value monist. For example, a utilitarian only seeks to realize and maximize one good: utility. Thus, no conflicts in the pursuit of goods or priorities arise. However, as I will argue, there may still be two norms that bring about equal amounts of utility, incommensurable states of affairs, or epistemic obstacles to knowing what path will maximize utility.

<sup>16</sup> In fact, some arguments are mutually exclusive. The first five objections are incompatible with the sixth; if there is no one norm that achieves goods, the problem is not epistemic but in some sense metaphysical. On the other hand, the belief that these problems arise only infrequently increases the need for a combination of these objections to succeed. Still, the incompleteness of non-constructivism, even if rare, should be of sufficient concern to motivate hybrid theory.

disagree about the content of the facts, so disagreement alone will not suffice to show this point.

Rather, a deeper worry persists: that there are numerous ways of instantiating an objective good for human beings, so that non-constructivism yields primarily prima facie norms; no one set of norms realizes it. One reason to think that goods are multiply realizable is that we endorse this claim when we engage in means-end reasoning. In means-end reasoning we often see that there are multiple means to attain the same end. If we agree that there is at least one non-constructed good that human beings can attain in social and political arrangements, then the fact that multiple roads achieve that goal will come as no surprise. For example, many avenues promote literacy and many avenues are equally successful at doing so. Even if we keep the amount of a good constant, many ways can achieve that same amount. We can see this at the individual level, in which many life paths lead to happiness, we can see this at group levels, in which multiple successful business models are successful, for example, and we can see this in the political realm, in which many types of state are just. I call this the multiple realizability of goods, and argue that despite difficulties in measurement, for any one good or combination of goods, many prima facie norms or paths will achieve that level and combination. Thus, even if all other things being equal, we pursue a policy of maximizing a good, non-constructivism cannot distinguish between two prima facie norms that realize the same amount of a good.

For example, consider the goal of reducing global poverty. This goal can be achieved through a variety of different means. Individual countries could each commit to giving five different types of aid to 154 countries or could contribute to multilateral

international organizations pursuing this goal in a centralized way.<sup>17</sup> Reducing global poverty could also require private citizens to contribute to non-governmental agencies and charities. These methods may not be mutually exclusive. One, none, or some combination of all of them might be required. These avenues towards reducing poverty are not merely a case of specifying a more general norm. “Provide assistance to foreign militaries” is not a highly specified version of the norm, “reduce global poverty.” Instead, these prima facie norms establish means towards a stated end, suggesting that multiple prima facie norms can achieve that end.<sup>18</sup>

The idea that goods are realizable through multiple prima facie norms is also made clear by investigation into certain basic goods. For example, if we take stability to be one of the natural goods relevant for justice, then we can see that several different types of society can realize that good. Does the good distinguish between parliamentary and presidential government or between direct democracy and representative democracy? Although a mechanism of power and transfer of power will be necessary for stability, there will be a variety of different methods for transferring power that will lead to stability and will lead to the same level of stability.

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<sup>17</sup> The first stated goal of the Office of the Director of Foreign Assistance in the U.S. State Department is: “Advance human rights and freedoms” (Foreign Assistance). Other goals are to: “Promote sustainable economic growth and reduce widespread poverty; Promote and support democratic, well-governed states; Increase access to quality education, combat disease, and improve public health; Respond to urgent humanitarian needs; Prevent and respond to conflict; and Address transnational threats.”

<sup>18</sup> This point is seen most easily when discussing a single, simple end, like getting from Saint Louis to Washington, D.C. However, we would be mistaken to think that building up a combination of ends: getting there for the lowest price, in the shortest time, at the best time of day, on the best day of the week necessarily constrains the selection of a route so much as to only leave one resulting avenue. The addition of multiple aims complicates, rather than simplifies, the choice of a norm, as I will argue below. It runs the risk of begging the question: that there is necessarily only one plane ticket that meets these criteria. And, as I discuss below, how is the proper combination of ends arrived at and prioritized? Is the value I place on getting to D.C. for the lowest price comparable to the value I place on getting there in the shortest time?

The idea that goods are multiply realizable also raises questions as to what counts as realizing it. How much of a good must a norm create for us to count it as realizing that good? Will any amount do, or is there some minimum (or even maximum) that constrains the existence of that norm? For example, differing societies can realize the good of stability to different degrees. An oppressive dictatorship might realize stability to a different degree than an oligarchy. If the two systems realize stability to similar degrees, then whether we must maximize stability or whether a range of different degrees count as realizing that good will be unclear. For example, suppose honesty among government officials is an objective good and some policy aimed at this good follows from it. Is a reduction in corruption all that is required for a norm to count as achieving this good, or is the complete eradication of corruption necessary to count a norm as responsive to this good? This problem is compounded when we are seeking multiple goods.<sup>19</sup> For example, in the pursuit of honesty among government officials and at the same time in the pursuit of personal freedom, a range of acceptable levels of honesty might be acceptable and be considered as achieving that good.<sup>20</sup>

I argue that if no one set of norms realizes the goods, and if non-constructed facts cannot determine how to choose among these norms, we must concede that all norms do not immediately follow from non-constructed facts. Rather, only *prima facie* norms follow from non-constructed facts. The multiple realizability of relevant goods drives the

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<sup>19</sup> For example, against diminishing returns, any increase in freedom, no matter how small, may be preferable to any increase in equality, no matter how large. Griffin, who calls this incomparability between values “trumping,” also thinks it is a type of incommensurability because there is no common unit of measurement, even though pair-wise comparisons are still possible (Griffin 1986, 83).

<sup>20</sup> I would expect this point to vary with respect to the type of good we are considering. Nevertheless, that for some goods, vagueness as to what levels are acceptable is significant. I will discuss this point in further detail below, in a discussion on incommensurability.

wedge between goods and norms. The need to make certain choices concerning paths to the goals we all pursue follows from this fact.

I have tried to motivate a skepticism toward there being just one set of norms that relies on objective facts. But once we become skeptics in this regard, the necessity arises of choosing one set of norms from prima facie norms. Basic practical reasoning requires such a choice. Without choosing some means to an end, we certainly cannot attain that end. And, since the reason for the wedge between goods and norms is not only that we cannot know the norms or that we cannot be sure of the norms but also that multiple norms will do, it follows that some piece of the puzzle is missing that would explain which norms follow from facts.

For example, stability requires this choice. Although realizing the good of stability is necessary, we have already seen that stability is multiply realizable. For that reason, the prima facie norms governing stability are incomplete without further choices. It is not helpful for stability, then, if each individual in a society pursues different paths towards stability, such as in the case of transferring power. Although a consistent rule on how power is transferred might be important for stability, movements toward this goal do not contribute to stability when one person acts on the basis that power is hereditary, another acts on the basis that power is God-given, and another uses majority voting procedures. In fact, this diversity in choices of prima facie norms runs counter to the value of stability and undermines it. This problem suggests we must make certain choices with regard to pursuing stability.

So far, I have primarily considered goods singly and discussed the multiple realizability of each individual good. However, many derived non-constructivist accounts

of norms offer more than one good we must realize. These goods must be weighed against one another and prioritized. Just as multiple paths to goods are equally successful, multiple prioritizations of goods are equally successful. For example, reasonable people may disagree on the prioritization of wealth and health. A policy that pursues health more aggressively than wealth may not be superior simply because it reflects the correct prioritization. Similarly, two individuals, one who chooses quality of life over quantity of life and one who chooses quantity over quality make conflicting value judgments. But one is not necessarily making a mistaken value judgment. Which option is better for the individual in this case may be a subjective matter, or the two options may be equal. And, if multiple prioritizations of goods are legitimate, then multiple policies based on those goods are legitimate.

This point can also be restricted to apply to a single good.<sup>21</sup> That is, a single good might have several components to it which fall prey to the same problems of prioritization. While we may be able to find an overarching good, or what Ruth Chang calls a “covering good,” by which to assess rankings, this good can be cashed out in different ways. (Chang 1997, 5-6) For example, when we say one war is more justified than another, we might mean “more justified with respect to having the right intention” or “more justified with respect to the probability of success.” If both these factors contribute to the justification of a war, some wars can fare better on one criterion and worse on the other. If neither understanding of justification is privileged, multiple rankings of wars are

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<sup>21</sup> Ruth Chang also characterizes prioritizations within goods in this way. (Chang 1997, 22-23) Some think this argument is an example of incomparability, but Chang makes the case that the argument “from multiple rankings” is not a case of incomparability. Although there is disagreement on whether it counts as incomparability, Chang argues that in such cases comparison is possible, but that no one comparison wins out against any other comparison. However, for my purposes, this debate merely concerns the classification of this problem as falling under the second argument in the choice problem (multiple prioritizations) or the fourth (incommensurability).

possible. Or, suppose we are assessing the richness of two states. Income and wealth are both contributing factors to richness, and while both nations are rich, they differ slightly with respect to income and wealth. On different understandings, which nation is richer differs, but the different understandings are each legitimate. This argument for the multiple successful prioritization objection capitalizes on the vagueness inherent in many relevant concepts of goods.

Furthermore, if the prioritization of goods depends on local and temporal circumstances such that prioritizations can vary across societies, there is little reason to think non-constructivist mechanisms can successfully prioritize goods. There might be reasons to value one good over the other and these reasons might vary across individuals and populations because both prioritizations reflect the correct attitude towards those goods.

Unsurprisingly, these goods can also come into conflict. For example, suppose the United States is deciding whether or not to wage war on Libya to free its people from tyrannical oppression. The U.S. must consider whether or not the losses in lives, health, and safety will be offset by the gains in freedom, self-determination, and respect for human rights. Even if the U.S. could determine the best way to achieve freedom, to achieve self-determination, and to achieve safety, no norm necessarily follows. Given the circumstances, these goods come into conflict. Multiple plausible rankings of these goods and thus multiple acceptable yet mutually exclusive methods of bringing about these goods are legitimate.

Even when goods themselves do not conflict, the pursuit of them can. Often, limitations on time and resources force us to make sacrifices in the pursuit of one good to



achieve another. For example, there is no reason to believe that the goods of health and education conflict. However, given limited resources, political institutions may have to pursue a policy of promoting one over the other. In that case, the goods will, in effect, be in conflict and the conflict must be adjudicated. Again, even if the goods of health and education did give rise to individual norms, those norms would not be sufficient to determine our action until they could be weighed against each other and a proper course of action could be decided. Furthermore, these decisions often depend on the specific circumstances in play. Therefore, they will vary across situations.

The pursuit of a good can also raise conflicts in achieving the good. For example, pursuing the well-being of one population might come at the expense of another population's well-being. Many individual goods raise conflicts in just this way, such as economic expansion, industrialization, and energy policy. When pursuit of a good causes these conflicts, problems arise as to distribution, harm, and diminishing returns. Thus, a stated policy to pursue well being raises questions: whose well being?<sup>22</sup> And to what extent?

The fourth problem I consider with derived non-constructivist accounts is that goods can be incommensurable.<sup>23</sup> Incommensurability is a broad term defined differently by different theorists and encompasses incomparability, indeterminateness, and intransitivity. Not every type of incommensurability is a threat to non-constructivist views and not every threat to non-constructivist views is a type of incommensurability.

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<sup>22</sup> I thank Clarissa Hayward for pointing this out to me.

<sup>23</sup> See (Raz 1986, 321-366). See also (Nussbaum 1990), (Sen 1987), (Griffin 1986, 75-92), (Richardson 1994, 89-118). Incommensurability is easiest to identify when we consider multiple goods in conjunction, but also occurs when considering goods singly.

Here, I focus on incomparability as a type of incommensurability. Incomparability points out that comparisons of goods are sometimes impossible. Joseph Raz gives examples both of things we cannot compare, such as the value of being a teacher with the value of being an engineer, and things we may refuse to compare, such as the value of friendship with the value of money. Inconsistencies in comparisons, such as intransitivity of preferences, also can be evidence that options are incomparable.<sup>24</sup> Tragic cases in which all available options are problematic, or wrong, or lead to bad consequences exemplify this problem not by showing the incomparability of valuable options, but by showing the incommensurability of detrimental ones.<sup>25</sup> Raz, who uses the terms “incomparability” and “incommensurability” interchangeably, defines the concept in the following way:

...if two options are incommensurate then reason has no judgment to make concerning their relative value. Saying that they are of equal value is passing a judgment about their relative value, whereas saying that they are incommensurate is not. (Raz 1986, 324)

Thus, the incomparability objection view is distinct from the first objection discussed above that two options may have roughly equal value. Chang highlights two possible ways of understanding incomparability: “A given positive value relation may fail to hold between items determinately (it may be false of them) or indeterminately (it may be neither true nor false of them)” (Chang 1997, 5). In the case of political norms, both types of comparability pose a problem insofar as determinate and indeterminate

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<sup>24</sup> Raz takes the intransitivity of certain choices to be evidence of incommensurate values and calls this feature “the mark of incommensurability” (Raz 1986, 325).

<sup>25</sup> The authors who discuss this point are too numerous to list here, but Hursthouse provides a discussion of the issue in the context of virtue ethics (Hursthouse 1999, 63-90), and others who discuss it include (Brink 1994, 221-223), and (Griffin 1986, 80).

incomparability of goods block the ability to choose between norms based on those goods.

If incomparability exists between goods, then it poses a problem for the creation of political norms based on those goods. For example, it undermines the ability to use a simple policy of maximization with respect to goods and it also undermines the ability to choose between norms that aim at different goods or different combinations of goods. However, the existence and pervasiveness of incomparability are central to the effectiveness of this claim. What evidence is there to think that incomparability threatens norms in this way?

The most convincing argument for the existence of incomparability is to offer instances of it. In this way, cases of incommensurability are in some sense meant to be self-evident. However, presenting instances of incomparable options runs the risk of the reader interpreting the situation differently. Since these cases are intuition pumps, they may fail to do the needed work to convince. For this reason, I do not take this fifth objection to be a knock-down argument in favor of my position. However, the more cases of incomparability we can identify, the more the burden of proof shifts to those who argue incomparability does not exist.

I have already identified several common examples of incomparability. The value of differing professions is a common example, as are tragic cases. For example, consider two genocides occurring in different parts of the world at the same time. The global community may not have sufficient resources to respond to both and may thus be required to choose a course of action that fails to prevent genocide. Such a choice may be permissible and obligatory, but the two courses of action may also be incomparable.

Similarly, consider sending military operatives to quell violence in a country. Sending more trained individuals is not equal to sending fewer individuals with more equipment, nor is one option better than another. In this case, the two options seem to be incommensurable.

Other evidence for incomparability can be found in what Chang calls “arguments from small improvements” (Chang 1997, 23-26). When considering two goods, neither of which is better or worse than the other, small improvements to one would seem to settle the choice.<sup>26</sup> In that case, the two goods were never incomparable; they were simply equal. However, small improvements often do not seem to solve such dilemmas. For example, suppose a state is choosing between admitting refugees across its border and making efforts to help their plight in their current place of residence. Suppose neither option is better or worse than the other. Making a small improvement to one option, such as slightly decreasing the cost of the efforts, might still fail to decide the issue. When small improvements of this nature do not answer solve our dilemmas, we have reason to believe the options we are considering are incomparable rather than equal.

There are other reasons for endorsing incomparability. For example, Raz argues that the consequences matter to our choice of options, but we do not always know what options will produce which effects. Raz points out that “...value is often determined by

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<sup>26</sup> Chang does not think this argument leads to incomparability because she denies the trichotomy thesis, according to which if we cannot say of two items that one is better, worse, or equal to another, then the two items are incomparable. The relations “better than,” “worse than,” and “equal to” do not exhaust the logical options in relative values. (Chang 1997, 4, 26). To discuss the trichotomy thesis is beyond the scope of this chapter because either position leads to problems in the choice of norms. If the two norms are incomparable, then there is a problem in choosing norms; and if the two norms bear some fourth relation to each other, such as “imprecise equality” or “being on a par” then there is still a problem with choice. Similarly, those that deny incomparability on the grounds that rational choice can be made between moral choices through other measures, such as prudential or legal ones, still admit the choice problem because they still admit the need to choose between options. I argue in Chapter 3 that social contracts are the best way to make these choices.

the probability that the option will produce certain effects” (Raz 1986, 327). But assessing probabilities might themselves require comparing incomparables, which is problematic for choosing between prima facie political norms. For example, a norm requiring foreign aid to countries facing a humanitarian crisis has a number of possible consequences. The money might help peacekeepers, stabilizing the affected country by addressing the underlying cause of the crisis. Or, the money could be spent on distributing food, water, and other necessities which avert easily preventable deaths. A still further option is that the money might fall into the wrong hands, stimulate corruption, and be used for dangerous weaponry. Here, the incomparability of the first two possible outcomes is compounded both by the fact that assigning probabilities to these outcomes is difficult and by the looming threat of the third, negative outcome.

Finally, lack of information can stand in the way of choosing a norm, even if, a correct one exists. We often have no way of knowing whether or not, for example, a full-press pursuit of health or a full-press pursuit of education will better realize well-being for a population.<sup>27</sup> Thus, even when the goods are not multiply realizable in theory, the goals are known and prioritized, conflicts are adjudicated, and no incommensurability emerges, the question of which norm is correct remains obscure.

In some ways, this problem relies on the “ought implies can” trope. In order for an obligation to exist, awareness of that obligation must be possible. Derived non-constructivist theories require the epistemic availability of non-constructed goods. But while the goods may be accessible to the human mind, the norms that follow from them

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<sup>27</sup> In Chapter 3, I discuss how to respond to cases in which a lack of information prevents our ability to make a choice, rather than incommensurability or rough equality preventing the choice. For my purposes here, it is sufficient to say that there are epistemological obstacles to identifying the correct norm.

may not. In this case, a mechanism external to non-constructivist theory must choose between the multiple possible options.

This last objection, when taken alone, is the weakest form of the choice problem because it leaves no normative work for the mechanism of choice. Here, the language of “prima facie norms” does not apply, since something is either a norm or not and limited information is the only thing that blocks our ability to know the difference. If there is a fact of the matter with respect to the choice of norms, then that choice does not necessarily capture genuine norms. Instead, it acts as a recommendation in the absence of knowledge. However, I include this objection because without epistemic availability of norms, derived non-constructivism as the grounding for global political norms is still incomplete. Even according to this weaker version of the choice problem, non-constructivism cannot be implemented without some feature external to the theory. Furthermore, if some mechanisms of choice, like agreement, are better at solving epistemic problems of this sort than others, we should prefer these mechanisms over the alternatives.<sup>28</sup>

Thus far, I have argued that we can drive a wedge between facts and norms. This argument shows that non-constructivist accounts have a hole in them; they need some mechanism to choose among the multiple sets of prima facie norms that follow from non-constructed facts. Thus, they are necessary but insufficient to ground a theory of global justice. I have not argued that all norms derived from facts fail in this way and I need not. Although the pervasiveness of the problems I level against non-constructivism will

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<sup>28</sup> I make the claim that agreements are the best mechanisms of choice in the case of epistemic uncertainty in Chapter 3.

determine how big the conceptual holes are, it suffices for my view that conceptual holes exist. I conclude that we must look outside the theory to fill these gaps.

Notice that it is not available to these theorists to argue that it does not matter which prima facie norm we choose since, after all, we still have to choose a norm, and we have reason to believe the mechanism for choice will have to come from outside the theory. Answering that any prioritization of goods will do, that any resolution of conflicts adequately responds to non-constructed goods, or that any choice between incommensurable values is sufficient to create binding norms is not enough. This admission on the part of the non-constructivist theorist cedes my point that the mechanism of choice cannot come from within the theory.<sup>29</sup> Although any prioritization may suffice, a prioritization must nonetheless be chosen. The fact that none is the clear winner shows that non-constructivist theories are lacking because nothing within the theory can establish binding norms. They produce non-binding prima facie norms (since we cannot think of a norm as binding if we have no moral obligation to follow it). Rather, we must look elsewhere to fill the gap in the view.

This argument also denies in part the possibility of a maximizing approach to goods. A maximization approach to goods states that for any good, we must maximize it, and for any combination of goods, we must choose the norm that brings about the most of each (or that realizes the best combination). Maximizing accounts give rise to specific, action-guiding norms because when there is uncertainty with respect to realizing goods, a “best” or “better” way emerges as the clear winner. For example, a “best” way of promoting safety, of respecting rights, or of achieving stability emerges. This type of

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<sup>29</sup> In other words, it seems reflective either of the concession that some norms lead to equally acceptable realization of goods, or that incommensurability is afoot.

view denies all five of the above objections. That is, it specifically denies that goods are multiply realizable, that conflicts exist, that problems in prioritization emerge, and that incommensurability ever arises. I have argued the recommendation “maximize stability and freedom” gives us nothing more than a prima facie norm when we recognize that maximizing stability undermines freedom. Another way of putting this point is that the recommendation, “maximize stability” must mean “maximize stability, all other things being equal” and therefore does not pick out a norm when all other things are not equal. Furthermore, incomparability is a direct objection to maximizing approaches to goods, since that objection states that we cannot always compare qualities or quantities of a single good or of different goods.

More than one set of weightings will successfully achieve a number of goods, and therefore the non-constructed facts about goodness do not tell us which norms to follow. As stated above, the strength of the choice problem rests on the success of the above five objections and the pervasiveness of those objections. For example, utilitarians acknowledge that epistemic problems arise, but that they are not pervasive. Similarly, utilitarians defend value monism, which circumvents problems in prioritization. Although it is beyond the scope of this chapter to conclusively disprove a utilitarian approach to international political norms, I have in this section raised a series of possible avenues in this regard.

Despite these objections, derived non-constructivism may still go a long way towards creating norms. Because these objections will not occur in every instance of a norm, some norms might follow directly from some non-constructed goods. Furthermore, derived non-constructivism can provide limited guidance in the face of these claims.



Every norm in the range of norms that achieve the good of stability may have certain features. In this case, we have significant guidance on what constitutes a norm governing stability, even in the absence of a mechanism of choice. Lastly, we can often identify what norms will not achieve a good under any specification. We may even be able to deduce some more general norms by reducing the range of norms that achieve goods to their commonalities.<sup>30</sup> Or, we might be faced with disjunctive norms, which although incomplete, still limit our options. These qualifications underline the significance of non-constructivism in creating norms, despite my arguments that it is incomplete.

In this section, I argued that non-constructed goods can be achieved by various sets of norms, which is inconsistent with most underived natural law theories. My criticism of non-constructivism, then, is also distinctly anti-natural law theory. Whereas natural law theorists might think that the non-constructed goods are not multiply realizable, I am arguing that they give rise to multiple sets of prima facie norms. Natural law theorists argue that norms do not depend on facts but exist independently and are discoverable by the human mind. I proceed now to a discussion of that view.

#### **IV. The specification problem**

Some theorists deny a connection between facts and norms, arguing that norms exist as natural or God-given. These underived theories do not fall prey to the same problems I outlined above, since the choice problem seeks to drive a wedge between goods and norms. In this section, I address these non-constructivists directly and show that the second subset theories of non-constructivism are also incomplete. Natural law

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<sup>30</sup> These considerations are to the advantage of the hybrid theory I ultimately defend, since they shed light on what agreements should look like and what agreements fail to achieve goods.

theories are too general to be action-guiding. I argue indeterminacy still besets theories that take rights or laws as brute because these norms are multiply specifiable for five familiar reasons. First, multiple systems comply with norms; second, there are multiple successful prioritizations of norms; third, norms can conflict; fourth, choosing between norms can sometimes result in incommensurable options; and fifth, epistemic problems plague confidence in which specification is correct. The sum of these claims I call the specification problem.

In addition to addressing natural law theorists, this argument also addresses non-constructivists who think norms are derivable from facts, but do not accept the choice problem, only accept the choice problem in part, or do not think the choice problem is pervasive. Even if, contrary to the argument I leveled against non-constructivists in section III above, norms do follow from non-constructed facts, in this next section, I argue incompleteness persists. Because the choice problem is aimed at an earlier point in a norm's metaphysical history, derived non-constructivist theories may fall prey to both the choice problem and the specification problem.

First, there are multiple systems that comply with norms. Multiple global institutions are capable of promoting and protecting human rights at the international level, for example, just as multiple organizations of government are capable of doing so at the national level. A further mechanism is needed to specify which global governance system to use out of the various successful alternatives that comply with the natural laws.<sup>31</sup>

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<sup>31</sup> Factoring in different prioritizations of these rights, especially different prioritizations that lead to incommensurable states or equally good rights compliance compounds this problem of specification. Others have remarked on this feature of norms in different contexts. For example, Buchanan speaks of the "indeterminacy" of human rights (Buchanan 2004, 180-190). According to Buchanan, human rights are

Another way to phrase this problem is as the particularity requirement. The particularity requirement is a problem of political obligation that arises with pure natural law theories. If what legitimizes coercive power is simply a natural law such as the governing body's respect for human rights, there arises a problem of political obligation. Why think we have a duty to obey the laws of one legitimate power over another? In other words, why should I obey this particular just state, as opposed to any other? For example, if I live in a legitimate state, made legitimate by the non-constructivist idea that my state is on the whole respectful of human rights and very rarely violates human rights, why think I must obey the laws of the state I live in, as opposed to other legitimate states? In other words, political power and political obligation are asymmetrical. What justifies political power cannot in turn also justify political obligation. At worst, natural law theories cannot justify political obligation in a way that explains obedience to the law. At best, natural law theories must explain political obligation with a set of reasons completely distinct from the reasons that explain political power. This asymmetry in which legitimate political power and legitimate political obligation are asymmetrical seems unintuitive. If political power is legitimate, it should implicate political obligation, and if political obligation is legitimate, it should implicate legitimate political power. However, unless political coercion and political obligation can be explained by the same set of reasons, the reciprocal nature of power and obligation is lost.<sup>32</sup>

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subject to multiple layers of indeterminacy, from problems with implementing rights protections, to prioritizing rights, weighing costs in pursuing rights, and determining to what extent rights should be protected.

<sup>32</sup> This objection is relevantly similar to the first objection to derived non-constructivist theories: goods are multiply realizable in various norms and norms are multiply realizable in various governance systems. Similarly, the remaining four objections are also analogous to the choice problem.

Second, multiple successful prioritizations of norms emerge. For example, national interest might trump charity to other countries in some cases and not others. When stabilizing one's own economy does just as much good as sending foreign aid to non-compatriots, then one action is not arguably better than another, and either prioritization might be acceptable. The recommendation, "Give foreign aid when able" can be justifiably overridden by national interest (or not). In other words, there may not be one "best" prioritization of norms and thus natural law theories might still be incomplete.

Third, there is difficulty in establishing a set of rights or laws that do not conflict.<sup>33</sup> The idea that rights or laws can recommend conflicting actions is troubling. It suggests that a comprehensive, coherent theory of justice can also lead to contradictions within the view. If rights do conflict, there is some sense in which the view is incomplete. Incompleteness, however, is not a reason to abandon a view. This objection only shows that some supplemental considerations are required to govern conflicts, not that we have a reason to abandon rights.

For example, Grotius' second law of nature, that "It shall be permissible to acquire for oneself, and to retain, those things which are useful for life" (Grotius 2005, 10) could come into conflict with his fourth, "Let no one seize possession of that which has been taken into the possession of another" (Grotius 2005, 13). There are *prima facie* reasons to think that these two laws can conflict without further specification. Grotius' fourth law could act as a limit on his second, establishing the exceptions that apply on the second. However, a starving or even hungry individual complicates this matter because

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<sup>33</sup> Views that take goods to be multiply realizable can easily explain this conflict.

the person close to death may or may not have more leeway in acquiring Grotius' useful things for life. These laws require clarification to avoid inconsistency.<sup>34</sup>

Not every conflict is necessarily problematic for compliance with multiple laws. Some have pointed out that conflicts in prima facie duties do not constitute real moral dilemmas, whereas conflicts in all-things-considered obligations do raise moral dilemmas.<sup>35</sup> Brink argues that insoluble moral conflicts involve what he calls "broad equipollence," or competing but equally morally weighty all-things-considered moral obligations.<sup>36</sup> The existence of this particular type of conflict, then, would be necessary for conflicting laws to raise problems. Like every version of the specification problem, the existence and pervasiveness of these claims are both central to their force.

Next, choosing between norms can sometimes result in incomparable options. For example, laws that require beneficence might be compatible with end-states that are incomparable in value. How, then, can natural law theories choose between the multiple possible options without some further means of choice? Incomparability here, as in the choice problem, leads to a problem in action-guidance. Without a way to navigate

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<sup>34</sup> Some have argued that differentiating between prima facie and actual obligations can dispel this criticism. See (Ross 1987), (Pietroski 1993).

<sup>35</sup> For example, David O. Brink makes this claim, saying conflicts in defeasible obligations do not count as true moral conflicts (Brink 1994, 216) and bases this point on W. D. Ross (Ross 2002, 1-29) and (Ross 1951, 84-86).

<sup>36</sup> (Brink 1994, 223-5). Brink argues against the existence of moral dilemmas because, in response to the paradoxes in logic they raise, he poses a dichotomy: we can reject deontic principles that raise the dilemmas or the existence of the dilemmas (Brink 1994, 236). Because I ultimately argue that we can adjudicate these dilemmas, I do not take either route. Still, his solution (to reject the existence of moral dilemmas) is compatible with the claims I make here. Brink argues that moral dilemmas require all-things-considered obligations are undefeated prima facie obligations. But he against the idea that an undefeated prima facie obligation leads to an all-things-considered obligation because we might have a disjunctive obligation in which we are required to meet one of the obligations but not both (Brink 1994, 238). My argument is compatible with this disjunctive obligation that replaces moral conflicts. I make the further point that we also need a way of determining which obligation in the disjunction is required.

incomparable choices, natural law theory runs the risk of being insufficient to create a complete set of binding norms.

Analogy to positive law also demonstrates incomparability in norms. We readily accept that positive law provides no guidance in many situations. Griffin points out that moral law is analogous to positive law and that to expect any different is unreasonable.

Says Griffin,

[B]ehind positive law, we think, there is an ideal form of law, moral law, endlessly refinable, universally applicable, and never at a loss for an answer...But moral law is limited in much the same way, and for many of the same reasons, as positive law. The myth is that there is always the morally right answer. (Griffin 1997, 49)

According to Griffin, this argument by analogy denies the expectation that moral law, unlike other forms of law with which we are familiar, can always provide a “right answer” with respect to hard problems.

Finally, even if the first four objections to there always being one possible specification of natural laws fail, epistemic problems remain. Even if one correct specification always exists, there are problems with uncovering what that specification is. When we face dilemmas in how to specify natural laws for a given situation, we may still assert that only one specification is correct. But the proliferation of evidence on both sides of a specification obscures the ability to know which one is the right one. When mere lack of knowledge prevents specification, we may still have to look outside the theory to implement or apply natural laws.

In short, the specification problem argues that the norms of natural law theory are too general to be helpful in pursuing justice. For example, Article 5 of the UDHR states that, “No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or

punishment” (U.N. 1948, 2). However, what punishment counts as humane without a definition is unclear, and this definition needs to specify the norm enough to be action-guiding. Unless we know that capital punishment is humane but solitary confinement is not, translating the general norm into a helpful rule will be difficult. Furthermore, even if we have a detailed list of definitions, whether the situations we face are examples of those types of punishment may be unclear.

Article 3 of the UDHR, which states that “Everyone has the right to life, liberty and security of person,” faces a similar problem (U.N. 1948, 2). “Everyone” and even “human being” need clear definitions to successfully dictate what this right requires in a range of situations, from abortion to euthanasia. “Security of person” also needs clarification to determine what this right requires. There are many problems, then, in specificity. Specification problems prevent norms from being successfully action-guiding.

These problems are well-traversed and I am not stating a new difficulty in rights or law talk. In fact, coming up with illustrative examples of this point is easy because human rights and natural laws are purposefully vague or broadly-construed. Rather than aiming at specificity, these theories see benefit in the generality of norms. Benefits, of course, do arise with this feature of brute norms. They are easily accessible, plausibly simple, and, as intended, broadly applicable. I do not aim to minimize the truth of this benefit or even to argue that if lengthy, disjunctive, overwrought laws or rights existed in nature as brute. In this section, I merely point out that without a mechanism for specifying general norms, they are incomplete.

Several solutions to the specification problem are possible. Most rights theorists argue that rights are not absolute.<sup>37</sup> Instead, there are some cases in which rights can be overridden. Rights theorists can thus prioritize rights to avoid significant problems in guiding action. Theorists disagree on how to systematically prioritize rights, which are themselves particularly weighty normative concerns. Arguing that negative rights take precedence over positive rights is one possible, but flawed attempt at adjudicating this dispute.<sup>38</sup> But this solution amounts to nothing other than restating problem two, conflict, as a problem in generality or multiple successful prioritizations. Of course, multiple right actions or no right actions in the face of such a situation might always be possible. But that view cedes the argument I am leveling against natural law theory that the view is incomplete without some method of choice between these multiple right actions.

Suppose we cede the point that rights never conflict, or that a systematic prioritization exists for governing these conflicts. Problem five still plagues theories of justice that require violations (or lack thereof) as the sole criterion for justice. In these views, the assessment of political legitimacy is dependent on a government's ability to protect human rights. A government that commits massive human rights violations is illegitimate, is unjustified in its demands of political obligation, and gives up its right of sovereignty. On the other hand, a government that on the whole protects human rights will be considered legitimate. A successful government, then, will recognize the existence of some natural facts of goodness, like human rights, and conclude that some norms are necessary to protect them. However, as in previous cases, there are multiple

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<sup>37</sup> Though see (Gewirth 1981).

<sup>38</sup> See (Buchanan 2004, 94-97), where Buchanan argues that this distinction relies on the mistake that protecting negative rights never requires positive action.



successful systems that can realize the goods established by the rights theorist and prevent rights violations. As argued in the last section, this view is not sufficient to explain how to choose between successful institutions or how to explain our duties to support institutions that protect human rights.

For example, Buchanan acknowledges several problems with institutionalizing human rights in international arrangements: more than one institution might realize human rights, implementation depends on resources, there will be variation in what is required across societies, and they are insufficient to protect women, who are more disadvantaged worldwide. (Buchanan 2004, 125-6) Buchanan sidesteps these problems by taking human rights as moral constraints on international institutions. My view is compatible with the claim that human rights may act as constraints on international institutions.<sup>39</sup> However, I break with Buchanan in thinking that the view can succeed without further intervention by some outside theory to choose among the various institutions that meet human rights requirements, without which, no particular institution legitimately wields power.<sup>40</sup>

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<sup>39</sup> Whether this interpretation is in keeping with Buchanan's assertion that there is no clear distinction between positive and negative rights is unclear since both may require positive action. More accurate might be identifying rights as constraining *and* impelling international action. However, once we do so, the criticism I have leveled against this view of international institutions, which Buchanan acknowledges, reemerges. Given that there are many ways to fulfill the requirements human rights offer, there is some missing component to determine binding, action-guiding norms.

<sup>40</sup> It can also be argued that Kantian moral theory is susceptible to these problems. Some Kantians take Kant to be defending a purely constructivist theory of morality. For my purposes, I take him to be a non-constructivist in which there are epistemically accessible norms in nature, discoverable through the use of reason. On one interpretation, Kant could be conceived as offering an objection to my view. According to Kant, there is only one norm—the categorical imperative—that universally applies to human beings. Thus, there can be no conflicts and no goods that are multiply realizable in more than one norm. However, this is a hard view to swallow even for Kantians. According to Kant, there are three versions of the categorical imperative: the formula of universal law, the formula of humanity, and the kingdom of ends. Whether these three formulas are really the same imperative is difficult to see. Kantians may take all three formulas of the categorical imperative as compelling, but argue that they make up three separate norms and argue that they need not equate them. Perhaps, then, most reasonable interpretation of the categorical imperative is not that

In this section, I argued that there is a problem with adequately specifying norms even if norms follow directly from non-constructed goods or are not derived from goods at all. Because many of the claims in the specification problem overlap with the claims in the choice problem, the two problems are closely related. Both the choice problem and the specification problem show that non-constructivist theories are insufficient by themselves to properly explain global justice. Some further component is needed to choose between multiple norms or specify a single norm.

## **V. Two sources of agreement**

This chapter aims to show that non-constructivist accounts of norms are incomplete, not that they are wrong. Thus, some aspects of non-constructivist theories emerge unscathed. There are two main sources of agreement between the hybrid view I ultimately defend and a pure non-constructivist view. First, I have not impugned the existence of non-constructed normative facts. Second, I defend the necessity of these facts to ground a theory of global justice. Both of these claims are defenses of non-constructivist accounts of norms in that they take those norms to be necessary for any successful grounding of legitimacy. These two sources of agreement comprise two

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there are three norms that are exactly the same, but that there are three different laws that the facts of natural goodness give rise to. In other words, for Kant, there are three versions of the categorical imperative or three norms that realize the good. We need some method to choose which norm to follow in a given situation and until we choose a norm, whether any of the three possible norms are binding is unclear. In other words, what actions we must take in response to the goodness and unconditional worth of humanity are unclear until we choose an appropriate norm. That is not to say that we can pick any non-Kantian norm. The norm must appropriately respond to the facts of goodness already laid out. Furthermore, even without choosing a formulation of the categorical imperative there is some basis with which to criticize our actions. Actions which aim at maximizing the destruction of humanity are clearly antithetical to the non-constructed facts of goodness Kantians defend. Still, our skepticism about there being one set of norms that take stock of the facts of goodness can be born out in a reasonable interpretation of a non-constructivist version of Kant. Another common objection against Kant that supports my view is that Kant's duties sometimes conflict. According to Kant himself, of course, duties never conflict, and Kant goes to great lengths to show this. However, Kantians or neo-Kantians will sometimes disavow this portion of Kant's view. For an analysis of the conflicts in duties, see (Wood 2007, 163-5).

desiderata for a successful theory of global justice on my view. A successful theory must meet both of these criteria.

One aspect of non-constructivist accounts of norms that I argue non-constructivists have right is the non-constructed facts that certain things that are good for human beings. These non-constructed facts I take to be uncontroversial. Human beings have certain physical needs, such as the need for food and water. Having such needs met is clearly good for human beings: being healthy and free of disease is clearly good for human beings. Similarly, relationships with others and relationships that proceed on the basis of respect are plainly good for human beings, as are certain freedoms. That such things are good for human beings I take to be non-constructed facts because they do not depend on any contract, agreement, or transaction.

My second claim is more controversial. I argue that norms must be grounded in these facts. Many theorists will disagree with me on this point. International political realists, for example, may agree that there are some things that are good for human beings, but disagree that we have to respond to these goods or respond in any particular way. They argue that such goods matter nationally, but do not matter at all internationally, such that if there exists some group of people who are achieving none of these goods, we have no duties to that group and that group has no claims on us.

However, I argue that insofar as norms governing political institutions exist, these norms must be related to non-constructed facts. How controversial is this point? Many have intuitions that suggest a stronger response to those facts than mere acknowledgement. If a nation experiences a natural disaster and it does not have the resources to properly respond to the disaster alone, I, like many of us, have the intuition

that norms and duties that govern human beings are grounded in these facts. This nation now has a population that is no longer achieving most of the things we take to be good for human beings. All other things being equal, norms governing institutions are required to respond to, rather than ignore the population. Some things are good for human beings, those goods are not being met, and therefore the facts about human beings ground the norms that arise from those goods.

If the non-constructed facts played no role in giving rise to obligations, there would be no problems to address in the nation affected by the natural catastrophe. Our acknowledgement of their plight would be no different than our acknowledgement that ants are working to create an anthill. Clearly the ants are pursuing something, but we have neither the time, inclination, nor the obligation to respond in any way. I think such a view is plainly false. Although some theorists no doubt defend it, I think the burden of proof is on them to explain why there are goods for human beings but that global political norms do not relate in any way to these goods.

## Chapter 3

### *Social contract theory is necessary but not sufficient to ground a theory of global justice*

#### I. Introduction

Global political norms explain when state behavior is justified, right, or good and when it is unjustified, wrong, or bad. These norms govern when states coercing one another is permissible, when offering aid to abet international crises is obligatory, and how territorial disputes should be adjudicated. What grounds a theory of justice? Some argue that nothing can provide this source of norms and therefore that there are no international political norms governing state behavior. I reject this view, but it is beyond the scope of this chapter to make the case against that position; my dissertation is targeted at those who believe in such norms. Others argue that non-constructed moral facts ground political norms in the global realm and the legitimate use of coercion based on them. In the last chapter, I explained why non-constructivist accounts are necessary but insufficient to ground these norms. Still others argue that constructivist accounts can provide the source of global justice. In this chapter, I argue that constructivist accounts like social contract theories are necessary but not sufficient to ground these global political norms.

In section II, I define social contract theory. In section III, I argue that social contract theory is insufficient by itself to explain global justice due to what I call *the constraint problem*. The constraint problem includes two powerful objections to social contract theory that are generally thought to disprove it; I argue they show it is

incomplete. The first is that parties sometimes agree to seemingly prohibited things; the second is that parties sometimes do not agree to do seemingly required things. I conclude that due to the constraint problem, some external component to the theory is required to fill these gaps in the view. In section IV, I argue that despite being insufficient to explain global justice, it is also necessary for three primary reasons. First, it is the best option to complete non-constructivist theories because it solves the choice problem and the specification problem. Social contracts generate norms, a feature surprisingly missing in many alternative views. The alternatives possibilities—such as monarchs, rolling dice, or spontaneous convention—are flawed. Social contracts are also good at tracking the truth when epistemic problems are the primary obstacles. Second, it respects autonomy. Third, practical considerations make social contract theory successful in the global realm, including considerations that it deals with pluralism, it elucidates obligations, and it promotes cooperation. In section V, I consider unsuccessful objections to the view that social contract theory is a necessary component of global justice. The consideration of these problems not only serves to show that social contract theory does not fall prey to any knock-down objections, but also serves to establish further desiderata for a successful theory of global justice.<sup>41</sup> In section VI, I conclude this chapter.

## **II. Defining Social Contract Theory**

Many argue that social contract theory can successfully ground global political norms. However, a broad range of views fall under the category of social contract theory, which creates obstacles in any ensuing discussion. Competing definitions of social

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<sup>41</sup> Although I am open to the possibility of this argument succeeding for national as well as international political norms, for reasons discussed in Section V, I am skeptical of it succeeding nationally.

contract theory abound. My definition is set up in opposition to other definitions which I argue are too narrow to capture the essence of social contract theory. As a result, objections emerge that seem to be knock-down objections, but in fact only apply to a small subset of views.

For example, in “Beyond the Social Contract,” Martha Nussbaum offers the following definition: 1) that the social contract is between physically equal parties, 2) that the contract is for mutual advantage, and 3) that the nation state is the subject of social contracts, meaning that the agreement is for the purpose of the nation state. While this definition adequately describes many social contract theories, it is too narrow to capture every version of social contract theory. (Nussbaum 2005, 198) For example, the third condition, that the subject of social contracts be the nation state, is too narrow a definition of social contract theory either descriptively or normatively. First, several social contract theories make the global realm the subject of their views. Philosophers including Rawls, Beitz, and Pogge, have all defended global social contract theories.<sup>42</sup> Second, as I hope to show in this chapter, no in principle reason prevents social contracts from working at the global level and there are several reasons that social contracts are extremely successful at the global level. In addition to arguing that a theory must exhibit all three criteria to be called a social contract theory, Nussbaum also argues against each criterion for a theory of justice. Thus, these criteria also act as objections to social contracts, which I address in sections III and V below.

In my view, all versions of social contract theory have four features in common. First, the theory makes legitimacy contingent on consent; second, it stipulates a contract; third, it specifies parties to the contract; and fourth, it describes the circumstances of the

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<sup>42</sup> (Beitz 1979), (Rawls 1999a), (Pogge 1989)

contract. These features are the defining features of the theory and any theory that exhibits these four features can be properly called a social contract theory. Variation on each feature accounts for different versions of social contract theories.

The first defining feature of social contract theory is that legitimacy is grounded in consent, whether hypothetical or actual. Legitimacy is grounded in consent because human beings are rational. Rationality is usually conceived of as either the pursuit of self-interest, wherein contracts are legitimate insofar as they successfully attain mutual advantage for rational, self-interested parties, or as the capacity to set ends, wherein contracts are legitimate insofar as they are an expression of autonomous agency.

The second defining feature of social contract theory is the contract. If legitimacy depends on consent, what is the consent to? The content of the consent explains not why something is legitimate, but what is legitimate. The third defining feature of a social contract is a specification of the parties that sign on to the contract. The parties to the contract can be peoples, nations, sovereigns, or individuals. The fourth defining feature of social contract theory is the state of nature, or what Hume calls, “the circumstances of justice.” These circumstances can be extremely minimal, stipulating only that consent is given freely under no physical duress, or they can be extremely robust, and they can be actual or hypothetical.

By enumerating the four necessary and jointly sufficient features of social contract theory, my aim is to bring some clarity to the theory. Different versions of social contract theory emerge as we specify the four defining features of the view. Contractarianism is the family of views that rational agents consent to contracts that are in their self-interest, thus legitimizing social contracts for mutual advantage.



Contractualism is the family of views in which hypothetical consent grounds legitimacy under specified conditions. Contractualism contains two types: procedural contractualism, which fixes the circumstances, and naturalist contractualism, which fixes the range of possible outcomes by reference to some outside source. There are also two types of actual consent: tacit consent, exemplified by continued compliance over time, and explicit consent, which requires parties to the contract to outwardly signify their consent.

### **III. The Constraint Problem**

The two objections I argue are most problematic for social contract theory also apply to every version of the theory as I have defined it and not merely one subset of the view. In other words, these objections against social contract theory are not successful merely against procedural contractualism or tacit contractarianism. The fact that objections against social contract theory as a whole exist corroborates my definition of the view as picking out something distinct in the literature and not merely an exercise in philosophical epicycles. Both of the objections I consider successful pertain to the content of the contract. The first is that people agree to things that are not legitimate; the second is that people do not agree to some things that are morally required of us. I take each in turn.<sup>43</sup> I argue that each of the twin problems that make up the constraint problem is sufficient to show social contract theory is incomplete; both must fail for social contract theory to be a complete view.

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<sup>43</sup> Given that autonomy is one of many goods, it should not be a surprise that it can be outweighed in certain circumstances. I have already argued that multiple weightings of goods are generally acceptable. The fact that autonomy can sometimes be outweighed by other considerations is in keeping with this argument.

Some contracts that parties agree to do not otherwise seem to be legitimate. Social contract theory, whether in theory or practice, allows for cases in which parties agree to terms that would otherwise seem to us to be unjust. If global norms of justice are grounded only by agreement, then morally reprehensible contracts could suffice for justice should global institutions agree to them. This reasoning suggests the incompleteness of social contract theory to explain justice.<sup>44</sup>

Social contract theory has two ways around this problem. First, it can say that when people agree to do illegitimate things, they are not properly consenting. For example, when parties to a contract agree to terms that are exploitive, social contract theorists will sometimes say that the exploited party is not properly giving consent. Second, social contract theorists can argue that goods constrain what parties can agree to. For example, parties can agree to only a specified range of contracts and cannot agree to anything they please.

Both of these responses turn social contract theory into a hybrid view because both responses appeal to resources outside the theory. To limit what counts as consent to a narrow range of options is ad hoc unless it can be explained from within social contract theory. We might think that certain minimal restrictions do not undermine the view. But when the conditions for the contract become robust, how social contract theory can justify them using agreement alone also becomes unclear. For example, if someone agrees to an exploitive contract, we might say that it does not properly amount to consent. Giving someone an offer she cannot refuse is akin to coercion. But what if rogue states get together to agree to ignore environmental considerations? The agreement does not go

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<sup>44</sup> Moral nihilists who take social contract theory to give us norms where there would previously be none bite the bullet on this point. However, unless you are already committed to moral nihilism, this solution will not hold much weight.

against self-interest or the autonomy of the consenters—or at least we can suppose it does not. And it might meet all the criteria enumerated earlier in the definition of social contract theory. In that case, we would have to appeal to non-constructed goods to explain why the contract was wrong.

Similarly, to limit the content of a contract to a narrow range of options is also arbitrary unless it can be explained from within social contract theory. On the contrary, most appeals to limits reference non-constructivist accounts of goods. Both responses appeal to reasons and norms outside the purview of social contract theory because this objection is successful in showing that social contract theory is not sufficient by itself to determine justice. I look at both solutions in more detail in Chapter 4.

The second successful objection to social contract theory is that we sometimes fail to agree to contracts morally required of us. Parties to a contract might miss or overlook important moral obligations. For example, developed countries might be required to give 1% of their GDP to alleviate poverty and hunger and poverty related diseases. However, virtually no developed countries are doing so. In that case, social contract theory does not by itself explain all of our obligations of justice. This objection can take the form of agreeing to a contract that misses out on obligations or not agreeing to a contract that includes obligations. In both cases, we fail to agree to perform things required of us, thus suggesting that social contract theory misses out on considerations of justice. Buchanan's example above of a nation-state refusing to offer humanitarian aid to a crisis exemplifies this point. Even if such refusals rarely occur in practice (although they mostly likely do occur commonly), we can nevertheless construct hypothetical cases in which parties to a contract miss out on important obligations.

One version of this objection is that social contracts are only for mutual advantage, and that mutual advantage is insufficient to fulfill our duties to others. The form of the argument against social contract theory is the following:

1. We have strong commitments to non-compatriots, whether these commitments stem from a belief in human rights, a form of cosmopolitanism, a Christian duty to charity, the capabilities view, compassion for those less well off than ourselves, or some other non-constructed norm.
2. Social contract theory does not include duties to individuals of other countries, or, on some interpretations, does not allow for duties to non-compatriots.
3. Therefore, social contract theory is unacceptable as a theory of international relations.

This argument, then, is an indirect one: it states that we have certain duties, social contract theory does not make room for those duties, and therefore we should not be disposed towards accepting social contract theory. The best route to defending social contract theory's use in the global realm is to deny the position that social contract theory's attackers so readily attribute to it: the view that social contract theory results in each country acting out of its own self-interest. In other words, a proper defense requires disproving 2. And I think that denying the second premise is available to social contract theorists.

In some ways, of course, this critique is warranted. In some views of domestic social contract theory, talk of self-interest and mutual advantage is common. For this reason, it can sometimes transfer to social contract theory at the international level.<sup>45</sup>

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<sup>45</sup> Rawls also seems guilty of this position in (Rawls 1999a). In this book, advocates the use of an original position at two levels: first, domestically, and second, internationally. The view of parties to the contract looking out for their own self-interest is used in both contracts. In the first original position, Rawls states, "... [T]he parties are modeled as rational, in that their aim is to do the best they can for citizens whose basic interests they represent, as specified by the primary goods, which cover their basic needs as citizens" (Rawls 1999a, 31). In the second original position, Rawls states that this condition continues to hold and that representatives are modeled as rational (Rawls 1999a, 33). Two features mitigate the force of this objection in Rawls' theory. First, 'self-interest' is not conceived as endorsing merely selfish behavior, but rather pursuing basic needs. The primary goods that Rawls speaks of in the above passages refer not only to economic goods such as income and wealth but also to the social bases of self-respect and self-worth. This

However, even if we can come up with examples of social contracts that do not fail to meet these obligations, the in principle argument still stands. And this argument has particular force against actual consent because we would predict the most failures in meeting obligations in the real world.

Again, social contract theorists have two possible solutions to this problem. Either contracts that miss out on these obligations are not properly called contracts on the view, or we have a duty to enter contracts that meet our obligations to others. Both of these solutions appeal to reasons outside the theory. On the one hand, the reasons for thinking a contract does not count as a proper contract must come from a reason beyond just agreement, in which case the reason must come from outside social contract theory. This is an especially powerful objection against actual consent because we can expect to see the most mistakes in the real world. If there were duties to enter contracts, we would also

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position is not straightforwardly selfish, but rather endorses a less stringent pursuit of self-respect. Second, the veil of ignorance prevents parties to the contract from benefiting only themselves. In the international context, the veil of ignorance means that parties to the contract must imagine they do not know important facts about the societies they represent. Rawls explains this concept:

Finally, the parties are subject to a veil of ignorance properly adjusted for the case at hand: they do not know, for example, the size of the territory, or the population, or the relative strength of the people whose fundamental interests they represent...they do not know the extent of their natural resources, or the level of their economic development, or other such information. (Rawls 1999a, 33)

Under these circumstances, pursuing self-interest is so broadly construed that it requires pursuing the interest of every society. Although parties to the contract are indeed acting in self-interest, they lack relevant information about their situation, so that acting in their own self-interest is acting in the self-interest of every people across the globe. In other words, there is no way to make exceptions for a particular country or give rights or benefits to individuals.

Nussbaum does not think that the veil of ignorance exempts Rawls from this criticism. She argues that he remains subject to the critique from mutual advantage. Nussbaum states: "Thus, while the Veil sharply limits the role played by interest once they enter the Original Position, interest continues to play a large part in determining who is in and who is out at the initial stage: namely, they bargain with rough equals in power and resources, because a contract for mutual advantage makes sense only between rough equals, none of whom can dominate the others. Despite his Kantianism, Rawls remains a contractarian in these two crucial respects." (Nussbaum 2005, 198) Nussbaum recognizes the contractualist strains in Rawls, yet nevertheless attributes some of the features of his theory to contractarianism. In the above discussion, I hope to have undermined Nussbaum's analysis of Rawls as a contractarian. Although it is possible to interpret him as committed to both rough physical equality of the parties to the contract and to the contract being for the mutual advantage of the parties, textual evidence also pulls away from this explanation of Rawls. Insofar as it does pull away from this interpretation, Rawls is a contractualist and not a contractarian.

have a way around this problem. Duties to enter contracts that are known to pursue non-constructed goods would ensure that parties do not justifiably fail to agree to important contracts. But again this appeals to something outside agreement, since we stipulated that people do not agree to the contract. The duty to enter contract must be a pre-agreement duty. That duty is by definition external to social contract. Both solutions suggest the theory's incompleteness and turn it into a hybrid view.

The consideration important for my purposes is that this objection is not reason to dispense with the theory altogether; it is not reason to discard the view. Because social contract theory can circumvent these difficulties when it is supplemented with non-constructivist or pre-agreement theories this objection merely shows why social contract theory is incomplete and not why it is wrong.

#### **IV. Reasons for social contract theory**

In this section, I defend social contract theory as a necessary component of justice.<sup>46</sup> I argue that social contract theory is needed to ground justice. First, I argue that social contracts are needed to complete non-constructivist theories. These reasons include the fact that social contracts are eligible to perform this role. That is, they are prima facie sufficient for creating norms. On the other hand, the other eligible candidates for completing non-constructivist theories fail, including global hegemonic states, coin tosses, and mere convention. Furthermore, social contracts can complete non-constructivist theories when those theories are incomplete due to epistemic problems because they are good epistemic tools. Second, I argue that there are reasons for thinking

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<sup>46</sup> In practical philosophy, there is reason to take the best option as the necessary option. I concede that other theories might complete non-constructivist theories, but I hope to show that the competing views are sorely lacking in various respects.

social contracts ground global political norms independent of the holes in non-constructivist theory. The reasons in support of this claim include the role of autonomy, instrumental reasons for valuing consent, and practical considerations.

In the last chapter, I argued that non-constructivist theories were incomplete due to what I called the choice problem and the specification problem. Given the need to choose among multiple prima facie norms or to specify a single norm, we need a mechanism to choose among the available alternatives. What are the possibilities to fill this gap? For example, suppose a group of states are worried about international terrorism. Specifically, States 1 and 2 are worried about terrorists traveling from State 3 to attack their citizens. We might think State 3 has obligations to States 1 and 2 to prevent terrorism on its territory that would threaten them. But what form do those obligations take? How strict are these obligations? Given that a number of tactics could fulfill their obligation, which route should they take? Does the route matter? If it does not matter, can they just roll the dice to determine what actions are necessary to complete their obligation to States 1 and 2?

A number of accounts can specify one norm out of the range of prima facie norms that successfully achieve natural goods. Mechanisms capable of specifying norms include a monarch, a philosopher king, a computer program, rolling dice, or a spontaneous convention. Of all the possible alternatives, I argue that consent, or agreement, is by far the best.

Why think that consent must pick out multiply realizable goods? One reason why consent is an excellent candidate for completing non-constructed facts is that consent is prima facie sufficient for creating norms. Consent has this power to create norms of

governing behavior, which fills the gap left by non-constructivist accounts. Consenting to a contract obligates the consenter to fulfill it. The fact that I have promised to do something is a good reason to do what I have promised to do. For example, mere stipulation can create this obligation, such as stipulating that a signature obliges the signatory. Consent also plays an explanatory role in our reasons for fulfilling obligations. When someone consents to a contract, we take them to have reasons for fulfilling that contract. When we ask someone why she did something, an appeal to the consent she gave to a contract is a satisfactory explanation of her behavior.

One need not be a social contract theorist to agree to the possibility of incurring rights and obligations through agreements. Those who attack social contract theory can still agree that we have good reason to respect contracts, when contracts exist. Thus, the fact that social contract theory is sufficient for creating norms makes it an excellent candidate for filling the gap left to us from non-constructivist accounts. Consent is successful both because it supplies the necessary specification of norms and because it receives ecumenical support in this respect.<sup>47</sup>

What separates those who agree with this point from the true social contract theorists is that those who agree that consent generates norms but are not social contract theorists think that consent is *prima facie* sufficient for legitimacy, but not necessary. Defenders of non-constructivist accounts do not deny the capability of contracts to create obligations in some situations; they just deny that contracts are required to create obligations. Now that I've specified one reason why contracts are needed—that they fill a

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<sup>47</sup> Furthermore, non-constructivist theories disagree amongst themselves and with other theories about the source of norms. If social contracts create norms that all non-constructivists, all constructivists, and others can recognize, it should be considered an ideal for the creation of norms.



gap that exists in non-constructivist theories—the fact that social contract theory is *prima facie* sufficient to create obligations takes on more force.

Thus far, I have argued that consent generates norms. On the other hand, monarchs, computers, and dice do not seem to generate norms. Computers can generate answers once we establish the range of possible options and build in the parameters. Rolling dice can do an unsophisticated version of the same thing. However, we would need to tell a further story to explain why these “answers” obligate us to abide by them. In a board game, rolling dice can create norms for where to move a playing piece across the board. However, there are background conditions for the creation of that norm: namely, that a specified group of players have come together and agreed to play a game with a specified list of rules. One could imagine Monopoly players agreeing to any number of norms governing the rolling of dice, but the agreement, not the dice, is doing the heavy lifting in that example.

Furthermore, we might have reason not to want these mechanisms to choose our norms even if they were capable of doing so. For certain types of choices, rolling a dice or the answer a computer program spits out might be acceptable, such as choosing which side of the road to drive on to achieve the good of public safety. Cases in which the answer is trivial, simple, or merely a coordination problem, may fall in this category. However, in other cases, our choice of norms is much more complex. When the means to achieve a good are varied and have different cost-benefit analyses, we may not want to leave the decision to chance. For example, consider an oil spill in international waters. Who is obligated to contribute to the clean up, and to what extent? What is the proper balance between spill containment and oil skimming? Furthermore, conflicts exist in the

goods we pursue in the face of the oil spill. When engaging in cleanup, we may have to weigh environmental considerations against obligations to human beings in the triage effort. Rolling dice certainly is not going to help us choose one out of many possible norms governing behavior in this scenario. And a computer will only help us if we have already established our priorities at the outset.<sup>48</sup>

A monarch looks like a better candidate for creating norms. We can imagine a monarch who achieves authority through coercion. Worries about creating world-state governed by a single individual notwithstanding, a monarch could conceivably specify the relevant norms to achieve goods in the global sphere. I now address the undesirability of this possibility along with the undesirability of using convention without consent.

What if the global community converges on certain paths to achieve the goods set out in the previous chapter, but does so without consent? That is, what if the global community meets the standard of realizing goods without social contract theory entering the picture? This example suggests that social contract theory is not in fact a necessary component for grounding global justice because conventions can specify norms without consent.

Consider a world-monarch, or even a global hegemon that chooses a set of norms from the various options available. Suppose the set of norms must achieve goods such as freedom, security, environmental protection, and health. But states do not agree to the norms. In this hypothetical example, states are benefiting from the shared goods of international cooperation, but doing so without consent. In that case, social contract theory is neither sufficient nor necessary for grounding international norms.

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<sup>48</sup> For reasons that agreement is the best method for choosing norms even in cases where there *is* a fact of the matter concerning the best norm, see below.

The first question to ask is, how are the norms successfully achieving goods? States must follow those norms to successfully achieve the goods. However, we are explicitly building into the hypothetical that these states do not consent to the norms.<sup>49</sup> Here, a distinction between thin agreement and thick agreement helps. Thin agreement might be defined as a general compliance with the specified norms that lead to natural goods, and nothing more. On the other hand, thick agreement is shared acceptance of the specified norms. Thin and thick agreements make no reference to the mechanism used to choose norms, making them helpful terms for this discussion. In the above example, what is achieved is thin agreement, or general compliance with nothing more. In other words, we are imagining a case in which there is thin agreement but not yet thick agreement. Thin agreement can be achieved with spontaneous convention, physical coercion, fear, intimidation, or even bribery. But it would not yet constitute thick agreement.

If goods are multiply realizable through various sets of norms, I think a natural shift will occur from norms that only achieve compliance under duress to norms that achieve compliance from shared acceptance, or thick agreement. If non-constructed goods can be achieved in many different ways, why choose the way that involves nonconsensual force? Nonconsensual force tends to be oppressive and may require violence. *Ceteris paribus*, then, we have reason to avoid it. Furthermore, thin agreement is not very stable. We might even think that forcing people to do things in their own interest can only last so long. Eventually, either compliant individuals will discover that compliance with the norms is the best way to achieve goods and compliance will produce consent to the norms, or they will discover that the norms are not achieving any goods. In

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<sup>49</sup> It is helpful to consider that this objection has teeth against actual contracts but does not pertain to hypothetical contracts. Why states would refuse to agree to various norms in *theory* if those norms successfully achieve the goods they value is difficult to imagine.

either case, forced compliance is not a significant objection. In fact, I will argue that thick agreement actually brings about a richer set of goods. I address this point below.

For example, consider an international institution desirous of alleviating poverty and ending corruption in a country whose banks have failed. As incentive, the international institution offers humanitarian aid in exchange for improved banking law and regulation. Suppose this impoverished country does not agree nor want the new laws, but cannot afford to turn down the humanitarian aid. Here, the international institution has offered the possibility of achieving goods for human beings through force and not consent. If the country complies, it will do so reluctantly. If given the choice, it would prefer the humanitarian aid without banking law reform.

The response to this offer will either be to accept the laws and aid, or to reject both. Suppose the country rejects the legal reform because they value their principles over their own lives. In that case, no one consents to the policy and (for that reason) the policy fails to achieve any goods. Or, suppose the country accepts the humanitarian aid and changes banking law regulation. This change cannot be called consent because the agreement was achieved under duress and because the country was given an exploitive offer.

However, suppose the change improves the legal system, thus achieving goods for their population through both the humanitarian aid and, in particular, the legal reform. Suppose further that the members of this state recognize the benefits achieved through the regulation and in hindsight consider the reform to be valuable in its own right. In that case, we have reason to take their continued compliance as tacit consent to the legal

reform. Political actors might move from “thin agreement”—compliance—to “thick agreement”—acceptance.

We can also see this point when we consider a follow-up to the above case. Suppose the international institution suggests further reform following the first successful changes. The state will either consent or refuse. The former legal reform, rather than hurting their country, helped it achieve a fuller set of goods for their citizens. Another move in the same direction can reasonably be expected to achieve more goods. When considering the second policy change, the country may accept the legal reform as beneficial. Or, suppose the former legal reform hurt the country and made its financial institutions worse. Their compliance to the reform did not lead to consent because they recognize its failure to bring about any goods, nor will they likely consider further regulation along the same lines. In this second case, tacit consent does seem possible.

This example is complicated by the coercive aspects of the example—can the country really be considered to consent if the lives of their citizens depend on consenting? One might say no: their actions do not amount to explicit or tacit consent. Even under the circumstances of continued compliance and acceptance of further reform, their actions merely amount to coerced action under duress. But that explains how we can achieve either compliance and consent, or compliance and coercion, but compliance without consent or coercion is a temporary stop either to coercion (or in this case, bribery), or to true consent.

So far, I have argued that shifts from thin agreement to thick agreement are natural or inevitable. However, no natural shift is likely from thick agreement to explicit consent. Just because states all agree to and cooperate with a set of international norms

that achieve goods they all value does not mean they will shortly sign a contract. Explicit consent is difficult to achieve. While not all versions of social contract theory can successfully circumvent this objection, tacit consent does. When states all abide by, agree with, and act in accordance with international norms, we can describe their actions as tacitly consenting to the norms.

However, a worry persists. Even if a shift from thin to thick agreement occurs in most cases, one could still wonder in principle why consent matters if everyone is attaining the natural goods. What if the global community perfectly achieves non-constructed goods, but never agrees to norms and never shifts to thick agreement?

The problem with examples in which parties work together to achieve the same goods by following the same norms is that these hypothetical scenarios run the risk of smuggling in consent. When people are cooperating to attain the natural goods by following specified norms, they are tacitly consenting to the specification of the norms that lead to those goods. When individuals cooperate to attain shared social goods—and successfully achieve them—it is difficult to describe the scenario any other way. We have reason to suspect, that is, that consent is doing all the normative work in those cases, but is not being identified as such.

To guard against the risk of smuggling in consent, we could make the examples more robust. For example, imagining everyone working together to achieve social goods through the same norms but never consenting to the use of the norms to achieve goods is easy if everyone is a zombie. The example also works if the relevant parties are drugged. Here again, we can imagine that the natural shift from thin to thick agreement with consent (tacit or explicit) never comes about. After all, they are drugged into enough of a

stupor that they can use means to achieve ends, but not sober enough to consent to those means.

Although this objection gains traction in the cases of zombies and drugged individuals, imagining hypothetical examples in which individuals are all working towards the same goods with the same international norms without ever even tacitly consenting is much more difficult. I argue that the difficulty in constructing cases undermines the objection. This stipulation—that the parties never consent in any way to the norms they follow—makes imagining how such a situation could come about virtually impossible. Furthermore, choices made by zombies and drugged people do not seem to be legitimate, nor does making representatives into zombies or drugging them seem legitimate. We can also go further and say that the case of coercion discussed above in which achievement of the goods comes about through coercion and constant intervention is not legitimate either. What makes it the case that no consent occurs in these scenarios is what makes it the case that the agreement is not legitimate. These examples also help explain why consent is doing theoretical work. One might worry that if tacit consent is always found in cooperative situations in which everyone aims at specific goods by following the same paths, then consent comes along for free. Zombies and drugged parties to a contract show that it does not come along for free, but that it is an important addition.

In Chapter 2, I asserted that the choice problem and the specification problem block the ability for non-constructivism to do all the normative work in establishing norms. The majority of the claims I made in that chapter centered on the idea that multiple norms can be adequately responsive to non-constructed goods or that multiple

specifications of a norm can adequately capture that norm. I do not think one norm in a range of possible norms is correct. However, I also argued that even if only one norm achieves the most goods in the best way and there is a fact of the matter about which norm is correct, epistemic problems emerge regarding how to identify the best norm. If there is a correct answer with respect to the choice and specification problems, then consent seemingly cannot complete non-constructivist theories in the same way I argue above. Why look to consent or the agreement of flawed individuals to respond to any epistemic problem? I argue that social contract theory is a good candidate for grounding global justice because it is likely to give rise to correct norms when correct norms exist.

In the case of mere lack of knowledge, agreement still emerges as the best way to choose and specify norms. We often think that experts would be best at identifying the truth about questions of fact. However, allowing individuals to make decisions—to offer their consent to a state of affairs—is a good way of tracking the truth. The most common citation to support this point is the Condorcet jury theorem. According to the Condorcet jury theorem, individuals who are each more likely than chance to choose the correct answer in a binary choice have a high probability of making the correct choice. In fact, a Condorcet winner in a majoritarian vote is more likely to be correct than an expert's choice. The benefits are compounded when you increase the number of voters. The more people who vote on the binary choice, the closer the probability approaches one that the choice will be correct—as long as each individual has a greater than .5 chance of choosing correctly.

The Condorcet theorem is extremely powerful and is often cited by political theorists. The thought that majoritarian voting can be more successful than a single expert



has implications not only for democracy but also for a range of political regimes. However, we are also cautioned from relying on it too heavily. After all, rarely do individuals get presented with a binary choice in their political decision-making. The choice problem notably does not generally present binary choices. Often, a number of paths can successfully achieve the non-constructed goods. Furthermore, we might worry that the criterion that individuals be better than chance at choosing correctly is too strong. Perhaps individuals are not better than chance at making the right decisions, a consideration which provides further support for the prospect of rolling dice. In fact, the Condorcet theorem works in the opposite direction when individuals are less likely than chance to choose the correct option. In that case, the probability approaches one that the Condorcet winner will not be correct.

However, some philosophers have argued that majoritarian voting is still extremely successful in the absence of Condorcet's criteria. Robert Goodin and Christian List expand the Condorcet jury theorem to address more than just binary choices.<sup>50</sup> They argue that the Condorcet jury theorem can be expanded to address plural choices and that the more people that vote on the choice, the more likely the vote is to be correct. Furthermore, they show that the individuals do not need a higher probability of .5 of making the right choice. Goodin and List show that the theorem works under the much weaker requirement that individuals be slightly more likely to choose the correct option than the incorrect one. For example, they state, "Contrary to what they [the epistemic

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<sup>50</sup> See (List and Goodin 2001, 277-306). Although Goodin and others have done important theoretical work proving the success of the Condorcet method under less stringent criteria, some are already preceding on this assumption. "Crowdsourcing," a term coined in (Howe 2006), in which lay-people or masses of experts weigh in on decision-making in huge numbers over the internet, has become a phenomenon in everyday decision-making, technological advances, creative enterprises, and even medical decisions (Sanghavi 2010).

democrats] suppose, [the Condorcet theorem] can be extended even to plurality voting among many options. And contrary to what epistemic democrats conventionally suppose, voter competences can in those many option cases drop well below 50 percent and the plurality winner still be most likely the correct choice” (List and Goodin 2001, 284-285). Even under these significantly weaker conditions, as the number of voters approaches infinity, the probability of the winner being correct approaches one.<sup>51</sup>

This research is important for my purposes. I go on to show below that we have strong intrinsic reasons to value consent. However, instrumental reasons for valuing the consent of individuals bolster these arguments, especially as opposed to a couple experts or a single decision-maker. Not only do we have reason to let individuals choose norms with consent for reasons that appeal to our other values, as I argue below, but we also have reason to let individuals choose norms with consent because they will be very likely to make correct decisions when we do so. Contrary to what non-constructivists argue—that agreement is fine but that we need the truth when it comes to choosing norms—it turns out agreement may be the most successful way of achieving the truth. Consent, when it is aggregated, is the most successful method for choosing norms even when we consider instrumental reasons alone.

Thus far, I have argued that social contract theory is necessary to ground norms because it completes non-constructivist accounts. It is sufficient for creating norms, the other candidates fail, and it provides good epistemic guidance. Another reason why social

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<sup>51</sup> According to Goodin and List, the Condorcet theorem is not the only truth-tracking decision-making procedures, and in some cases is not even the best. In some cases, a Borda count, in which individuals create a rank-ordered list of preferences, is more successful than straightforward votes for one option. However, for my purposes, a Borda count is as powerful as the Condorcet theorem because both demonstrate the success of aggregated decision-making over the alternative methods of choice, such as a monarch or expert making the choices.

contract theory and consent are necessary to complete non-constructed facts is partly derivative of those facts. For example, autonomy, personal responsibility, freedom, and self-determination all underline the necessity of using social contract theory and consent to choose or specify norms.

Garnering consent is the correct treatment of rational agents. Rationality means different things according to different theorists. Contractarians take rationality to be action in self-interest, whereas contractualists take it to be the capacity to set ends, whether they are in self-interest or not. I defend obtaining consent from rational agents without coming down on the definition of rationality because regardless of the correct account of rationality, getting consent for competent agents is necessary for justice. By defending the point generally, I need not subscribe to a controversial definition of rationality; I need not define rationality as either self-interest or the capacity to set ends. In this section, I argue that the consent of rational agents is necessary on either definition of rationality. Instead, the necessity of social contract theory for justice relies only on the existence of rational agents.

Why think that consent is necessary for grounding norms that govern rational agents? First, competent individuals are self-determining. They have the capacity to set ends for themselves and this capacity *prima facie* ought to be respected. Getting consent from rational individuals respects this autonomy because it follows individuals' rational expression. When coercive power overrides individuals' rational expression, it violates the autonomy of individuals in a way that is *prima facie* unjustified. Since I argue for a hybrid theory of justice, I ultimately argue that overriding individual autonomy is

justified in some cases. However, I also argue for erring on the side of respecting autonomy. In other words, respecting individuals' autonomy is prima facie desirable.

Furthermore, we should guard against the alternative. When we do not value or respect autonomy, we are in effect endorsing oppression. Choosing not to respect autonomy but instead to endorse paternalism is choosing to use coercion to obstruct individuals' pursuits even when those pursuits do not harm others. This, I argue, is morally akin to oppression because it blocks personal freedom and can result in forcing individuals to engage in pursuits they do not value. On the other hand, when individuals voluntarily submit to coercive institutions either for mutual advantage or for other moral considerations such as fairness, these institutions are in keeping with autonomy and are thus legitimate. Coercion in particular requires prior consent because it violates autonomy otherwise. The connection between coercion and autonomy is often thought to require this. And, as I argue above, we have reason to believe that the goods that coercion is meant to achieve will be limited, unstable, and lack meaning of autonomy is not respected in their achievement.

In addition to the intrinsic value of autonomy as self-government, autonomy also has instrumental value. Individuals prosper and flourish when they have the opportunity to pursue their ends, whether or not they do so successfully. The sense of control we get amidst this freedom is itself a reason to endorse the freedom, even when individuals fail to attain what is in their own self-interest. Respecting autonomy by garnering consent endorses individuals' control over their lives, which leads to happiness, well-being, and self-fulfillment. For example, Steven Wall states, "It can be reasonable to defer to the judgment of others some of the time in some circumstances; but a person who surrenders

his or her judgment in all contexts would not lead a fully good human life. This intuition is explained by the idea that it is intrinsically good for people to take charge of their own affairs and lead their lives on their own terms, even when others could do a better job of it” (Wall 1998, 146). In other words, exercising autonomy in our lives is distinctly valuable. This point is widely defended. For example, L. W. Sumner argues that autonomy is instrumentally valuable because it contributes to the authenticity of our lives. This authenticity creates welfare and happiness. Although welfare and happiness are our ultimate goals, autonomy is necessary to achieve them.<sup>52</sup> In fact, those who are more interested in the instrumental value of autonomy may still argue that autonomy also has intrinsic value and vice versa.

The implications of valuing autonomy for social contract theory are significant. Consent is the best way to respect individuals’ capacity for self-governance because it gives individuals decision-making authority over the very choices that autonomy governs. For this reason, even those who defend non-constructivist theories have reason to endorse consent since autonomy is an example of a good that can be achieved primarily through seeking consent.<sup>53</sup>

We have already seen that consent is necessary to respect the free expression of autonomy among rational agents. A second reason to value consent appeals not to

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<sup>52</sup> See (Sumner 1996).

<sup>53</sup> This respect for autonomy in the international context will depend on the parties to the contract and the method of consent. For example, representative consent to contracts will differ from direct consent from constituents. There is reason, however, to believe representatives can respect this autonomy. Representation gives individuals causal contribution to international decision-making and can hold representatives accountable to the individuals of their relevant groups. International institutions govern state behavior, but those states are made up of individuals. When we speak of states having obligations, we can cash out those obligations as obligations cooperating individuals have. Because governing a state is also governing a set of individuals, international institutions should be respectful of autonomy. The specific hybrid theory I argue is most successful in the international realm I defend in Chapter 6.

autonomy, but to self-interest. That is, agents are in a good position to know and to find out what is best for themselves. Even those who attack social contract theory support this point. For example, Mill, who neither defends social contract theory nor consent as legitimizing coercion, states,

But neither one person, nor any number of persons, is warranted in saying to another human creature of ripe years that he shall not do with his life for his own benefit what he chooses to do with it. He is the person most interested in his own well-being: the interest which any other person, except in cases of strong personal attachment, can have in it is trifling compared with that which he himself has; the interest which society has in him individually (except as to his conduct to others) is fractional and altogether indirect, while with respect to his own feelings and circumstances the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by anyone else.  
(John Stuart Mill 1978, 74)

Here, Mill argues that we should respect individual freedom because we have desires to promote well-being and respecting individual freedom successfully attains well-being of individuals. Of course, one could disagree with Mill that individuals are in such a good position to know what is best for themselves. However, we need not argue that individuals are particularly good at determining what best promotes their well-being. Showing that individuals are in a better position than most for determining what is in their self-interest suffices for this position. Those who value well-being, then, have prima facie reason to get consent whenever possible.

For example, developed states have a long history of failing to recognize what actions will help developing states and at being less successful than those states at determining what actions will help them. Sending clothing and shoes to developing states can raise complaints from local merchants that their businesses cannot compete with free merchandise from abroad. Even food aid can be detrimental to developing states. Farmers

in developing states might prefer the United States to get rid of farm subsidies and tariffs to make their businesses competitive in both local and global markets rather than receive handouts. In the 1970s, Nestlé, along with public health experts, marketed infant formula in the developing world, thinking that formula would be better than breast milk for babies and that formula would be better for weaning babies than local practices of using cow's milk or rice milk. This campaign famously backfired, resulting in increase infant death due to parents diluting the expensive formula or using contaminated water to make it.

Looking back to our earlier discussion of thin and thick agreement, the reasons for thinking thick agreement bring about a richer set of goods are now evident. Thick agreement, in that it arises out of autonomous agreement to norms, brings about a richer set of goods because respect for and exercise of autonomy brings about a richer set of goods. I do not think these reasons should be taken lightly. Although rolling dice might seem to bring about the same set of goods when used in pair-wise decision making, we have reason to think autonomy can achieve more goods in a better, more stable fashion.

Positive practical considerations also give us reason to use social contract theory to ground global justice. Although these considerations may not be as persuasive as the theoretical arguments in favor of social contract theory, they are nevertheless important. In applied philosophy, practical considerations matter lest we stray too far into ideal theory. Social contract theory working well in practice might not be an independent argument for the theory, but it is still relevant to our evaluation.

Social contract theory is successful in practice for several reasons. First, a healthy skepticism about anything beyond a basic, minimalist conception of agreement-independent moral norms should lead us to be desirous of accommodating pluralism

about values. Although we may have strong opinions about what the proper norms are to achieve goods, we also recognize that there is significant diversity in opinion on these matters. Since disagreement must be accommodated, force is *prima facie* an undesirable alternative to consent. Consent is a good way of accommodating pluralism in virtue of the fact that it endorses self-determination. And, as seen above, it successfully adjudicates the disagreements we find in a pluralistic sphere.

Second, consent improves cooperation, since a sense of responsibility and control contributes to agents' fulfillment of agreements. Actual consent improves the implementation of political coercion, providing a failsafe way for making agents understand and be aware of obligations. Actual consent also improves compliance with obligations, since agents see agreement as a reason to take themselves to be bound by obligations. Although these features are practical considerations of the benefits of consent subject to empirical inquiry, they are nevertheless important to take into account alongside theoretical reasons for the importance of consent.

Third, actual consent, both tacit and explicit, enjoys the benefit of historical precedence in international law.<sup>54</sup> The United Nations, European Union, The Nuclear Non-Proliferation Treaty, The Kyoto Protocol, and the International Criminal Court Statute all serve as examples of global institutions that operate on the consent of members. Even countries that do not have social contracts at the national level often

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<sup>54</sup> International political realism in which no non-constructed facts about goods are thought to exist and thus nations pursue their self-interest to the detriment of the international community also benefits from historical precedence. However, this policy only counts as an objection if we conceive of it as a possible alternative to consent. In this dissertation, I am navigating the range of possible views on the source of international norms, and thus do not have the space to reject views that deny the existence of international norms.



participate in social contracts at the international level.<sup>55</sup> We should not underestimate the importance of precedent in international law. Because those concerned about global justice are concerned with the feasibility and practicality of their theories, precedent is a uniquely powerful force.

The considerations in this section, taken together, give us strong reason for thinking that social contract theory is necessary for global theories of justice. Social contract theory is also an ideal way of choosing and specifying norms. This fact emerges in part by comparison to the other possible alternatives. For this reason, social contracts best complete non-constructivist theories. Next, social contract theory best respects autonomy, which has broad bases for support. Finally, practical considerations of implementation support the use of social contracts to ground norms at the global level.

## **V. Objections and replies: further desiderata for a hybrid theory**

So far, I have argued that social contract theory is necessary to ground global norms like the legitimate uses of coercion but that it is not sufficient. In this section, I show that social contract theory does not fall prey to the most common objections against it, which are often taken to be knock-down objections. I argue that these objections all pertain to subsets of social contract theory, rather than social contract theory as I defined it in section II. However, these objections are helpful in establishing a successful version

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<sup>55</sup> One could argue that some tyrannical states engaging in consent are not actually endorsing consent, first, because the consent of their leaders is not representative of the population, and second, because those tyrannical leaders would not allow true representatives to engage in consent at the international level on their behalf. However, when these leaders are nevertheless engaging in consent rather than rejecting the international institutions or using coercive force and bribery they are endorsing the consensual nature of the institutions. Furthermore, these considerations show the hypocrisy of the tyrannical regimes. If they do not think consent matters, why do they value registering their own consent to international institutions?

of social contract theory, because they enumerate the desiderata that a social contract component of a theory of global justice must meet.

The first objection I consider pertains to the parties to the contract. In this view, rough equality is required for social contract theory, but rough equality does not exist in the world.<sup>56</sup> For example, Nussbaum, in a critique of Rawls as committed to the Humean circumstances of justice, characterizes his position in this way: “First, Rawls explicitly endorses the idea that the social contract is made between parties who are roughly equal in power and resources, so that no one can dominate the others” (Nussbaum 2005, 198). Nussbaum has good reason for this interpretation of Rawls.<sup>57</sup> For example, in Chapter 3, Rawls describes this feature of the original position in much the same way Nussbaum does, saying that, “These individuals are roughly similar in physical and mental powers; or at any rate, their capacities are comparable in that no one among them can dominate the rest. They are vulnerable to attack, and all are subject to having their plans blocked by the united force of others” (Rawls 1999b, 109-110).<sup>58</sup> However, if social contract theories are committed to this circumstance of rough equality, they are committed to a characterization of the world that is inaccurate. Nussbaum rejects Rawls’ account as

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<sup>56</sup> In section II, I look at Nussbaum’s definition of social contract theory and argue it is too narrow in part because she thinks rough equality is a defining characteristic. Here, I argue that rough equality as she means it is not a feature of social contracts.

<sup>57</sup> Although Rawls does subscribe to the Humean circumstances of justice, Nussbaum’s analysis may be undermined in its specificity. It fails because there are many circumstances of justice (as Hume calls it) that are relevant to the starting point for the theory. Rawls lists reasonable pluralism, moderate scarcity of resources, and a defined geographical area as objective circumstances of justice, and adds subjective circumstances of justice—that human nature lies between egoism and altruism. Therefore, to single out one single circumstance of justice as a definitional property of social contract theory seems uncharitable.

<sup>58</sup> Whether or not Rawls is committed to this version of rough equality is itself a difficult interpretive question. See below.

representative of human beings in the world today. Poverty, social conditions, and disability make it untrue that all human beings alive today are roughly equal.<sup>59</sup>

However, what is required for rough equality is rough *moral* equality, not rough physical equality. Surely, this requirement is much more central to a social contract. If the parties to the contract are not morally equal, and are of varying moral importance, then any agreement made among them would be highly suspect. We have reason to interpret actual social contract theorists as committed to rough moral equality instead of rough physical equality.<sup>60</sup> Moral equality is necessary for contracts to be fair and informed in contractualism for the same reason we do not enter into contracts with trees and rocks.

Moral equality also makes more sense as the correct referent in contractualism because moral equality plays a large role in contractualism generally. For contractualists, all human beings are morally equal because all human beings are autonomous and rational. This idea of moral equality is not meant to depend on physical characteristics of human beings, but rather to the moral community generally. Moral equality plays a large

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<sup>59</sup> This objection pertains to actual contracts, but not hypothetical ones. Specifically, it only applies to tacit and explicit contractarianism; it does not apply to contractualism. When it comes to contractualism, we can constrain the circumstances of justice and ask what parties to the contract would agree to if they were equal.

<sup>60</sup> Rawls defends this sort of moral equality in *A Theory of Justice*. Rawls says, “It seems reasonable to suppose that the parties in the original position are equal. That is, all have the same rights in the procedure for choosing principles, each can make proposals, submit reasons for their acceptance, and so on. Obviously the purpose of these conditions is to represent equality between human beings as moral persons, and creatures having a conception of their good and capable of a sense of justice” (Rawls 1999b, 17). Beitz also denies rough physical equality while endorsing social contract theory. In his book, *Political Theory and International Relations*, Beitz argues most vehemently against viewing international affairs as a state of nature in the sense that all countries are roughly equal and are trying to dominate one another. (Beitz 1979). In fact, he devotes an entire chapter towards showing precisely that point, equating the view that international affairs is akin to a Hobbesian state of nature with moral skepticism and the view that countries act only on their own self-interest, sometimes referred to as political realism. According to Beitz, the Hobbesian state of nature as applied to international politics can be reduced to 4 main propositions—propositions that Beitz argues against in succession. These propositions include the circumstance of justice that Nussbaum takes to be definitional for social contract theory: rough equality.

role in the theory: I cannot agree to any contracts that I cannot justify to others.<sup>61</sup>

Therefore, understanding the circumstances of justice as requiring moral equality instead of rough equality is explanatory for both contractualism and contractarianism.

It seems that we can successfully defend contractualism against claims that it cannot accommodate humanitarian intervention or global distributive justice.

Contractualism, on the account given above, does presume commitments to human beings as human beings, and therefore includes basic moral principles. However, can we defend contractarianism against the same claims? If contractarianism falls prey to the problems Nussbaum spells out, then we have only given half of a defense of social contract theory.

I believe that we can defend contractarianism against Nussbaum's claims, although not with the same strength. But Nussbaum does not have any in-principle reasons why we should dislike the model of "mutual advantage." Rather, she argues that the model of mutual advantage creates problems in the international sphere; most notably, it creates the problem that we cannot pursue humanitarian interests. I discuss this further in the third objection I consider. Furthermore, in contractarianism, pursuing "mutual advantage" is only rational if those benefiting are of roughly equal moral importance. If some who benefit are not of moral importance, perhaps they should not be receiving benefits nor be a part of the community gaining advantage. Nevertheless, in contractarianism, Nussbaum's attack is much harder to meet. For some contractarians, rough physical equality is a prerequisite for any social contract. If no rough physical

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<sup>61</sup> This central idea explains why public reason plays such a large role in Rawls's corpus. On the flip side, for hypothetical contractualists, rough physical equality does not play a strong role, since the reasonable persons we are considering are hypothetical. They need not exist, and if they do, we might imagine that they are roughly physically equal, but the point is not central to the theory.

equality exists between two parties, then they cannot enter into a contract and thus they cannot have any moral obligations to one another.

Gauthier defends a Hobbesian, contractarian approach for mutual advantage that might exemplify Nussbaum's worry. (Gauthier 1986) According to this view, parties must be roughly physically equal to enter into a contract. If, as Nussbaum suggests, no rough equality exists internationally, this raises a worry: do we have any duties to weaker or stronger states? If Gauthier's position violates our intuitions about the treatment of weak states, this objection becomes very powerful. If Nussbaum's objection against rough physical equality as a salient feature of contracts suggests problems for contractarianism, can it be saved? I will argue below that contractarianism is insufficient by itself to ground international political norms. Although I do not think that positions such as Gauthier's can necessarily circumvent the strongest version of this objection, contractarian views can be saved to the extent that they are combined with non-constructivist views.

This objection about rough equality establishes a desideratum for a theory to ground global political norms: it must not violate our intuitions about duties to those outside the contract or to weak or vulnerable populations. If Nussbaum's objection is correct, there are no resources from within contractarianism to meet this desideratum. However, as long as the theory as a whole meets the requirement, this objection will not undermine the use of contractarianism within the view.

Other objections to social contract theory pertain to the circumstances of justice.<sup>62</sup>

One objection is that actual consent can never come about because in order for someone

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<sup>62</sup> I do not consider some related objections that pertain to the circumstances of justice. For example, some argue that consent is sometimes used as a tool of oppression and some argue that actual consent is virtually

to freely consent they need to be provided with a robust set of alternatives. Parties to a contract may seem to consent to an alternative, but their consent does not count as true consent because they are not often offered a sufficiently diverse range of options. For example, United States citizens voting in an election cannot be interpreted as consenting to the United States government because they are not permitted to vote on any alternatives to a democratic republic. This objection applies to explicit or tacit contractarianism, but not contractualism.

This objection is too demanding. Significant increases in choices neither enhance autonomy nor improve decision-making.<sup>63</sup> In fact, sometimes the availability of alternatives actually clouds decision-making. For this reason, as economists have shown, individuals are willing to pay to reduce their number of choices. Jon Elster has argued, “On the one hand, [an] individual might benefit from having specific options unavailable, or available only with a delay, or at greater cost, and so on. . . . On the other hand, [an] individual might benefit just from having fewer options available, without the desire to exclude any specific choices” (Elster 2000, 2). Therefore, we should not require complete or even large sets of alternatives to take actual consent seriously.

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impossible in practice. To the former, suffice it to say that to use consent as a tool of oppression seems to be social contract theory in name only, and certainly not the strongest version of the theory. To the latter point, I address above one reason to believe that consent comes about more often than we think. I acknowledge that actual explicit consent may be rare, but actual tacit consent is quite common. Furthermore, if we distinguish along with Simmons between promising, written contracts, and authorizing acts of others, then finding examples of consent in practice should be easier (Simmons 1976, 275).

<sup>63</sup> For example, a smaller array of choices decreases people’s regret about their decisions. For example, Ted Sarver argues, “Since regret arises in our model from ex post comparisons between the alternative selected and other available alternatives, a regret preference will reflect an agent’s desire to limit her options” (Sarver 2008, 264). Another experiment showed participants were better at analyzing fewer pictures than more, “Pictures chosen from extensive options, on the other hand, did not elicit orienting responses. Recognition was fastest and most accurate for pictures selected from limited options, suggesting that participants encoded them better. Based on these results, we suggest ways of conceptualizing the attributes of computer media that uniquely affect cognitive processing” (Wise and Pepple 2008).

However, this objection retains force in cases where there are truly no alternatives for parties to the contract. If agents are only given one option, or if they are not presented with a sufficient range of options, their consent does not count as meaningful because it cannot be considered freely made without undue constraint. In that case, we could fairly assume that agents would make different decisions under less limited conditions.

Furthermore, if we grant the underlying worry of this objection, that agents making choices cannot be said to consent when their options are limited, we can see that this condition occurs frequently. For example, in national democracies, even if citizens have the ability to vote on a significant diversity of representatives (a big assumption, to be sure), the governing institution itself is not on the ballot. No matter which party or representative a citizen votes for, she will nevertheless be endorsing the status quo for government. In that case, her vote for a representative or candidate cannot be interpreted as a vote for the system itself, because she cannot register her dissent nor can she give her support to any alternatives.

This criticism is a deep problem for national government. Virtually every human being lives in space governed by national political institutions, making alternatives to existing political institutions nearly impossible unless the state is undergoing a coup or some other radical change. This criticism of explicit or tacit contractarianism only applies at the national level, where no alternatives to governmental institutions exist. However, while alternatives to governmental institutions are not generally available at the national level, they are at the global level.

At the global level, where the political governing institutions are not complete, the variety of possible multi-lateral contracts are numerous and the opt-out possibility a true

option. In addition to increased options in multi-lateral contracts and for opting out of multi-lateral contracts, there is also more opportunity to create multi-lateral contracts. At the national level, citizens have little to no choice in the array of coercive institutions they are subject to, as well as little to no ability to opt out of those coercive institutions. Similarly, opportunities to create new coercive institutions that we can choose to be subject to are slim. For this reason, we so often find those who do not endorse every aspect of coercive institutions left with no other option than to violate them wholesale, like Thoreau refusing to pay any of his taxes.

Therefore, while this objection may preclude the possibility of consent at the national level, due to global circumstances it does not apply at the international level. Sufficient alternatives in international contracts exist and states, individuals, non-governmental organizations, and other global actors can and do refrain from signing global treaties. This objection fails to gain traction outside the national level.<sup>64</sup>

The above objection suggests a second desideratum for a successful social contract theory: there must be available alternatives. This desideratum is an in-practice requirement, as opposed to an in-theory requirement. Based on objection, we can say that social contract theory will only be viable when parties to the contract have sufficient alternatives. I have suggested reasons for thinking that the international realm meets this requirement. Nevertheless, we must tread carefully, making sure never to endorse social contract theory unless there are opt-out features of the contract as well as alternative contracts.

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<sup>64</sup> This is one important reason why a hybrid view that includes a social contract element only works at the international level and does not ground national political norms. Because circumstances are so drastically different in the international stage, differing theories for each stages makes theoretical sense. Reasons for rejecting social contract theory at the national level do not constitute reasons for rejecting it at the international level. Reviving social contract theory internationally remains justified.



The next objection I consider pertains to the parties to the contract. According to this objection, parties to the contract may have moral obligations to those “outside” the contract.<sup>65</sup> For example, in his paper, “The Internal Legitimacy of Humanitarian Intervention,” Buchanan argues that according to social contract theory, states are formed for the mutual advantage of their citizens.<sup>66</sup> Says Buchanan, “...the state is an association for the mutual advantage of its members and ... the government is simply an agent whose fiduciary duty is to serve the interests, or to realize the will of those citizens” (Buchanan 1999, 73). This sentiment is repeated elsewhere in the article. For example, Buchanan states that, “According to the dominant view, the state is a discretionary association for the mutual advantage of its members. The government is simply the agent of the associated individuals, an instrument to further their interests” (Buchanan 1999, 74).<sup>67</sup> Objectors to social contract theory sometimes call it the “discretionary association view” because parties to the contract may not be broad enough to cover every moral agent.<sup>68</sup>

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<sup>65</sup> This objection varies depending on why those who are outside the contract are outside the contract. For example there are those who want to be party to the contract but are excluded and those who do not want to be a part of the contract to whom we have duties. Both objections apply only to contractarianism. For the contractualist, as stated above, parties are not ‘outside’ the contract in the same way. There are several responses to these objections. I defend tacit consent, which undermines the force behind this argument. Others defend a threshold view: if enough people sign on, the contract becomes applicable to others. This view is particularly common in international law.

<sup>66</sup> In section II, I look at definitions of social contract theory that are too narrow to capture many variations of the view. This definition of social contract theory falls under that description.

<sup>67</sup> Like the previous objection, this objection only applies to a small subset of social contract theories as I have defined them. Specifically, it applies to contractarianism in its multiple forms. On the contractualist account, we have duties to all human beings to treat each other with respect and to justify our reasons to one another. Whole societies will not remain “outside the contract” on this view, since consent is merely hypothetical. Our duties to respect one another arise out of personhood and rationality rather than whoever happens to have consented to the same contract we have.

<sup>68</sup> There is a closely related objection that I consider below, that there are some things that are morally required of us that social contract theory seemingly does not require us to do. Although this objection takes the form and is closely related to the above objection, that objection pertains to every version of social contract theory, whereas the discretionary associate view only pertains to a small subset of social contract theories.

However, contractarianism does not always exclude those who are not party to the contract. For example, contracts can have third-party beneficiaries: parties can come together to agree to rights and duties for those outside the contract. Creating a third party beneficiary can as simple as two parties agreeing to gift a pen to a third party. Or, the beneficiary can be much more far-reaching, such as parties contracting to protect children, the disabled, animals, or future generations.

However, Buchanan goes further, arguing that helping the worst off in the world would be impermissible according to the theory. For example, he states, “From the standpoint of the discretionary association view of the state, pure humanitarian intervention is not only non-obligatory. It is in fact morally impermissible, unless there is a clear democratic mandate” (Buchanan 1999, 77). In other words, social contract theory deems impermissible anything that the parties to the contract do not want to do.

Elsewhere, Buchanan states, “At least so long is [sic] there is one citizen who votes against it, pure humanitarian intervention is illegitimate, because the purpose of the state (the goal which unites all citizens in one political association) is limited to the advantage of those citizens, and the effective pursuit of this goal limits the sphere of legitimate democratic decision making” (Buchanan 1999, 76). According to Buchanan, unless citizens vote for humanitarian intervention, support would be illegitimate.

Among contractarian theories, this criticism may remain. In my definition of social contract theory, I differentiated between actual and hypothetical contractarianism. Buchanan’s objection applies to the former, but not necessarily the latter. We could imagine a situation in which engaging in humanitarian intervention is in citizens’ self-interest, but because they do not realize it, they fail to vote correctly. In fact, Buchanan

does not require that citizens vote for actual mutual advantage; he acknowledges that they can vote for whatever they want. If mutual advantage pulls apart from perceived mutual advantage, then Buchanan is taking a substantive view on the interpretation of social contract theory.

Among actual contractarianism, I also differentiated between explicit and tacit contractarianism. Again, this objection applies primarily to the former, but not necessarily the latter. In fact, actual tacit versions of contractarianism do not necessarily endorse unanimity in consent; they take a threshold view in which if enough citizens vote for the intervention, the intervention is obligatory, not impermissible.

Despite these maneuvers, Buchanan's objection retains force against actual tacit threshold consent in contractarianism. Buchanan is right to point out that representatives will sometimes fail to consent to necessary humanitarian aid or other moral requirements derived from goods. In short, Buchanan's objection gives us another desideratum. A successful theory of international justice must not violate our intuitions about duties to help—or not to harm—others.<sup>69</sup> If contractarian theories, taken by themselves, fall prey to this objection, arguing they are a worthwhile pursuit will be hard to do.

In the above defense, I attempted to dispel the most common objections against social contract theory.<sup>70</sup> I argued that many of these objections pertain to a small subset of constructivist views, rather than constructivist theories in general. In the next section, I will argue that some objections are successful against all versions social contract theory,

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<sup>69</sup> For this reason, I will ultimately argue below that social contract theory is not sufficient by itself to ground international norms or the legitimate uses of coercion.

<sup>70</sup> Another common objection against social contract theory is that it is incompatible with natural law theory. Despite the numerous examples of hybrid theories in historical literature, this objection has taken hold in the literature and been used against social contract theory. Although I do not address it here, Chapters 4-6 will give several examples of how the two theories are compatible.

but that we should not abandon social contract theory. Based on the argument above, I argue we should retain social contract theory but revise it to include a non-constructivist element.

## **VI. Conclusion**

In this chapter, I defined social contract theory and gave a complete list of every central feature of the theory. I then gave compelling reasons why social contract theory is not complete by itself to establish norms of justice. I offered two objections to social contract theory which, although they are not reasons for discarding the theory, suggest that the theory is incomplete. Next, I argued that social contract theory is necessary to ground norms because consent is sufficient to create norms. This consideration gave us reason to think that social contract theory was the best solution for completing non-constructivist theories. I also argued that the existence of rational agents makes social contract theory necessary for any theory of justice. I argued that respect for rationality requires getting consent from competent agents. I also argued that practical considerations and respect for autonomy supported the necessity of social contract theory to ground uses of coercion. Finally, I considered objections to social contract theory, and explained why they failed. In Chapter 4, I provide the synthesis of these theories, arguing that each theory fills the gaps of the other and that a hybrid view is both possible and successful. In Chapter 5, I establish historical examples of the hybrid theory I ultimately defend.

## Chapter 4

### *A hybrid theory of global justice*

In this chapter, I argue that a theory of justice for the global realm requires both a non-constructivist element and a social contract element. First, I define hybrid theory. Next, I make the case for general hybridity.

#### **I. Defining hybrid theory**

A hybrid theory of global justice of the sort that I defend is any theory that incorporates social contract theory and non-constructivism. As evidenced in the last two chapters, hybrid theories are opposed to pure social contract theories on the one hand, pure non-constructivist theories on the other hand, and of course, they are also opposed to theories that do not incorporate either of these elements or that deny the existence of global political norms. My sort of hybrid theory contains many different species, since the social contract component and the non-constructivist component can be combined in many ways. For example, one could defend a contractualist social contract element and a consequentialist version of non-constructivist theory and combine these elements into one theory of global justice.

A hybrid theory needs to articulate three main attributes. First, it needs to explain the content of the non-constructivist component. Does it endorse prima facie norms derived from facts about goods or underived norms, for example? Second, it needs to explain the content of the social contract element. Who are the parties to the contract, what is the nature of the consent, what are the circumstances under which the consent is normative, and what is the content of the contract? Third, a hybrid theory needs to

explain the way these two components fit together. Does non-constructivism constrain the range of permissible contracts? Does it constrain the characteristics of the parties to the contract or the circumstances instead? Without specifications of these three elements a hybrid theory runs the risk of being at best, overly vague, and at worst, self-contradictory. Before I address these questions in Chapter 6, I here offer a general defense of hybrid theory, specifying the components of the view and the particular hybridization of those components.

I argue that there are non-constructivist constraints on prima facie norms but that cooperation with one another through consent is also required. In this view, something can only be called a norm for global justice if it satisfies the non-constructivist constraints and promotes cooperation through consent. In other words, I take this view to be most successful in showing how social contracts best solve the problems in non-constructivism and how the non-constructivist best component solves the problems in pure social contract theories, as I have foreshadowed in Chapters 2 and 3 and as I explain below.<sup>71</sup>

However, there are several ways of cashing out this version of hybrid theory as well. In Chapter 2, I made a distinction between two different versions of this view. The first states that the non-constructivist laws or properties are too vague to be applicable and that we need consent to apply them much like we need a judge to apply civil laws. According to this view, non-constructivism has sufficient moral authority to determine justice, but practical considerations make obscure the demands. The second version, and the one I endorse, states that there are multiple ways of achieving non-constructed facts about what is good for human beings. In this view, non-constructivism is insufficient by

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<sup>71</sup> This hybridization is also the version endorsed by historical hybrid examples like Epicurus, Grotius, and Hobbes, as explained in the next chapter.

itself to give us a complete set of norms. We need consent not to identify a theory of justice that already exists, but to help create one.

## **II. A general defense of hybrid theory**

In this section, I make the case for hybrid theory generally, synthesizing the arguments laid out in the forgoing chapters. I argue that there is strong motivation for a hybrid theory of some form. That is, I argue that non-constructivism best solves the constraint problem and social contracts best solve the twin problems in non-constructivism. This explanation of social contract theory and non-constructivism completing each other also explains the way the two components of the theory fit together.

Non-constructivism, as we found in Chapter 2, falls prey to two problems that make it insufficient for grounding global political norms alone: the choice problem and the specification problem. If we accept the arguments laid out in Chapter 2, it is clear that non-constructivism cannot provide a complete account of political norms. However, according to the choice and specification problem, while non-constructivism is incomplete, it merely requires some method of choosing amongst the various possible norms that achieve the goods it endorses. This problem calls for a hybrid theory, but not necessarily a hybrid theory of the type that I defend, which incorporates a social contract.

Social contracts entered the picture when we looked at possible alternatives to solving the choice problem in Chapter 3. Upon closer inspection, most alternative mechanisms of choice turned out not to fulfill the role needed to complete non-constructivist theories by legitimizing one out of several possible norms or sets of norms. Social contract theory best solves the choice problem and the specification problem,

making it the ideal to ground global political norms. Furthermore, independent reasons necessitated the incorporation of social contracts into a theory of global justice.

However, we found that social contract theory also faced a twin problem: the constraint problem. According to the constraint problem, first, parties to a contract can sometimes agree to things that would otherwise seem to us to be morally abhorrent. That is, if we follow the social contract theorist in taking a constructivist view of political norms in which whatever individuals agree to is what is politically required of them, the possibility of bad agreements looms large. This possibility is underlined by the quite common occurrence in actual contemporary politics of contracts that would otherwise seem to be morally deplorable. Second, parties can also fail to agree to things that would seem otherwise to us to be morally required of them. In the global arena, countries avoid signing onto contracts that seem morally required but also violate short-term self-interest, thus either free-riding or turning a blind eye to the needs of others. For example, as we approach the 2012 benchmark for the 1997 Kyoto Protocol, the failure of the United States to ratify the protocol despite representing the single largest contributor of carbon emissions suggests a case of a country refusing to agree to a morally required contract.

The phrasing of the constraint problem attempts to avoid begging the question by appealing to intuition rather than moral fact. By considering the possibility of contracts that violate our intuitions about political obligations, I am suggesting that the theory is wrong simply because it fails to account for basic, common, moral intuition about what is required of us. That is, if a theory of political norms contradicts in large part our intuitions about what is required of us, we have reason to put it in doubt. This move does require that we share my intuition that we have some duties, for example, to non-



compatriots. However, as stated at the outset, this dissertation is not aimed at those who reject political obligations or at those who advocate international political realism.

Rather, this argument is aimed at those who agree that we have some rights, duties, and obligations. To these readers, I argue that social contract theory is insufficient to ground international political norms.

What, then, can fill the gap left by social contract theory? Social contract theory must be constrained and impelled by something external to the theory to prevent it from falling prey to significant pitfalls. A number of possibilities can potentially fill the gap in the theory. The status quo or cultural values can supply constraints on social contract theories and do not fall under the category of non-constructivist as I have defined it. For example, if we rely on commonly endorsed societal values to constrain social contracts, we may avoid some unjust contracts, or at least the semblance of them.<sup>72</sup> These alternatives, however, are flawed. Both are needlessly resistant to change. The status quo is by definition a conservative benchmark. Worse, they both rely on the assumption that our current practices are not themselves massively wrongheaded. They are also ad hoc. Why think that culturally-endorsed values are relevant, consistent, or legitimate? They give us some basis with which to anchor contracts, but not a very good one.

Non-constructivism as I have defined it is a better way to fill the gaps left by social contract theory.<sup>73</sup> The very thing which leads us to believe social contract theory

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<sup>72</sup> Divine command is another source of constraints that could supply the necessary constraints on social contract theory. However, there is reason to take divine command as a version (if not a very attractive one) of non-constructed norms.

<sup>73</sup> One might worry that cultural values or the status quo are not significantly different from the version of non-constructivism I defend. That is, one might worry that what looks like non-constructed facts about goodness are actually nothing more than a reflection of current societal values. There are two versions of this worry: one epistemological, and one metaphysical. The epistemological concern that we cannot properly tell the difference between culturally endorsed norms and real moral facts is a legitimate concern,

falls short is also that which endorses non-constructivism: the belief that some contracts can harm or fail to help others. This belief suggests that there is some objective standard by which to measure the success of contracts in helping or hurting others beyond the fact that individuals have agreed to it. In other words, there are some objective facts about what is good for human beings, or in other words, non-constructivism is true. That contracts can sometimes fail to protect or support these goods is what justifies the claim that social contract theory is incomplete. Just as I argued that social contracts are the best way to complete non-constructivist theories, so non-constructivist theories are the best way to complete social contract theories.

Why think that non-constructivism can fill this gap in social contract theories where other measures fail? Non-constructivism provides the constraints absent in social contract theories taken alone. Objective facts about goodness contribute to the shaping of these norms in a straightforward way. In fact, once we acknowledge that there are facts about goodness for human beings, this becomes the wrong question. If there are such objective goods, any theory of global justice should be in keeping with them or else run the risk of violating the most basic aspects of morality and justifying great human harm. A theory requires compatibility with the objective facts that determine what is good for human beings.

In Chapter 3, I argued that we have some independent reasons for including social contracts in a theory of justice. If these reasons justify social contract theory, and if non-constructivism completes social contract theory, then this role of solving the constraint

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but it is not specific to my theory in particular. Every moral theory runs this risk, since we can always doubt our reason for endorsing certain moral facts. In other words, I take rival theories to be in the same boat with respect to this concern. The metaphysical objection is that there is no real difference between non-constructed facts about goodness and constructed societal values. This objection takes moral facts to be nothing more than human construction. I have addressed this concern elsewhere.

problem also serves to further explain the necessity of non-constructivism in a hybrid theory. In other words, not only is a non-constructivist component necessary to ground a theory of international justice in its own right, but also instrumentally insofar as it completes a social contract. Non-constructivism best solves the constraint problem just as social contracts best solve the choice and specification problems.

In this chapter, I laid the groundwork for a hybrid theory of global justice. The justification for a hybrid theory generally is distinct from the defense of a particular hybrid view, which specifies the above three attributes. Thus, one could agree with the need for a hybrid view but disagree with the particular theory I defend in Chapter 6. Nevertheless, my aim is to fill out the details of these components and in Chapters 5 and 6, I turn to this project.

## Chapter 5

### *Hybrid theory exemplified*

In this chapter, I turn my focus to particular versions of hybrid theory. Is hybrid theory approximately plausible without yielding any precisely plausible theory? If so, hybrid theory will not get off the ground as a solution to the problems I raised with theories of international justice in Chapters 2 and 3. Whether social contract theories of global justice and non-constructivist theories can be successfully combined without facing inconsistency, conflict, or confusion remains to be seen. Because hybrid theories were more prevalent in antiquity and in early-modern philosophy when international political theories were not often discussed, they were constructed primarily to address political problems at the national level.<sup>74</sup> While hybrid theories of national political justice abound, then, there is no hybrid theory for international political justice. Nevertheless, the political philosophy of the Epicureans, Grotius, and Hobbes each exemplify hybrid theory in ways that are particularly informative to the view I set out in the following chapter. For this reason, my goal in this chapter is twofold: first, to make an interpretive case for understanding Epicurus, Grotius, and Hobbes as hybrid theorists, even when this interpretation is non-standard and second, to show the strengths and weaknesses of these views as they inform my own.

#### **I. Epicureans**

Our knowledge of Epicurus' views is limited by the fact that very few texts survive, even if we appeal to work by other ancient Epicureans, including Lucretius.

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<sup>74</sup> There are also contemporary pluralists about principles of justice that exemplify this view. For example, see (Klosko 2004).

Adding to this complication is the fact that there is no clear theory of justice in Epicurus' surviving work. Nevertheless, piecing together a coherent view is possible and I provide an analysis of that view here.

Like most social contract theorists, Epicurus' views on justice begin with a state of nature. There are two Epicurean states of nature: one explicit and historical, and one more subtle and ahistorical. The first is described in Lucretius' *On the Nature of Things*.<sup>75</sup> Lucretius says of pre-civilized people,

They dwelt in glades and forests and in caverns in the hills./ When lashing wind and rain made them seek shelter from the sky/ They hid their dirt-caked bodies under thickets to keep dry./ They could not look out for the common weal. There were not then/ Laws or customs governing the ways men dealt with men/ But each man seized what plunder Chance put in his way. (Lucretius 2007, 5.953-5.960)

Here Lucretius describes people who live without laws and do not work for mutual advantage or the common good. Each individual lives purely egoistically: "To/ thrive, each learned to watch out for himself, his own will to survive" (Lucretius 2007, lines 5.960-5.961).

Lucretius then explains the transition to a more advanced stage of human association. In this next stage, the family unit serves as the basis of society. Lucretius points to marriage and children as the first steps towards civilization. But at this point, society is not complete. Lucretius says, "Yet harmony could not entirely be created; but a good and substantial number preserved their contracts honorably" (Long and Sedley 1987, 5.1020). This passage is significant for my purposes because it points to contracts as an important feature of society itself and as a stabilizing force. Contracts here are seen

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<sup>75</sup> It is believed that Epicurus gave a similar account in his *On Nature*, but that work is now lost. See (Vander Waerdt 1988, 91).

not only as an optional agreement that bind individuals only so long as they choose to enter them, but also as a necessary step on the road towards peace and stability.

Finally, Lucretius describes the culmination of human society. “Then some people taught how to institute magistrates and constitutional rights, with a view to the voluntary employment of laws. For the human race, worn out by its violent way of life, was enfeebled by feuds; all the more, then, of its own volition it submitted to laws and constraining rights” (Lucretius 2007, 5.1145). In this last stage of development, human beings turn finally to social contracts: agreements with one another to submit to laws out of their own volition and with their own consent.

Other intimations of the state of nature are more abstract. In his *Key Doctrines*, Epicurus explains what I take to be a theoretical state of nature. Unlike Lucretius’ view, it is not a historical account. Nevertheless, it offers a contrast between lawless people and a society that instantiates justice by entering into a social contract. In particular, it sounds like a page from Hobbes. Says Epicurus, “Nothing is just or unjust in relation to those creatures which were unable to make contracts over not harming one another and not being harmed; so too with all peoples which were unable or unwilling to make contracts over not harming and not being harmed” (*Key Doctrine 32*). In this passage, Epicurus is describing those who have not entered into a social contract, in other words, he is describing a state of nature. Furthermore, he describes individuals in the state of nature as incapable of causing injustices to one another: justice comes about with the creation of a social contract. He continues: “Justice was never anything *per se*, but a contract, regularly arising at some place or other in people’s dealings with one another, over not harming or

being harmed” (*Key Doctrine* 33). Here Epicurus gives an account not only of a social contract, but of the purpose of a social contract. It is for mutual advantage.

Evidence of social contracts abounds in the Epicurean literature; it is not limited to Lucretius or to a historical state of nature. In an excerpt in Porphyry’s *On Abstinence*, the Epicurean Hermarchus explains the unlawfulness of murder.<sup>76</sup> He says, “For none of those legal institutes which were established from the first, whether written or unwritten, [from one generation to another] became lawful through violence, but through the consent of those that used them.” (Hermarchus *ap.* Porphyry *Abst.* 1.8.1). In other words, the law is not whatever is enforced in society, but rather the law is defined by that to which people agree. Hermarchus is distinguishing between laws that people follow out of fear of punishment and laws that people follow because they understand them to be beneficial for human life. And, according to Hermarchus, people consent to laws that they take to be beneficial for human life. Cooperation, consent, and social contracts are significant in the theory.

However, Epicurus is not a contractarian. If he were, then he would have to hold a conventionalist view of justice in which any contract that individuals agreed to would suffice to meet the requirements of justice. He explicitly denies this view, saying, “But if someone makes a law and it does not happen to accord with the utility of social relationships, it no longer has the nature of justice” (*Key Doctrine* 36). According to Epicurus, laws must have social utility to be just. Therefore, despite his emphasis on consent, Epicurus cannot be a pure social contract theorist.

Neither is Epicurus a contractualist, since he takes nature to constrain the content of the contract and not the situation of the contractors. For example, Epicurus states,

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<sup>76</sup> (Wynne-Tyson and Taylor 2007)

“Nature’s justice is a guarantee of utility with a view to not harming one another and not being harmed” (*Key Doctrine* 31). Epicurus thinks that we all share a natural concept of justice, according to which justice secures utility by minimizing harm. This minimization of harm plays a large role in his naturalist view.

Now that I have identified Epicurus as both a social contract theorist and given reason to think he is not a pure social contract theorist, it is necessary to explain how the non-constructivist component constrains the social contract theory element. According to Epicurus, justice has two requirements. Justice requires first, mutual agreement not to harm one another and to minimize harm,<sup>77</sup> or a social contract, and second, a non-constructivist basis by which to measure the success at achieving this intended purpose. Both the social contract and the non-constructivist component are necessary for justice.<sup>78</sup> The intended purpose of such social contracts is naturalist and objective, in keeping with my account in Chapter 2 of non-constructivism. If individuals come to mutual agreements that do not in fact minimize harm, then they cannot properly be called just agreements. Similarly, if individuals are minimizing harm but do not do so through mutual agreement, they cannot properly be deemed to act justly.

There are several examples of Epicurus’ non-constructivist component. In the *Key Doctrines*, he states, “Taken generally, justice is the same for all, since it is something useful in people’s social relationships” (*Key Doctrine* 36). In other words, in addition to being an agreement, justice is also something which is useful or prudent. In Epicurus’

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<sup>77</sup> Minimizing harm such as from natural disasters or foreseeable attacks from enemies. For an explanation of why this second point on avoiding harms is important, see (Brown 2009, 194 with n. 46).

<sup>78</sup> According to Long and Sedley, “The existence of justice is entirely dependent upon (1) the ability to make such contracts, and (2) their actually achieving the intended result—‘the utility of social relationships.’ Hence a codified legal system will be just if and only if it satisfies this criterion” (Long and Sedley 1987, 134).



*Letter to Menoeceus*, he corroborates this view when he says, “Of all this the beginning and the greatest good is prudence” (Ep. Men. 132). Prudence, or practical wisdom, is a virtue. On Epicurus’ view, prudence is central, because it is the virtue that enables the wise pursuit of pleasure, where pleasure is the good. Therefore, laws should aim at the good of the citizens, their utility. That is to say, they aim at the pleasure of the citizens by minimizing pain (as opposed to promoting pleasure).

Despite being “the same for all,” justice can take many different forms when it is instantiated in laws and agreements. While all just laws must have utility for their citizens, what is useful for citizens diverges according to time and location. Epicurus elaborates:

What is legally deemed to be just has its existence in the domain of justice whenever it is attested to be useful in the requirements of social relationships, whether or not it turns out to be the same for all. (*Key Doctrine 37*)

In this passage, Epicurus states his position that lawmakers can pass any law, but in order for a law to be just it needs to fulfill certain requirements. For example, it has to be for mutual advantage or for the benefit of society. This feature of the quotation explains the natural law component of his theory. However, Epicurus recognizes the inherent vagueness of natural laws and therefore the complexity that comes with applying them. For example, different societies will have different environments and citizens, resulting in different laws that promote their good.

In addition to recognizing that different countries can have equally just laws that differ from one another, Epicurus explains further how a law in a single country can fall in and out of accordance with justice, depending on the circumstances.

But if someone makes a law and it does not happen to accord with the utility of social relationships, it no longer has the nature of justice. And even if what is useful in the sphere of justice changes but fits the preconception for some time, it was no less just throughout that time for those who do not confuse themselves with empty utterances but simply look at the facts. (*Key Doctrine 37*)

Here, the “preconception” is justice naturally conceived.<sup>79</sup> Epicurus explains that some agreements and laws do not capture justice—those that “do not accord with the utility of social relationships”. This shows his view as a natural law view. He then adds that a law might accord with the utility of social relationships and thus capture justice at one time but later fall out of sync with the utility of social relationships and therefore fail to be just at the later date.

Although Epicurus is not often referred to as a hybrid theorist or even social contract theorist or a non-constructivist, the interpretation leaps off the page. Furthermore, the interpretation I attribute to him is not particularly controversial.<sup>80</sup> One reason this phrasing of the interpretation might be overlooked is that it relies on the broad definition I presented in Chapter 2 of non-constructivist theories. There, I group a wide range of theories into one category based on features essential to the hybrid view I ultimately defend and in opposition to constructivist theories. The opposition of these two types of theories helps explain Epicurus as a hybrid theorist.

I draw on Epicurus primarily as a means to understanding a hybrid view and as a means of situating my dissertation in a historical context. Epicurus is helpful for my purposes not only because he offers a definition of hybrid theory that is precise and

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<sup>79</sup> Epicurus’ epistemology of preconceptions indicates that we have some conceptual knowledge based in experience. Thus, according to Elizabeth Asmis, “...preconceptions are derived from sense perception; and their function is to serve as points of reference for inquiry” (Asmis 2005, 277).

<sup>80</sup> (Long and Sedley 1987), (Brown 2009)

comprehensive and not only because he offers support for my view, but also because the specific type of hybrid theory that Epicurus defends is particularly close to my own. I echo his view in the use of a constructivist and non-constructivist component, and, more importantly, the way the two components of my theory fit together.

Epicurus provides the best possible explanation of the form of a hybrid theory because he demonstrates how the two components can be fitted together without conflict. According to Epicurus, there are two criteria for justice and both must be met: both are necessary and jointly sufficient for a complete theory of justice. This combination avoids the risk of the components conflicting and recommending opposing actions, running parallel to one another and functioning in different domains, or allowing one component to do all the normative work without leaving room for the other.

Epicurus defends a view in which the constructivist and non-constructivist component fit together without conflict and in which each are necessary for justice; I maintain a portion of Epicurus' reasons for combining the two components. For example, Epicurus argues that agreements not tethered to some non-constructed good "no longer has the nature of justice." This version of the constraint problem I lay out in Chapter 3 explains why social contracts cannot by themselves ground justice. On the other hand, Epicurus does not argue that the prudential non-constructivism faces any objections like the choice problem or the specification problem. His reasons for including a social contract component are just that consent is a necessary component of justice. Thus, his reasons for arguing each theory is necessary but insufficient to explain justice do not map directly onto mine.

Moreover, I diverge from Epicurus' content in addition to the form of his view. In particular, I do not inherit the precise substance of his non-constructivism, which makes justice dependent on prudence (and ultimately on hedonism). In Chapter 2, I name the content of the non-constructivist component of my hybrid theory as the non-constructed goods that reflect objective facts about human beings. Far from endorsing a theory based on hedonism, I argue for pluralism about the non-constructed goods for human beings. While pleasure may be included in this set of goods, it is far from telling the whole story.

## **II. Hugo Grotius**

I also use Grotius as an example of hybrid theory. Like Epicurus, Grotius is not the paradigm example of a hybrid theorist. Indeed, an interpretation of him as such will be comparatively original. Nevertheless, I think the most plausible account of Grotius' political philosophy is one that recognizes him as a hybrid theorist.

Contrary to Epicurus, whose texts are short, fragmented, and incomplete, Grotius' life's work spans thousands of pages and covers dozens of topics. Also unlike Epicurus, whose work was not international in scope, Grotius is often thought to be the first international political philosopher and the first international law theorist. His work, then, is particularly relevant for anyone working in international justice. I start by discussing in what ways his view can be called a social contract view; next, I discuss the natural law element of his view; and third, I discuss the way Grotius combines these two aspects of his theory. I conclude this section by discussing how his view informs mine.

Although Grotius does not use the phrase "state of nature" in his works, he does speak of the transition from a lawless group of individuals to a civil society by means of a

social contract, much like Epicurus. I first discuss Grotius' state of nature, and then the social contract by means of which we enter civil society.

In the *Prolegomena* to his work *On the Law of Prize and Booty*, Grotius lays out the laws of nature as he sees them. However, Grotius does not consider the nature of man to be so intrinsically good that every individual will obey these laws outside of the enforcement mechanism of society. After laying out the first six laws of nature, Grotius tells a story of mankind as it exists without any structured organization or methods of social cooperation:

When it came to pass, after these principles [first six laws] had been established, that many persons (such is the evil growing out of the corrupt nature of some men!) either failed to meet their obligations or even assailed the fortunes and the very lives of others, for the most part without suffering punishment—since the unforeseeing were attacked by those who were prepared, or single individuals by large groups—there arose the need for a new remedy, lest the laws of human society be cast aside as invalid. This need was especially urgent in view of the increasing number of human beings, swollen to such a multitude that men were scattered about with vast distances separating them and were being deprived of opportunities for mutual benefaction. (Grotius 1950, 19)

In this account of human society, Grotius makes clear that there are laws of nature, but that without a system of punishment, some people will fail to follow them. Instead, they will steal and kill and defect on their contracts. For Grotius, the state of nature consists in groups of individuals without organization, with no way to punish wrongdoings, and who routinely steal from and kill one another.

The “remedy” Grotius speaks of that will cure human beings of their failings with respect to following the moral law is civil society. He continues:

Therefore, the lesser social units began to gather individuals together into one locality, not with the intention of abolishing the society which links all men as a whole, but rather in order to fortify that universal society by a more dependable means of protection, and, at the same time, with the

purpose of bringing together under a more convenient arrangement the numerous different products of many persons' labour which are required for the uses of human life. (Grotius 1950, 19)

The main purposes, then, for initiating civil society are for Grotius the mechanism of punishment, physical security, and trade and monetary gain. These are the ends for which civil society is created out of the state of nature. In general, then, "the common good" serves as the purpose.

Like most theorists who rely on the state of nature in their discussions about the formation and foundation of society, Grotius argues for a social contract based on consent for the purpose of the common good. For example, Grotius states,

In this matter, too, as in every other, human diligence has imitated nature, which has ensured the preservation of the universe by a species of covenant binding upon all of its parts. Accordingly, this smaller social unit, formed by a general agreement for the sake of the common good—in other words, this considerable group sufficing for self-protection through mutual aid, and for equal acquisition of the necessities of life—is called a commonwealth [*Respublica*]. (Grotius 1950, 19)

Grotius here relies on a "covenant" and "general agreement" to establish the commonwealth as it emerges from the state of nature.

Grotius also endorses the model of consent in his series of rules. Rule II puts it simply, saying that, "*What the common consent of mankind has shown to be the will of all, that is law*" (Grotius 1950, 12). Similarly, Grotius derives Rule III from II, which states that,

*What each individual has indicated to be his will, that is the law with respect to him.* With this rule the old saying agrees, that no injury is committed against a person who is willing; as does also the traditional maxim that nothing else is so congruous with natural equity and the good faith of mankind, as is the observance of agreements which have been accepted among the various parties. (Grotius 1950, 18-19)

Here, Grotius explains that the law derives its legitimate force from the consent of the subject. No violation of right can exist against one who has consented. Furthermore, Grotius continues to place emphasis on agreement, as we saw him do above.

This model also can be shown by his comments on civil law (as opposed to laws of nature), where Grotius makes explicit the role of consent. Rule IV states that,

For the individual members of the group have themselves consented to this arrangement, and one of the various attributes of the free will is the power to accommodate one's own will to that of another. The will of all, when applied to all, is called *lex* [statutory law]...It is approved by the common consent of all mankind...In short, *lex* rests upon the mutual agreement and the will of individuals, and with this fact in mind, Demosthenes and Plato sometimes refer to it as..., 'the common pact of the state'. Thus, on the basis of the earlier rules, the following additional rule has developed: *Whatever the commonwealth has indicated to be its will, that is law [ius] in regard to the whole body of citizens.* (Grotius 1950, 23)

In this passage, Grotius specifies that law is based on the consent of the people who make up the state. The law is defined by what the commonwealth indicates is its will. Similarly, Rule V states that the will of the commonwealth is also law with regard to individual citizens. He expands on this rule, saying, "Indeed, as is quite commonly acknowledged, the very nature of jurisdiction renders it absolutely impossible for any jurisdiction to be established save by general consent." (Grotius 1950, 24). Grotius continues this pattern of applying the principle to the commonwealth and individuals by extending it to states in Rule VIII, where the governance of states depends on the consent of states (Grotius 1950, 26).

Grotius also endorses the model of consent in *The Rights of War and Peace*. According to his claims in this work, the basis of our obligation to obey civil law is consent:

The Mother of Natural Law is human Nature itself, which, though even the Necessity of our Circumstances should not require it, would of itself create in us a mutual Desire of Society: And the Mother of Civil law is that very Obligation which arises from Consent, which deriving its Force from the Law of Nature, Nature may be called as it were, the Great Grandmother of this law also. (Grotius 2005, 93)

Not only does Grotius claim that civil law rests on the consent of the people, but he also argues that the government as a whole does too. “But as there are several Ways of Living, some better than others, and everyone may chuse which he pleases of all those Sorts; so a People may chuse what Form of Government they please...” (Grotius, 2005, p.262). In this passage, Grotius makes clear that the people can choose what form of government they want and the legitimacy of that government relies on their consent.

What consent is, exactly, is not always clear in Grotius’ texts. Richard Tuck says in exposition that Grotius, “...believed that any *respublica* was formed by the voluntary union of individuals to make a civil society; but he also seems to have believed that any society with a suitable set of representative institutions would count as a *respublica*” (Tuck 2001, 83). In other words, Grotius conceives consent to be either explicit or tacit, taking it to legitimize a state either through a social contract or through representative institutions like democracy.<sup>81</sup> In other words, consent can be direct, as in consent to a regime as a whole, or indirect, as in consent to a regime by participation.

Although my interpretation of Grotius as a social contract theorist might be uncommon, evidence certainly abounds for the interpretation. On the other hand, interpretations of Grotius as a natural law theorist are standard. According to my definition of natural law theory in Chapter 2, there are four central characteristics of natural law theories: first, the norms are brute and not derived from facts; second, they

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<sup>81</sup> On tacit versus explicit consent, see (Grotius, 1950, p. 19).



list some content; third, they bind human beings; and fourth, they are epistemically available to human beings. Grotius meets all four of these criteria.

In the Prolegomena to *The Law of Prize and Booty*, for example, he states, “Accordingly, let us give first place and pre-eminent authority to the following rule: *What God has shown to be His Will, that is law*. This axiom points directly to the cause of law, and is rightly laid down as a primary principle” (Grotius 1950, 8). Here, we see that Grotius takes natural laws to be derived from God’s will. But in other places and in *The Rights of War and Peace*, Grotius explicitly denies this view, saying that human reason or nature itself grounds the laws. For example, Grotius states that the laws of nature exist independent from God elsewhere, stating, “And indeed, all we have now said would take place, though we should even grant, what without the greatest Wickedness cannot be granted, that there is no God, or that he takes no Care of human Affairs” (Grotius 2005, 89).<sup>82</sup> Whether God, nature, or even human reason is foundational, these statements endorse an underived non-constructivist view.<sup>83</sup>

The laws cannot be broken down into further components; they exist as laws with no further metaphysical story to explain their existence. For example, Grotius states, “For the Laws of Nature being always the same, may be easily collected into an Art” (Grotius 2005, 107). This view is also corroborated by Grotius’ statement that:

The Law of Nature is so unalterable that God himself cannot change it. For tho’ the Power of God be infinite, yet we may say, that there are some Things to which this infinite Power does not extend, because they cannot be expressed by propositions that contain any Sense, but manifestly imply a Contradiction. (Grotius 2005, 155)

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<sup>82</sup> For example, in a passage citing Porphyry’s *On Abstinence from Animals*, he states, “This...Care of maintaining Society in a Manner conformable to the Light of human Understanding is the Foundation of Right, properly so called...” (Grotius 2005, 85-86). See below for more evidence of this view.

<sup>83</sup> See (May 2006, 4) for reasons to think these sources are overdetermined in Grotius’ work.

Here, Grotius makes plain that the laws exist as brute and unchanging, independent from God,<sup>84</sup> identifying his view with what I call a natural law theory, as opposed to the non-constructivist theories derived from facts.<sup>85</sup>

Second, Grotius lists the laws of nature and fills out their content, establishing the next criterion for natural law theory. For example, take the first two laws of nature:

Accordingly, from this combination of concepts, two precepts of the law of nature emerge: first, that *It shall be permissible to defend [one's own] life and to shun that which threatens to prove injurious*; secondly, that *It shall be permissible to acquire for oneself, and to retain, those things which are useful for life.* (Grotius 1950, 10)

Here, in the *Commentary on the Law of Prize and Booty*, Grotius lays out thirteen laws of nature, which, combined with his nine rules, confirms the content of his view.

Third, the laws of nature clearly bind us, although they may do so in different ways. A further feature of the above first two laws is that they apply even in the state of nature before civil society. In other words, defending oneself and providing for oneself the necessities of life are permissible in the state of nature. This might not seem very surprising. The law of self-preservation is particularly minimal. More difficult is interpreting the second law. The term “useful” seems to be an understatement when applied to things that are necessary for the continuance of life. We would not say of someone on the brink of starvation that a morsel of food is “useful.” Nevertheless, by the term “useful,” we can appropriately assume Grotius meant to include those goods that are

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<sup>84</sup> For example, Grotius states that the laws of nature exist independent from God elsewhere, stating, “And indeed, all we have now said would take place, though we should even grant, what without the greatest Wickedness cannot be granted, that there is no God, or that he takes no Care of human Affairs” (Grotius 2005, 89).

<sup>85</sup> Grotius continues, “For Instance then, as God himself cannot effect, that twice two should not be four; so neither can he, that what is intrinsically Evil should not be Evil” (Grotius 2005, 155). But compare this formulation of the Euthyphro dilemma: “God does not *will* a Thing because it is just; but it is just, that is, it lays one under an indispensable Obligation, because GOD *wills* it” (Grotius 2005, 164).

necessary for life. More important to consider is whether Grotius meant to include more than just what is necessary for life in the term useful. Clearly, then, the laws of nature bind us, whether in the state of nature as in the first several laws, or in civil society, in which we saw that the laws of nature are enforced by civil law through punishment.

Lastly, they are epistemically available to human beings according to Grotius. In the Prolegomena to *The Law of Prize and Booty*, Grotius says, “The Will of God is revealed, not only through oracles and supernatural portents, but above all in the very design of the Creator; for it is from this last source that the law of nature is derived” (Grotius 1950, 8). Here, Grotius points out that God serves as the basis for the laws of nature. Furthermore, the laws are epistemologically available to human beings as revealed. That the laws are epistemologically available to us should also be unsurprising given the certainty with which Grotius lists them for us in his work. Similarly, in *The Rights of War and Peace*, Grotius states, “God by the Laws which he has given, has made these very Principles more clear and evident, even to those who are less capable of strict Reasoning, and has forbid us to give way to those impetuous Passions, which, contrary to our own Interest, and that of others, divert us from following the Rules of Reason and Nature...” (Grotius 2005, 91-92).

I established Grotius as both a consent theorist and a natural law theorist, but how these two parts of his view fit together remains to be shown. Grotius gives us examples of the social contract and natural law element occurring in the same realm. For example, the theories seem to overlap in this quote from *De Iure Praedae Commentarius* about freedom: “God created man, ἀνθρώπου, ‘free and *sui iuris*’, so that the actions of each individual and the use of his possessions were made subject not to another’s will but to

his own. Moreover, this view is sanctioned by the common consent of all nations” (Grotius 1950, 18). Here, the two sources of normative authority work independently and converge to authorize the same permissions and prohibitions. Something is just when it satisfies both the natural law and consent requirement.

However, there are also places in which each part of his theory seemingly works parallel to the other with moving parts that do not intersect. For example, the theories seem to work in separate domains in the context of a discussion on punishment and specifically, punishment of foreigners. The paradox of punishing foreigners is, of course, that they have not consented to the law of the land. Grotius’ solution is as follows, “...the state inflicts punishment for wrongs against itself, not only upon its own subjects but also upon foreigners; yet it derives no power from the latter from civil law, which is binding upon citizens only because they have given their consent; and therefore, the law of nature, or law of nations, is the source from which the state receives the power in question” (Grotius 1950, 92). This view should help us understand how natural law and social contract theory fit together in Grotius’ view because the case of the criminal foreigner is a case where consent and natural pull apart. According to Grotius, although foreigners have not contracted to obey civil laws, they are still responsible for obeying natural laws. When they violate those laws, the government is justified in punishing them.<sup>86</sup>

What justifies Grotius’ conclusion that punishing the foreigner is permissible, even if the foreigner does not consent to civil law? Grotius does not appeal to tacit consent to justify the punishment but rather argues that consent is not what explains the

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<sup>86</sup> This view is unique to Grotius’ view of punishment, which is a type of justice more universal in his view than distributive justice. For example, see (Tuck 2001, 89). However, it nevertheless offers an example of the two theories working in conjunct.

justification of punishment. One could argue that since the laws of nature are endorsed by God, the foreigner has a duty to obey them. The duty to consent is a principle that many consent theorists rely on to explain such conflicts. However, Grotius seems to argue that consent plays no role in this situation. One could also argue that natural law works as a way to fill in the gaps left by consent. When consent and natural law pull apart, natural law takes over as the primary source of political obligation. However, this interpretation undermines the necessity of consent as doing any philosophical work at all in the theory. Furthermore, it is not in keeping with Grotius' view, which states that the civil law binds the citizens *only if* they consent, even though it binds foreigners *whether or not* they consent. One could also argue that the foreigner is in the state of nature, but that insofar as she has violated the laws of nature that bind in the state of nature punishment is permissible. This interpretation would justify some punishments against the foreigner, such as punishments for murder, but not every violation of civil law. Furthermore, the quotation speaks of violations against the state, which do not occur in every instance of civil law. For this reason, this interpretation of the passage may be strongest.

Grotius' theory is an exemplary hybrid theory that combines social contracts and natural laws in an international context. Insofar as I defend hybrid theories generally, I think Grotius' view is both an interesting and compelling case of a hybrid theory. However, due to the ambiguities we have seen, I cannot appeal to his theory full stop. The view, in the end, seems to be incomplete. Nevertheless, I do follow Grotius in some respects. Grotius argues that consent is a necessary but insufficient condition for political norms: he states that the civil laws bind the citizens "only" if they consent. I, too, defend this point. I have argued that constructivism is necessary to ground international political

norms, but that it is not sufficient (as I have also argued that non-constructivism is necessary but insufficient to ground international political norms). In this sense, I am indebted to my predecessors for their contributions to hybrid theory.

### **III. Hobbes**

In this section, I argue substantial textual evidence suggests that Hobbes is a hybrid theorist who combines natural law theory with a social contract. The biggest threat to this interpretation of Hobbes is that the sovereign is not bound by the laws of nature, and thus that the laws of nature do not limit what counts as a just state. First, I evaluate passages that appear to support my opposition and show how they actually support my view. I also analyze several laws of nature commonly thought to make the sovereign immune to the laws of nature and show why they limit the sovereign's power. Next, I argue against Hampton's interpretation of Hobbes's sovereign as unlimited. I follow this discussion with a fuller account of what being bound by the laws of nature means for the sovereign. I explicate passages in which Hobbes explicitly takes the sovereign to be bound by the laws of nature. I also elucidate laws of nature that are ambiguous as to whether the sovereign is bound by them and show that they do bind the sovereign. In most literature on Hobbes, philosophers treat him as if he were purely a social contract theorist. My interpretation of Hobbes explains how natural law fits into his theory and shows how he must be viewed as both a social contract theorist and a natural law theorist. Because the sovereign plays such a defining role in the state, my focus in this discussion of Hobbes as a hybrid theorist emphasizes the role these two components play in

sovereignty. The revised theory of sovereignty I put forward in this section explains how these two components work together.

Traditionally, the sovereign is not thought of as subject to any of the laws of nature. Hobbes' work is generally taken to be pro-royalist and to endorse absolute power for the sovereign. The lack of a right to rebellion gives credence to this view, as does the fact that Hobbes' state of nature is so terrible that even an oppressive tyranny would seem to be an improvement over it. This view is virtually unchallenged in the literature.<sup>87</sup>

For example, R. S. Peters states that, "Hobbes's feat was to employ this model [the social contract] to demonstrate that absolutism is the only possible logical outcome

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<sup>87</sup> For example, see (Peters 1967), (Sorell 1998), (Bobbio 1989), who I gloss below, and (Malcolm 1996), (Gert 1996), (Habermas 2006), and (Lloyd and Sreedhar). Malcolm characterizes Hobbes' corpus in this way, saying, "For sovereignty to exist at all, Hobbes argued, it was necessary for all the rights of the subjects to be yielded to it; what he tried to show was that the reasons that made sovereignty necessary also made it absolute. . . His two later published versions of his theory, *De cive* and *Leviathan*, would develop further some of the points of detail, but the essential lineaments would remain the same" (Malcolm 1996, 28). In the same volume, Gert interprets the sovereign's power as absolute in passing, saying: "All of the premises about human nature, which Hobbes claims are true of all persons and which he uses in arguing for the necessity of an unlimited sovereign, are in fact statements about the rationally required desires. . ." (Gert 1996, 164). Jaume points out that those who have argued for Hobbes as the source of liberalism have also defended the absolutist interpretation of Hobbes, citing Habermas and Strauss. (Jaume 2007) Habermas appeals to this interpretation, saying "the liberal content of natural rights is sacrificed to the state in the absolutist form." (Habermas 2006). Sharon A. Lloyd and Susanne Sreedhar defend this view, saying, "Hobbes sought to discover rational principles for the construction of a civil polity that would not be subject to destruction from within. . . Because virtually any government would be better than a civil war, and, according to Hobbes's analysis, all but absolute governments are systematically prone to dissolution into civil war, people ought to submit themselves to an absolute political authority" (Lloyd and Sreedhar). Some authors only hold this view in part. For example, Alan Ryan describes Hobbes' sovereign as absolute, saying, "We the subjects have nothing but duties toward the sovereign, but he is not in the strict sense under any *obligation* to us" (Ryan 1996, 231). I take issue with this interpretation below. Ryan does take the sovereign as bound by the laws of nature as an obligation to God. However, this obligation is mitigated because the citizens cannot enforce the law. Ryan states, "...Hobbes relegates that law to the realm of aspiration. If the sovereign breaches it, we are not to resist but to reflect that it is the sovereign whom God will call to account, not ourselves" (Ryan 1996, 237). I not only flesh out the ways in which Hobbes' sovereign is bound by the laws of nature, when, and why, but also give a different interpretation of the sovereign as bound by the laws of nature. Some authors do not hold this view because they subscribe to what I call the self-defense thesis, in which the sovereign's power is not absolute because it is limited by the rights citizens retain to defend their lives. Although I do not deny the self-defense thesis (as I will argue below), my view is much stronger. Unlike the self-defense thesis, which does not take the sovereign to be subject to any laws of nature, I maintain that the sovereign's power is limited by more than just the citizens' right to defend their lives. Defenders of the self-defense thesis include (Hampton 1988), (David Van Mill 2001), (Carmichael 1990), (Harman 1997), and (Jaume 2007).

of consistent concern for individual interests” (Peters 1967, 42).<sup>88</sup> According to Peters, Hobbes’ contribution was to show that the social contract model most clearly supports the sovereign’s absolute power. Similarly, Tom Sorell defends this view. Although according to Sorell, the sovereign has prudential reasons to treat the citizens of the state well, the sovereign is not bound by the laws of nature. Says Sorell,

The law of nature is not binding on the sovereign’s behaviour, since he retains the right of nature and is authoritative about what to do for the best. If, in his opinion, it is for the best to behave iniquitously, then no other free agent, still less one of his subjects, can blame him for behaving accordingly. But the fact that his iniquitous acts are in this sense blameless does not mean that they are wise. (Sorell 1998)

In this passage, Sorell argues that although that there may be self-interested reasons not to anger the citizens, the correct interpretation demands that the sovereign not be bound by the laws of nature. In other words, the sovereign’s power is absolute and unbounded, least of all by the laws of nature.<sup>89</sup>

Norberto Bobbio recognizes passages in which the sovereign seems to be bound by the laws of nature, but points out the difficulty in reconciling this position with the sovereign’s absolute power and rules in favor of the latter. He states, “At this point, the sovereign could encounter only one effective limit to his own power: the subjects’ resistance to a command which they deem unjust. But the subjects have imposed on themselves the obligation to obey all the sovereign’s commands. Thus, even that limit

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<sup>88</sup> Peters continues that, “...[B]ecause of his overriding concern for security, and because of his rather depressing estimate of human nature, he came to the somewhat gleeful conclusion—highly displeasing to those who believed in government by consent—that absolutism could be the only rationally defensible form of government” (Peters 1967, 42).

<sup>89</sup> Hamilton calls Hobbes’ absolutism “extreme” or “radical.” Hamilton recognizes some republican strains in Hobbes’ corpus, indicating a departure from absolutism. But he also takes the sovereign to absolute, such as when he says, “But key elements of his extreme absolutism were not shared by other English supporters of the Crown, such as his views that sovereigns are not bound by their promises and that they are above civil law and may tax without the consent of their subjects” (Hamilton 2009, 414). I will address some of these points below.



vanishes, and the sovereign power is really unlimited, both with regard to natural laws, and to the rights of citizens” (Bobbio 1989, 59). Bobbio continues, “Abuse [of power] consists in going beyond the established limits. Therefore there cannot be abuse where there are no limits” (Bobbio 1989, 59). Although Bobbio has a complex interpretation of Hobbes’ sovereignty, it is in the end absolute or unbound by the laws of nature.

Though short, this discussion is meant to establish the existence and prominence of my opposition. The common view of Hobbes interprets his social contract as doing all of the work in the *Leviathan* and fails to explain why Hobbes establishes a set of natural laws or how they fit into his theory. For this reason, pointing out in that Hobbes lists natural laws as brute, establishes content, indicates that they obligate, and shows they are epistemically accessible is insufficient. Nor is it sufficient to show how his social contract meets the definition I lay out in Chapter 3. My interpretation makes natural law more than a non sequitur in Hobbes’ work. I show what role natural law plays in the *Leviathan*, take his view to be more complex than a pure social contract theory, and explain how these two parts fit together.

The first piece of evidence used to defend the view that the sovereign’s power is absolute, not bound by the laws of nature, and free of obligations to citizens is that the sovereign is in the state of nature. According to Hobbes, when people make a covenant to form society, they make this covenant with one another to lay down their rights and name the sovereign. This approach to the social contract means that the sovereign does not make a covenant and is a third-party beneficiary of the contract, “. . . Because the Right of

bearing the Person of them all, is given to him they make Sovereigne, by Covenant only of one to another, and not of him to any of them...” (Hobbes 1996, 122).<sup>90</sup>

Insofar as the sovereign does not enter the social contract, the sovereign—here and in what follows I mean the sovereign *qua* sovereign and not the natural human being who happens to be the sovereign—remains in the state of nature. In the state of nature, however, self-preservation trumps all else and nobody follows the laws of nature. Although the laws always bind *in foro interno*,<sup>91</sup> or in conscience, nobody follows them unless they are sure others will follow them also. Therefore, since the sovereign remains in the state of nature, there is no external obligation to follow them. This argument is commonly thought to negate the possibility that the sovereign is bound by any laws of nature.

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<sup>90</sup> Other authors have drawn attention to the third-party status of the sovereign. For example, in *Hobbesian Moral and Political Theory*, Gregory S. Kavka states, “The sovereign is not, *qua* sovereign, a party to this original social contract, and he receives the sovereignty as, in effect, a free gift which the parties bestow on him (or them) in hopes of thereby obtaining for themselves domestic peace and prosperity and effective common defense against outsiders” (Kavka 1986, 386). In Kavka’s interpretation of the social contract, the sovereign receives his power as a gift and is not party to the contract, so he has no obligations to the people arising from the contract. Alan Ryan considers the sovereign in this position: “...Hobbes points out that we covenant *with each other*, not with the sovereign. Strictly, we are contractually obliged to one another to give up our natural rights in the sovereign’s favor.... In one sense he is the beneficiary of our contracts but not a party to them....” (Ryan 1996, 231). Larry May also speaks of Hobbes’s sovereign as a third-party beneficiary and gives a detailed account of this status. According to May, in the late 1500s and early 1600s, third-party beneficiaries were given elevated standing in the law and were able to sue parties of the contract for the “free gifts” they were meant to receive. May explains, “Contracts have always been seen as creating both rights and duties; so as soon as a third party is said to be a true party to a contract, he not only has the right to bring an action when the promised benefit does not result, but he himself is also liable, at least in theory, to be brought to court and sued by one of the other parties” (May 1980, 197). May argues that the status of the sovereign as a third party does not exclude him from legal responsibilities. If May is right, then the sovereign has duties to his subjects even though he has not contracted with them.

<sup>91</sup> Warrender says, “There are thus two classes of obligations—obligations *in foro interno* or ‘in the court of conscience’, which are not affected by the proviso of sufficient security, and which, according to Hobbes, oblige always; and obligations *in foro externo*, or the realm of external action, which are contingent upon the security of the agent” (Warrender 1957, 53). Warrender continues his evaluation with a more detailed account of external obligation: “Hobbes does not say that the laws of nature do not oblige *in foro externo*, but that they do not *always* oblige in this way. He expands this statement by indicating that the individual is obliged to perform the external acts prescribed by the laws where he has sufficient security against other men, but where it can happen that performance of the law will put him in mortal danger, the obligation does not stand” (Warrender 1957, 58).

I argue that the sovereign's position in the state of nature does not diminish her obligation to follow the laws of nature. The laws of nature apply to the sovereign whether she is in the state of nature or in society. In fact, the sovereign's unique position in the state of nature makes her bound to follow the laws where others in the state of nature are not similarly bound. Moreover, citizens may enforce certain laws of nature against the sovereign, making her externally bound as well as bound internally.

Hobbes states that when we are sure that others will follow the laws of nature, we would be fools not to follow them ourselves as well: "And again, he that having sufficient Security, that others shall observe the same Lawes towards him, observes them not himselfe, seeketh not Peace, but War; & consequently the destruction of his Nature by Violence" (Hobbes 1996, 110). In other words, even if we can free-ride, doing so would be foolish when we have security. To disobey the laws of nature would be to seek war instead of peace, and therefore our own self-destruction.

The above quotation does not talk of being in a commonwealth or in a state of nature. Rather, it talks of "security." For this reason, those who think the sovereign is still in a state of nature and not in a commonwealth will still have to account for it. The sovereign may not be in the commonwealth, but he is certainly in a state of security. He can be sure that others will observe the laws of nature to himself, and can punish them if they do not. The sovereign appears to be in a unique position of security and so is required to follow the laws of nature or else seek his own destruction. According to Hobbes, individuals in security are obligated to follow the laws of nature not only *in foro*

*interno* but also *in foro externo*. Therefore, Hobbes might mean that the sovereign would be the Foole if he disobeyed the laws of nature.<sup>92</sup>

Nevertheless, one might think that only if sovereigns are capable of being punished or lawfully accused of wrongdoing does calling them externally bound make sense. The sovereign cannot properly be considered bound by the laws if they are unenforceable. Hobbes defines bindingness accordingly: “For the Laws of Nature... are not properly Lawes, but qualities that dispose men to peace, and to obedience. When a Common-Wealth is once settled, they are actually Lawes... For it is the sovereign Power that obliges men to obey them” (Hobbes 1996, 185). Hobbes specifies that the laws of nature are only properly laws when disobedience has no consequence. The laws of nature appear not to be proper laws for the sovereign.

However, the laws of nature themselves provide evidence against these claims. For example, the subjects in the commonwealth clearly can disobey the sovereign when she disobeys the first law of nature. The first law states, “every man ought to endeavour Peace, as farre as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of Warre” (Hobbes 1996, 92). Hobbes indicates the sovereign is bound by this law as her main duty: “The OFFICE of the Sovereign (be it a Monarch or an Assembly,) consisteth in the end, for which he was trusted with the Sovereign Power, namely the procuration of *the safety of the people*; to which he is obliged by the Law of Nature...” (Hobbes 1996, 231). Insofar as the sovereign has hope

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<sup>92</sup> For a variation on this point, see (Pitkin 1972).

of securing peace, and in fact might be the only person in a commonwealth that could ever obtain peace, the sovereign in particular is bound by this law.<sup>93</sup>

Furthermore, the law's phrasing sidesteps the issue of whether the sovereign is in the state of nature. The law does not mention the state of nature or civil society. Hobbes speaks only of the ability to obtain peace. Hobbes's wording means this law of nature binds the sovereign even though he is in the state of nature. Any person in civil society both can and ought to seek peace, even if this person has not made a covenant with others. Furthermore, if he is the sovereign, he ought to seek peace as his sole end. Therefore, this law binds the sovereign even though he is in the state of nature.

The first law of nature has particular strength because we can interpret it as a right the people have against the sovereign. Hobbes states, "The Obligation of Subjects to the Sovereign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them" (Hobbes 1996, 153). At first glance, the people are bound to the sovereign as long as she *does* protect them, but only as long as she is *able* to protect them. Presumably, the sovereign could be able to protect her subjects but choose not to. However, when juxtaposed with the first law of nature, that one ought to seek peace *if one is able*, this statement does take on force. If the sovereign is able to seek peace, she ought to seek peace, and if she is unable to procure it, then the people have no obligation to her. In that sense, the sovereign has reason to fear the loss of her power when she disobeys this law, since her citizen's obligation to obey her ends when she violates it. In other words, there are consequences when the sovereign violates this law.

Thus far, I have argued that the fact that the sovereign is in the state of nature is inconsequential to his obligation to follow the laws of nature and that the sovereign is

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<sup>93</sup> Alan Ryan defends this point in (Ryan 1996, 232).

bound externally as well as internally. A related argument is that the sovereign's power is absolute and no power in a commonwealth is higher. I will discuss several passages in which Hobbes seems to endorse absolute power for the sovereign and show why this interpretation is flawed.

The seventeenth law of nature states that no man be his own judge. However, no man can judge the sovereign because she is the supreme judge. Anyone who has power to judge the sovereign has absolute power and would take away from the power that the sovereign herself has. Therefore, this law suggests no one could ever be the judge of the sovereign. Furthermore, the seventeenth law seems not to apply to the sovereign since she cannot justly be accused of any wrongdoing or injure the people. Perhaps Hobbes would say that since no man can be his own judge, but no man can judge the sovereign, there ought never to be a case against the sovereign.

However, the sixteenth law states that every man be subject to arbitration. This law appears to conflict with the seventeenth and eleventh laws of nature. When we juxtapose the law of equity<sup>94</sup> to treat others fairly with the sixteenth law, the sovereign is seemingly bound to submit himself to arbitration because if he did not, he would be giving himself preferential treatment. Although the people have no power against the sovereign, if equity is to be preserved the sovereign ought to accuse himself and submit himself to arbitration. However, if the sovereign is subject to arbitration he is obligated to have a judge. The sixteenth and seventeenth laws have the interesting conclusion that the sovereign can either violate the laws of nature or submit to having a judge. Although Hobbes argues that no man should be the judge of the sovereign, it seems inevitable that if the laws of nature bind him he ought to have a judge.

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<sup>94</sup> I address this law in greater detail below.

Other passages seem to take the sovereign as absolute explicitly. In the quotation below, the sovereign does not seem to be subject to the laws of nature:

It is true that a Sovereign Monarch, or the greater part of a Sovereign Assembly, may ordain the doing of many things in pursuit of their Passions, contrary to their own consciences, which is a breach of trust, and of the Law of Nature; but this is not enough to authorize any subject, either to make warre upon, or so much as to accuse Injustice, or any way to speak evill of their Sovereign; because they have authorized all his actions, and in bestowing the Sovereign Power, made them their own. (Hobbes 1996, 172)

This passage says the sovereign has the authority in addition to the power to act against the laws of nature. This claim would then be particularly strong because it would allow the sovereign to act against her conscience. Since the law of nature binds *in foro interno*, this disregard of conscience indicates that the sovereign can disregard the law of nature. Furthermore, Hobbes states explicitly in this passage that the sovereign can “ordain the doing of many things” contrary to the laws of nature. However, the primary difference between a society and the state of nature is that to ignore the laws of nature in the state of nature is rational, whereas to ignore them in society is foolish. Hence, if the sovereign permits violations of the laws of nature in a proper government or commands such violations, how she has lifted the people out of the state of nature at all is unclear.

Nevertheless, this passage denies the subjects of a commonwealth the authority to make war upon the sovereign. When the sovereign violates the laws of nature, the extent of the subjects’ authority is to fail to obey the sovereign. Although this possibility may seem small compared to true revolution, the sovereign’s power would be severely reduced without the obligation of the subjects to obey him.

Hobbes makes a distinction between artificial and natural persons that is used to argue that the sovereign's power is absolute but I argue means just the opposite.<sup>95</sup>

Hobbes' definition is as follows:

Of Persons Artificiall, some have their words and actions *Owned* by those whome they represent. And then the person is the *Actor*; and he that owneth his words and actions, is the *AUTHOR*: In which case the Actor Acteth by Authority. (Hobbes 1996, 112)

By a natural person, Hobbes means a person whose actions and words are her own whereas by an artificial person, Hobbes means a person whose actions and words are authorized by someone else. In later contexts, the sovereign is clearly artificial, or the actor in the above analogy, since the sovereign's actions are authorized by the people through a covenant. The type of covenant by which the commonwealth is brought about supports this interpretation:

*A Common-wealth* is said to be *Instituted*, when a *Multitude* of men do Agree, and *Covenant, every one, with every one*, that to whatsoever *Man* or *Assembly of Men*, shall be given by the major part, the *Right to Present* the Person of them all...every one, as well he that *Voted for it*, as he that *Voted against it*, shall *Authorise* all the Actions and Judgements, of that Man, or Assembly of men, in the same manner, as if they were his own... (Hobbes 1996, 121).

In other words, the covenant that the people make to form the commonwealth authorizes the sovereign to act on their behalf.

Once we understand the sovereign as an artificial person or an actor, we can interpret the claims that Hobbes makes about actors as applicable to the sovereign. Specifically, Hobbes thinks these actors or artificial persons are not responsible for their actions as actors, even when they contradict the law of nature.

When the Actor doth any thing against the Law of nature by command of the Author, if he be obliged by former Covenant to obey him, not he, but

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<sup>95</sup> I here break from my shorthand assumption that the sovereign is a single person for the sake of precision.



the Author breaketh the law of nature: for though the Action be against the Law of Nature; yet it is not his: but contrarily, to refuse to do it, is against the Law of Nature, that forbiddeth breach of Covenant. (Hobbes 1996, 113)

At face value, this statement seems to suggest that the sovereign has unlimited power.

The citizens of a commonwealth give the sovereign complete power in their name and all the sovereign's actions are authorized by them and essentially done by them, as if the sovereign were an arm to their political body. Hence Hobbes's statement: "...for though the Action be against the Law of Nature; yet it is not his..." Nothing the sovereign does is his own responsibility, and the people can never punish him. Punishing the sovereign would be like a playwright punishing an actor for reading lines off the page.

Furthermore, one could interpret this passage as saying that the people can never disobey the sovereign. To do so would be inconsistent with what they themselves authorized, and would have no justification. However, another way to understand this passage is to see the sovereign as bound by the same laws the people are. The citizens of a commonwealth are, above all else, bound by the laws of nature. Therefore, for the people to authorize the sovereign to do things they are not morally permitted to do would be absurd. In other words, it would be absurd for the people to make a covenant with one another to obey the laws of nature if, in doing so, they authorize someone to act against the laws of nature on their behalf. Just as disobeying the sovereign demonstrated inconsistency, authorizing actions the people themselves are not allowed to perform is also inconsistent.

This conclusion puts the subjects of a commonwealth in an awkward position. If they obey the sovereign, they act against laws of nature or endorse a violation of the law of nature he performed. If they disobey the sovereign, they act against the third law never

to break covenants, since they will have violated the social contract. Whenever the sovereign acts contrary to the laws of nature, or allows actions contrary to the laws of nature, or legalizes them in a written law, the subjects face a conflict. They cannot disobey her, yet they cannot follow her. Therefore, we might say that the people do not have the authority to permit actions contrary to the law of nature. If I am bound by a law not to murder, I do not have the authority to command someone to murder on my behalf. Understanding Hobbes in this way puts a limit on the power the people may give the sovereign. They would not have the power to authorize her unlimited power.<sup>96</sup>

Hobbes may be saying that the sovereign is bound by the laws of nature in the exact same way the people are. The sovereign being bound by the laws of nature is of utmost importance for peace and for society. Interpreters of Hobbes often claim that the laws of nature do not bind the sovereign since he makes no covenant and is only a third-party beneficiary. However, we can turn that idea on its head and understand Hobbes as saying that because the actions of the sovereign are really the actions of the people, the sovereign is bound by the same laws as the people. To focus on the fact that the sovereign is a third-party beneficiary is to miss the purpose of the covenant.

One last aspect of the sovereign seems to support the idea that the sovereign is absolutely free, but can be interpreted otherwise when put in context. Hobbes says, “The Legislator in all Common-wealths, is only the Sovereign...” (Hobbes 1996, 184). As the legislator, the sovereign’s job is to interpret the laws of nature. “All laws, written, and

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<sup>96</sup> Of course, sometimes the government has the authority to act legitimately in ways the people cannot, like punish or collect taxes. However, there is a distinction between actions that people transfer authority to the government to do and actions that people cannot transfer authority to anyone to do because they never had authority to do those things themselves. Actions like punishment are actions that the people have the right to do in the state of nature but that they gave up when they transferred them to the sovereign. For example, I can give over rights to punishment, since I can dole out retributive vigilante punishment in the state of nature, but I cannot give over rights to murder, since I never had those rights. Taxation, which is not contrary to the laws of nature, might be another type of action I can permissibly transfer the right to.

unwritten, have need of Interpretation. The unwritten Law of Nature, though it be easy to such, as without partiality, and passion, make use of their rational reason... has consequently the greatest need of able Interpreters” (Hobbes 1996, 191). Therefore, the sovereign could interpret the laws of nature as not binding on her, or perhaps not binding on her in certain situations. In this way, the sovereign could become free of the laws of nature regardless of what theoretical claims Hobbes made above.

Furthermore, Hobbes says that the sovereign is not bound by civil laws, since the sovereign writes the civil laws:

The Sovereign of a Common-wealth, be it an Assembly, or one Man, is not Subject to the Civill Lawes. For having power to make, and repeale Lawes, he may when he pleaseth, free himself from that subjection, by repealing those Lawes that trouble him, and making of new; and consequently he was free before. For he is free, that can be free when he will.... (Hobbes 1996, 184)

One could extend this quote, which talks only of civil laws, to apply to the laws of nature because Hobbes says that the civil laws and the laws of nature are co-extensive. “The Law of Nature, and the Civill Law, contain each other, and are of equall extent” (Hobbes 1996, 185). In fact, Hobbes states that as soon as a commonwealth is established the laws of nature actually become civil laws. “For the Lawes of Nature...are not properly Lawes, but qualities that dispose men to peace, and to obedience. When a Common-wealth is once settled, then they are actually Lawes, and not before...” (Hobbes 1996, 185). By equating the laws of nature and the civil laws, Hobbes seems to be claiming that the sovereign is not bound by the laws of nature, since the sovereign is not bound by civil law. It would make sense to gloss the passage this way, since interpreting the laws of nature seems akin to writing the civil laws. We found that the sovereign was free from the civil laws since he could rewrite them to avoid being bound to obey them. Similarly,

the sovereign seems to be able to interpret the laws of nature such that he is not bound to obey them.

However, Hobbes considers the possibility of whether the law of nature can be changed or interpreted to punish the innocent or violate equity, and deems that it cannot:

‘Tis against the Law of Nature, *To punish the Innocent*.... I say therefore, that there is no place in the world, which this can be an interpretation of a Law of Nature, or be made a Law by the Sentences of precedent Judges, that had done the same. (Hobbes 1996, 192)

The sovereign cannot have complete freedom in interpreting the laws of nature.

Furthermore, there is reason to believe the sovereign does not even have that sort of freedom with respect to the civil laws. “The Lawes of Nature are Immutable and Eternall; For Injustice, Ingratitude, Arrogance, Pride, Iniquity, Acception of persons, and the rest, can never be made lawfull. For it can never be that Warre shall preserve life, and Peace destroy it” (Hobbes 1996, 110). The sovereign does not have the authority to write civil laws that contradict the laws of nature or interpret the laws of nature in such a way to make them to his own advantage. Further evidence is that the sovereign cannot force a man to put his life in danger or force a man to kill himself (Hobbes 1996, 150-152). The sovereign does not have the authority to violate the laws of nature or force others to violate the laws of nature, or otherwise interpret them as such.<sup>97</sup>

In *Hobbes and the Social Contract Tradition*, Jean Hampton gives reasons why we might think Hobbes is committed to an idea of absolute sovereignty.<sup>98</sup> Although

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<sup>97</sup> Larry May makes a similar point about the interpretation of laws with regards to the law of equity. We will see below that the law of equity binds the sovereign. However, for now, suffice it to say May’s argument in this respect: “Hobbes thus defines a ‘good law’ in terms of the principles of equity, and carefully distinguishes it from just laws. Equity becomes the cornerstone for evaluating laws as good or bad, and is thus the prime natural law to bind the sovereign” (May 1987, 246). According to May, the sovereign is bound to write and pass laws that adhere to the procedural restraints of equity.

<sup>98</sup> (Hampton 1988)

ultimately she does not endorse this view, she argues that absolute sovereignty would be successful if it were not for the fact that citizens retain their right of self-defense in society.<sup>99</sup>

According to Hampton, Hobbes's argument for an absolute sovereign is an argument by regress in which any power that limits the power of the sovereign would therefore be greater.<sup>100</sup> There must be a final, absolute, human power that remains unlimited.<sup>101</sup> Hampton gives two main arguments for why the laws of nature cannot be the final court of appeal. First, the laws of nature are too vague and too general to be used as the final deciders: they need a person to interpret them. Second, the laws of nature are morally incomplete, so they need a sovereign to fill in the gaps. Based on these two arguments, she concludes that a person must be the final power in a commonwealth. If either of these arguments fails, she will not be able to interpret the regress argument as limited to human powers. I argue both fail.

Hampton first argues the sovereign is not bound by the laws of nature because the sovereign interprets them.<sup>102</sup> Hampton states:

Hobbes's point is that human beings can be expected to come up with a variety of interpretations of these vague laws, given their self-interested bias in pursuit of their different self-regarding goals (particularly self-

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<sup>99</sup> Says Hampton, "This means that the sovereign is not the only authority in a commonwealth and that he will have to reckon with disobedience or rebellion on the part of some or all of his subjects if they decide that his laws or actions jeopardize their lives. In fact, one of the consequences of allowing the subjects this self-defense right was Hobbes' very peculiar position on the legitimacy of rebellion in a commonwealth, a position that made all royalists who had lived through the events of the 1640s furious" (Hampton 1988, 199).

<sup>100</sup> In the terminology of *Political Philosophy* Hobbes endorses an *alienation social contract* as opposed to an *agency social contract* (Hampton 1997, 41).

<sup>101</sup> In our discussion of the seventeenth law of nature that no man be his own judge, we saw that the sovereign's duty to accuse himself of injustice and submit himself to arbitration meant that the rule of law was higher than the sovereign.

<sup>102</sup> This point is closely related to the specification problem I consider in Chapter 2.

preservation) that can never be resolved by appeal to any objective and perfectly clear moral rule...Of course, their conflicts could be resolved if they could appeal to someone charged with judging what these laws of nature say. But if such a judge were instituted, Hobbes would say that this judge is sovereign.... (Hampton 1988, 100)

However, this point does not commit us to the conclusion that an interpreter of laws must have absolute power. The sovereign's ability to interpret the laws is severely limited. A sovereign cannot interpret the laws however she pleases and cannot judge unequally in their application, as we saw above. Rather, the text suggests the more moderate view that the sovereign interprets the laws but is also constrained by them. This constraint is bolstered by the sovereign's subjects, who can enforce the laws of nature through civil disobedience when the sovereign violates them.<sup>103</sup>

Next, Hampton argues that the laws of nature are not complete, necessitating a human sovereign to fill in the gaps. "However, more important is the fact that this set of natural laws is 'morally' incomplete. In particular, only one of the laws of nature, [the eleventh] law on equity, contains any prescriptions about property (i.e., about who is entitled to what, and why)" (Hampton 1988, 100). If this were the only law of nature that dealt with such an important notion of property then Hobbes's laws of nature would seem incomplete. However, laws twelve through fourteen apply to the distribution of property as well.<sup>104</sup> Hobbes' discussion of property dealings is in fact very specific.

Furthermore, Hobbes himself treats the laws of nature as morally complete.

Hobbes states explicitly that the law of nature constitutes moral theory:

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<sup>103</sup> For example, we might think that the analog in this case is the Supreme Court justices, who interpret the Constitution in disputed cases but are also constrained by it. I thank Julia Driver for this point.

<sup>104</sup> The twelfth law speaks of equal distribution of common property that cannot be divided, the thirteenth states that common property that cannot be divided or shared be distributed by lot, and the fourteenth law is of primogeniture.

And the Science of them, is the true and onely Moral Philosophy. For Morall Philosophy is nothing else but the Science of what is *Good* and *Evill*, in the conversation, and Society of man-kind...And consequently all men agree on this, that Peace is Good, and therefore also the way, or means of Peace, which (as I have shewed before) are *Justice, Gratitude, Modesty, Equity, Mercy, &* the rest of the Laws of Nature, are good; that is to say *Morall Vertues*; and their contrarie *Vices*, Evill. Now the science of Vertue and Vice, is Morall Philosophie; and therefore the true Doctrine of the Lawes of Nature, is the true Morall Philosophie. (Hobbes 1996, 110)

In the above quotation, Hobbes clarifies that the totality of moral theory is encompassed by his doctrine of the laws of nature. Hobbes unmistakably views the laws of nature as morally complete.

It does not follow from the fact that the laws need interpretation that this interpreter must have absolute power and that the laws themselves cannot limit this power. The sovereign cannot interpret the laws however she pleases. The sovereign cannot make injustice and ingratitude lawful, for example, since it would violate the laws of nature to do so (Hobbes 1996, 110). Hobbes describes a sovereign with more power than any other person but not with absolute power, since she is bound by several of the laws of nature.

Having shown why the common view of Hobbes is wrong, I give a positive account of Hobbes's conception of sovereignty in which the sovereign is bound by the laws of nature by looking at equity, Laws 2, 3, and 4, and the self-defense thesis.

Hobbes explicitly states that the sovereign is bound by the law of nature. For example, in the quotation below, Hobbes indicates that the sovereign is subject to the law of nature:

The safety of the People, requireth further, from him, or them that have the Sovereign Power, that Justice be equally administred to all degrees of People; that is, that as well the rich, and mighty, as poor and obscure persons, may be righted of the injuries done them; so as the great, may

have no greater home of impunity, when they doe violence, dishonour, or any Injury to the meaner sort, than when one of these, does the like to one of them: For in this consisteth Equity; *to which, as being a Precept of the Law of Nature, a Sovereign is as much subject as any of the meanest of the people.* (Hobbes 1996, 237, my italics)

In this passage, Hobbes states explicitly that the Sovereign is subject to the laws of nature just as the people are. The sovereign is only bound to follow the law of equity because he is bound to follow the laws of nature generally.

Furthermore, Hobbes might mean that there would be a violation in equity if the sovereign, who is mighty and probably rich, were not subject to the laws of nature in the same way as poor and obscure citizens are. In other words, it would be unfair in some sense if the sovereign were *not* subject to the laws of nature. The argument for equity that Hobbes gives in the quotation above states that it is unfair when the mighty are treated differently from the obscure. The sovereign is the mightiest person in the commonwealth and some subjects in the commonwealth are surely either poor or obscure. Treating her differently than these subjects would be a violation of equity. Understanding Hobbes in this way would make this passage interestingly subtle: it would require that the sovereign be treated no differently than anyone else, be he rich or poor, but it would do so implicitly.

Other aspects of the above quotation also support this conclusion. First, Hobbes does not speak of the sovereign *enforcing* equity—that is, making sure that all people are treated equally. Rather, Hobbes speaks of the sovereign *being subject* to equity—in other words, that the sovereign be judged fairly. This statement is especially interesting in light of our previous discussion that the sovereign is obligated to submit to arbitration. Second, Hobbes states that the safety of the people requires that the mighty and obscure be treated



equally. This makes the sovereign uniquely subject to equity, since the safety of his people is her very duty.

In several places, Hobbes also argues that the law of equity binds the sovereign. The law of equity states that, “if a man be trusted to judge between man and man, it is a precept of the Law of Nature, that he deale Equally between them” (Hobbes 1996, 108). Hobbes often speaks of the sovereign being bound by this law in particular, “The safety of the People, requireth further, from him, or them that have the Sovereign Power, that Justice be equally administred to all degrees of People...For in this consisteth Equity...” (Hobbes 1996, 237).<sup>105</sup> However, it applies only in the sovereign’s judgments of others, giving him no particular power.<sup>106</sup> Because the law of equity is uniquely applicable to judges, and because Hobbes views the sovereign as a judge, equity is a law that is especially important for the sovereign. In fact, it is so clear that sovereigns are judges that we might take Hobbes’s statements about equity as evidence that Hobbes viewed the sovereign as bound by the laws of nature more generally. The eleventh law of equity is related to the eighteenth law, that no man should take bribes or be partial in judgments. Insofar as the eighteenth law also applies to judges like the sovereign, and insofar as it is

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<sup>105</sup> This is a reiteration of a statement Hobbes makes earlier: “It is true that they that have Sovereigne power, may commit Iniquity; but not Injustice, or Injury in the proper signification” (Hobbes 1996, 124).

<sup>106</sup> According to Larry May in his article, “Hobbes on Equity and Justice,” “Equity places a limitation on the *exercise* of rulership instead of on the right of rulership” (May 1987, 242). In his article, May argues that the law of equity has increased importance for the sovereign in particular. “Yet, as we shall see, this law is singled out and given higher status than the others when Hobbes discusses the duties of the sovereign. The reason for this seems to be that equity, unlike all the other laws of nature, applies only to those men who are ‘trusted to judge between man and man’” (May 1987, 245). However, May argues that the law of equity means more than just the obligation to judge disputes fairly. Through analysis of Hobbes’s use of the words “justice” and “equity,” May concludes each has technical meaning. Hobbes uses ‘justice’ to mean the fulfillment of contracts and “equity” takes on a meaning like procedural fairness.

similar to the law of equity, which Hobbes argues binds the sovereign, we might think that the eighteenth law also binds the sovereign.<sup>107</sup>

Several laws may be thought ambiguous as to whether they bind the sovereign; I argue that they do bind the sovereign. The second law of nature states that one is obligated to lay down one's rights for the sake of peace. At some points in the text, Hobbes seems to say that the sovereign cannot lay down her rights, give up her sovereignty or be punished by the people:

And because, if the essentiall Rights of Sovereignty...be taken away, the Commonwealth is thereby dissolved, and every man returneth into the condition, and calamity of a warre with every other man, (which is the greatest evill that can happen in this life;) it is the Office of the Sovereign, to maintain those Rights entire; and consequently against his duty, First, to transferre to another, or to lay from himself any of them. (Hobbes 1996, 231)<sup>108</sup>

Whereas citizens are certainly able to preserve peace by laying down their rights, the sovereign could never do so.<sup>109</sup> In this sense, the second law of nature seems as if it does not bind the sovereign.

However, Hobbes might be indicating that the law is not applicable to the sovereign instead of exempting him from it. The second law of nature reads, "...that a man be willing, when others are so too, as far-forth as for peace and defence of himself he shall think it necessary, to lay down the right to all things..." (Hobbes 1996, 80). The

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<sup>107</sup> Perez Zagorin defends an interpretation of equity as central to Hobbes' view on sovereignty. Zagorin states, "The principle of equity, I believe, thus exists in Hobbes's political philosophy as a genuine and significant moral limit on the rights of the sovereign and the absolutism of the state" (Zagorin 2009, 95). According to Zagorin, equity resolves what he calls a paradox between the sovereign's absolute power and the sovereign's apparent duties.

<sup>108</sup> See also (Hobbes 1996, 127).

<sup>109</sup> This law is in keeping with my interpretation of the first law. In that discussion, I pointed out that the subjects of a commonwealth are not obligated to obey the sovereign if the sovereign is unable to keep peace, not that the sovereign ought to lay down his power if he is unable to keep the peace or for any other reason.

wording of this law implies that a man be willing to lay down his rights only when he thinks it is necessary for peace and self-defense. Yet we have already seen that it is not necessary for the sovereign qua sovereign to lay down his rights to achieve peace and self-defense.

The sovereign may also be bound by the third law of nature, “That men performe their Covenants made: without which, Covenants are in vain, and but Empty words; and the Right of all men to all things remaining, wee are still in the condition of Warre” (Hobbes 1996, 100). A technicality might exempt the sovereign from the third law because she does not have to make a covenant with anybody whereas everyone else does have to make at least one covenant. But this is only a technical exemption because it gives the sovereign no particular power. If the sovereign qua sovereign ever were to make a covenant with the people, we might interpret her as being bound by it.<sup>110</sup>

This third law raises the question of whether the sovereign’s personal actions are distinct from his official actions. If we can make such a distinction, and a member of the sovereign makes covenants qua natural person, these covenants would be distinct from what the people authorize. The people could theoretically accuse or punish a member of the sovereign qua natural person for violations of contracts made qua natural person. Thus, the artificial sovereign could not be unjust to his citizens, but could be unjust qua natural person. The sovereign qua natural person would be bound by the laws of nature.

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<sup>110</sup> Indeed, to go about our daily lives without making covenants would be difficult. For example, the sovereign might borrow money from one of his subjects in exchange for a service or on the condition that he will pay it back or pay citizens in exchange for military service and policing or even start a government-owned business, which would require contracting with his citizens as employees or contracting with citizens who wish to purchase the product or service of the business. Any exchange with citizens that does not result in slavery likely involves a contract.

However, one should doubt the interpretation that identifies the sovereign as both an artificial entity and as a separate natural entity. Hobbes never makes this distinction with respect to the sovereign and may not have intended this distinction to apply to the sovereign. When the people make a covenant with one another authorizing the sovereign to rule, they do not put a restriction on the third-party beneficiary that prohibits the use of power for personal gain.<sup>111</sup> Therefore, we have reason to believe that the sovereign is wholly artificial and the people authorize all his actions. Nevertheless, the sovereign is still bound by this law of nature. As we saw above, the sovereign qua artificial person is only authorized by the people to act in ways the people may act, which is in keeping with the laws of nature. Even if the members of the sovereign are wholly artificial when it comes to fulfilling the laws of nature, they must still follow this and other laws.

David van Mill gives a compelling argument that the sovereign is also bound by the fourth law of nature in his book, *Liberty, Rationality, and Agency in Hobbes's Leviathan*. (David Van Mill 2001) The fourth law of nature is the law of gratitude, "that a man which receiveth Benefit from another of meer Grace, Endeavor that he which giveth it, have no reasonable cause to repent him of his good will" (Hobbes 1996, 105). Van Mill argues that this law applies to the sovereign because her power is a free gift from his subjects. The sovereign, then, is bound to treat her subjects with gratitude. Because the citizens gave the sovereign her power and laid down their natural rights to her, the sovereign is obligated not do anything that would cause them to regret this choice.

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<sup>111</sup> To think that there is no natural person that corresponds to the sovereign's artificial person, or that Hobbes intended this view would be odd. However, the implausibility of this interpretation supports my view.

Although the view I defended in this section is not widely accepted, it is not entirely unheard of in the literature. Some argue that since citizens retain the right to self-preservation, that the sovereign is indirectly limited. Since this is one point on which Hobbes does not falter, it is an important area in which we can find evidence to support a view of Hobbes' sovereign as retaining limited power.<sup>112</sup>

For example, Van Mill argues that citizens have no obligation to obey the sovereign if they are being threatened. He states,

It also needs to be noted that each individual always retains the right to disobey if she feels directly threatened by the actions of the sovereign. The whole point of giving up the right of nature is that by doing so we secure our person; consequently our obligation lasts only as long as the sovereign provides security, and security in such a manner that we do not become weary of our existence. (David Van Mill 2001, 167)

According to van Mill, "Should the sovereign threaten the right of self-preservation that each individual still retains in society, the subject has legitimate grounds for disobedience" (David Van Mill 2001, 164). Van Mill argues that this right to self-defense results in an even greater right to rebel. He states, "In one sense, Hobbes actually gives a stronger right of resistance than Locke. For the latter, one can only rebel after a long train of abuses, and serious abuses at that. For Hobbes, one is removed from the obligation to obey if the sovereign uses force..." (David Van Mill 2001, 167). Thus, van Mill defends an even stronger view than I have, since I only argued that citizens may disobey the sovereign and not that citizens may overthrow or rebel against the sovereign.<sup>113</sup>

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<sup>112</sup> Claire Finkelstein gives a compelling account of why Hobbes's argument for the self-defense thesis may not be successful in (Finkelstein 2005).

<sup>113</sup> Other authors have defended a similar view to van Mill's, including Jean Hampton, as we saw above, D. J. C. Carmichael (Carmichael 1990), and John D. Harman (Harman 1997). Jaume also defends a similar view of the self-defense thesis in (Jaume 2007). Says Jaume, "The so-called despotism of Hobbes—heralded by his scandalous claim that individuals are no freer in Lucca than Constantinople—does not in

Rather than arguing that other countervailing powers in the state pull against the sovereign's power, I argue that there are direct limits to the sovereign's legitimate use of power. The sovereign's power is limited not only by the power that citizens retain, but also by the laws of nature. These two views are compatible, perhaps even complimentary, but nevertheless distinct.

In this section, I argued that the laws of nature bind Hobbes's sovereign. First, I disproved the common view that the sovereign must have absolute power and must not be bound by the laws of nature. Even though the sovereign remains in the state of nature and even though there must be no human power higher than the sovereign, the sovereign can and must be viewed as subject to the law of nature. Second, I gave a positive account of sovereignty, showing what laws bind the sovereign and why.

My interpretation recognizes Hobbes as both a social contract and a natural law theorist and shows how his social contract and natural law components fit together into a cohesive view. It is only through understanding the sovereign to be bound by the laws of nature that we can come to a reasonable interpretation of what sovereignty and the laws of nature must mean, and I gave strong reasons to think that the sovereign is subject to laws 1, 2, 3, 4, 11, 16, 17, and 18. This discussion highlights the necessity for social contracts to be tied to some version of a non-constructivist view. The common interpretation of Hobbes, which takes his social contract to function completely independent of any natural laws he previously avowed, also highlights the undesirability of such a view. A social contract that gives government absolute power over citizens irrespective of any harms it causes, which does not aim at any goods or mutual advantage

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fact destroy or put to sleep the desire for self-preservation, that is, the natural right in terms of which this desire qualifies in the register of rights" (Jaume 2007, 209).

for citizens, and from which there is no possible exit, is not a desirable social contract. The threat of this interpretation of the *Leviathan* exemplifies this desideratum, which also emerged from the previous two chapters.

However, despite the new characterization of sovereignty in the *Leviathan*, Hobbes does not present a view on which to model a modern hybrid theory. Although I have argued that the sovereign's power is not absolute, it is nevertheless greater than would be desirable for current states, because neither the natural law component nor the social contract component play a large enough role in justifying the state. Although I have made the case for thinking they play larger roles than is commonly thought, there is still reason to think that the people should have more ability to withhold consent and that the ability of the sovereign to achieve goods for society should matter to its justification. This view is also particularly undesirable for a theory of international justice, for a multitude of reasons. Sovereignty will not be as centralized on an international stage and enforcement will not be as straightforward or as easily achieved. These considerations are more than merely practical obstacles. They are also normatively relevant: sovereignty should not be as centralized internationally as it is nationally and an enforcement institution at the international level as robust as a national one involves dangerous levels of power. While Hobbes' theory is informative, it is not a blueprint for an international hybrid theory.

#### **IV. Conclusion**

In this chapter, I looked at classic examples of hybrid theory to determine whether a specific version of the view is successful for application to international political norms.

This endeavor first required interpretive claims showing that the views discussed in this chapter are in fact illustrations of hybrid theory. I argued Epicurus, Grotius, and Hobbes each exemplify hybrid views that combine a non-constructivist component with a social contract. However, I found existing, historical cases of hybrid theory wanting. While these exemplars of hybrid theory are informative, they are also problematic. Can a revised theory avoid the problems I argue face these models of hybrid theory and in doing so provide a basis for international political norms? I take up this task in the next chapter.



## Chapter 6

### *Tacit contractarian hybrid theory*

#### **I. Introduction**

A specific version of a hybrid theory is necessary. Epicurus, Grotius, and Hobbes each provide a possible specification, which I consider in Chapter 5. However, I also break with these historical figures on details of their theories. I diverge from Epicurus with respect to the content of the natural laws and the increased weight I give to consent. Grotius' theory I argue is unsatisfactory due to problems with how the two components fit together. Although influential in my own thinking, Grotius' theory does not provide an adequate model. Hobbes's theory is more successful at combining natural law with consent. While I argued that the sovereign does not have absolute power in a Hobbesian state, neither non-constructed goods nor consent is influential enough in his theory of sovereignty. Therefore, a particular hybrid theory that meets the desiderata necessary for a hybrid view without taking on the problems of Epicurus, Grotius, or Hobbes is necessary.

In this chapter, I articulate and defend a particular version of a hybrid theory I argue is most successful. I argue that hybrid theory can avoid the problems that beset other theories of global justice. In section II, I plump for derived non-constructivist pluralist theory; in section III, I defend a particular version of social contract theory; in section IV, I look at how these two components can be combined, considering especially how my view can respond to the objection that I have raised the bar for international norms too high; and in section V, I conclude this chapter with a discussion on whether or not this version has successfully met the desiderata outlined in previous chapters.

## **II. Derived non-constructivism**

In my view there are certain minimal, non-constructed facts about what is good for human beings, such as health, freedom, stability, community, security, autonomy, and self-determination. Thus, my preferred version of non-constructivism is value pluralist; I defend a view that takes there to be multiple goods for human beings, rather than just one good like utility or hedonism. These goods tend to be non-controversial, though I do not require that they be uncontroversial. Since this is not a meta-ethical theory, I leave for others the task of defending the metaphysical, epistemological, and semantic commitments of this view. I take this to be a benefit of my view rather than a liability: one can supply one's favored meta-ethical view and plug it into this account and still achieve my main thesis.<sup>114</sup>

## **III. Social contract theory**

As argued above, consent to a contract is needed to pick out the norms that can achieve these goods. In this section, I identify a version of social contract theory that successfully avoids the problems established in Chapter 3 and meets the requirements for a hybrid theory already laid out. I argue that the parties to the contract should be individuals worldwide, that the nature of the consent is actual, and that tacit consent can count as consent on this view.

Who are the parties to the contract in a hybrid theory? There are two main candidates: representatives or individuals worldwide. Benefits and problems are associated with each answer to the question, and I take each in turn.

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<sup>114</sup> Although there are limits, in my view, on what meta-ethical commitments could be substituted and still count as a hybrid theory. This sketch is admittedly quick. A complete list of these goods is beyond the scope of this project. However, a global discussion of these topics is warranted.

The first possibility of parties to international contracts is representatives of states.<sup>115</sup> Representatives maintain the ability to opt-out of contracts altogether, which I argue is central to true consent, since populations can choose not to elect or send a representative to a contract. Representatives can also choose to withhold consent or dissent from international contracts. Furthermore, the choice of representatives as parties to the contracts takes advantage of international institutions as they exist in the forming and maintenance of multilateral treaties today.

However, several problems still accrue with representatives. For example, they might not actually respect autonomy of individuals, since they are once-removed from individual decision-making. Pogge makes this point when he argues against the Rawlsian view that parties to global contracts should be representatives of states, saying,

... Viewing the parties as representing *states* and thus yielding a criterion that assesses international institutions exclusively in terms of the internal justice of states, would lead here to a break in continuity. The right to equal political participation extends up to but not beyond the national level. (Pogge 1989, 249)

That is, because equal participation in this proposal is given to states rather than individuals, it does not recognize the free and equal moral status of individuals, nor does it respect their autonomy. Rather, it gives this privilege to states.

If the parties to the international contract are representatives, worries emerge that they will not represent the interests or preferences of their people. Especially in tyrannical regimes, it is problematic to give this right to people who neither represent their people's

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<sup>115</sup> For example, Rawls discusses this possibility in Chapter VI of *A Theory of Justice*, saying, "Now at this point one may extend the interpretation of the original position and think of the parties as representatives of different nations who must choose together the fundamental principles to adjudicate conflicting claims among states" (Rawls 1999c, 331). Rawls goes on to describe a second veil of ignorance amongst these representatives of states. Later, he revises this position to argue that the second-order original position should take place among representatives of peoples (Rawls 1999a, 23-30). However, this shift is in part a semantic choice to highlight the fact that states traditionally pursue self-interested policies internationally.

interests nor will use the power to promote the interests of their citizens. Tyrants might appoint these representatives or these representatives might not be accountable to the people. Where non-elected representatives do act in the interests of the people they represent, the lack of accountability makes temporary successes suspect. Furthermore, tyrannical regimes may not allow representatives unaccountable to the regime to exist or vote on their behalf, or even leave the country, undermining the practical ability of representatives. Representatives from tyrannical regimes may also lack the necessary power to make contracts on behalf of their societies: these oppressive regimes might violate or ignore contracts representatives make.

Furthermore, sovereignty and statehood in many cases is in dispute or unclear. For example, Palestine, Taiwan, Korea, and Tibet present problems in determining and recognizing statehood in the international community, and there are dozens of disputed territories worldwide. Recognizing statehood and determining state boundaries have added significance when disputes are influential in the creation and enforcement of international norms. Territorial disputes would not only have effects nationally, but would also have consequences in the creation of international norms.

Lastly, reliance on representatives opens up this view to a tyranny of the majority objection. A tyranny of the majority occurs when an imbalance of power is systematic and the majority capitalizes on their elevated position by oppressing or otherwise ignoring the interests and preferences of the minority. In such a case, it is virtually impossible for a minority's vote to have much influence, making the minority easy to ignore. For example, Alexis de Tocqueville raises this concern in the national context in *Democracy in America*, saying "The omnipotence of the majority appears to me such a

great peril for the American republics that the dangerous means used to limit it seem to me even a good” (de Tocqueville 2002, 183).<sup>116</sup> Here, de Tocqueville takes majority voting to run the risk of creating tyrannies of the majority, so much so that we might be justified in erring in the opposite direction.<sup>117</sup> There are two ways of raising this objection. The first is a practical consideration: aggregating votes leads to national, ethnic, religious, and socio-economic majorities that could flood the concerns of smaller groups. This consideration raises the worry that empirically, this practice can lead to abuses. The second consideration is a theoretical concern. Given that majorities exist, some interests will be outnumbered. The concern is not an empirical objection of abuse, but rather a systematic problem inherent to majoritarian voting. This problem is unique to the use of representatives because it endorses a procedure in which some who have not consented to a norm are still subject to it.

The next candidate for filling the role of parties to the contracts is individual citizens worldwide.<sup>118</sup> Only individuals who are capable of giving consent to a contract would count in this proposal, which would exclude animals, children, and the mentally disabled. There are several justifications for the parties to the contracts to be individuals

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<sup>116</sup> Elsewhere, de Tocqueville states, “I regard as impious and detestable that in matters of government the majority of a people has the right to do everything, and nonetheless I place the origin of all powers in the will of the majority. Am I in contradiction with myself?” (de Tocqueville 2002, 240). Here, de Tocqueville states the paradox: we both take the majority’s decision to be legitimacy-conferring and also are concerned with the extreme power (or “omnipotence”) that that cedes.

<sup>117</sup> De Tocqueville takes freedom of association to be the main counterweight to tyrannies of the majority, because it allows for opposition planning.

<sup>118</sup> The position that individuals should be party to contracts governing international relations is defended by Thomas Pogge in *Realizing Rawls*, where he argues to keep Rawls’ view intact but use one global original position (Pogge 1989, 247). Pogge defends this reimagining of the original position because it is adequately responsive to the Rawlsian view of the individual’s standing as the basic unit of morality, because it circumvents the massive discrepancies in power between states which would undermine the legitimacy of any contract, and because it allows national justice to be evaluated on the sole basis of its advantage to its members.

rather than representatives. First, it is justified by the import I attribute to autonomy in governance. Taking consent seriously puts presumptive favor on individual decision-making, since it is individuals' consent that matters. Second, it sidesteps a number of problems associated with states, such as that they might be tyrannical, non-representational regimes or might not be accountable to their populations. For example, suppose Country U refuses to agree to Protocol K, an international contract necessary for the protection of the environment. Suppose further that the citizens of U recognize the value of Protocol K and would like to be party to it. U citizens may make cooperative efforts to abide by K without having a representative act on their behalf and without being a signatory to K. This case suggests the way individuals and can circumvent certain common problems with using representatives.<sup>119</sup>

However, problems arise with this approach to global contracts as well. Global contracts are indirect, making individuals less invested in their outcomes. Second, these contracts can be extremely complex, placing a high burden on individuals to be informed on international issues. Third, determining what individual decisions count as determining for global contracts is problematic in part because individuals are not often faced with choices on international issues. Fourth, making individuals parties to contracts makes the standard too high, reducing the theory's applicability in the actual world and making it difficult to determine how to evaluate state action. I take each objection in turn.

The first objection is that these contracts are indirect, and thus that individuals are less interested in the particular outcomes of them. If individuals are not invested in the outcome of a particular contract, perhaps they should not weigh in on matters that are of

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<sup>119</sup> Because implementation of a policy acts as consent in this example, it may seem as though there are only norms if policies and practices are implemented. However, there are other ways to consent to a political norm; successful implementation is not a requirement of the hybrid view.

no interest to them. However, even contracts at the global level can have large consequences for populations, despite these consequences being only indirectly related to global decision-making. Thus, there may be epistemological obstacles in recognizing the effect of contracts and faulty choices may result.

Second, placing international contracts in the hands of individuals does place a high burden on individuals because it requires them to be informed to a high degree. But is it any different at the national level? National political decision-making requires complex knowledge of a range of different issues, from foreign policy, to climate change, to health care cost benefit analyses. Yet, we hold citizens accountable to be informed on these issues and often leave decision-making in their hands. National contracts and norms based on consent are in the same boat, so to speak, given that contracts can cover complex and constantly changing circumstances.

In fact, it is plausible to posit a requirement to be informed on global issues, even those for which we have no direct interest. Insofar as global issues, foreign policy, and the policies of foreign governments play a large role in the harm or protection of human beings, for example, and insofar as individuals have influence on these matters in a variety of ways, we may have a duty to have a minimal set of knowledge on global affairs. Carlo Filice defends one version of this position.<sup>120</sup> Starting from the prima facie obligation to prevent harm, Filice argues that people must know about harms to prevent their occurrence. Furthermore, there is a prima facie obligation to position oneself to prevent these harms and often doing so does not require significant moral costs. In this context, there is an obligation to be informed about preventable harms. For these reasons, Filice argues,

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<sup>120</sup> See (Filice 1990, 400-401).

...each of us has a prima facie obligation to make serious attempts to become and remain informed about the occurrence of major, avoidable harm whenever these attempts at gaining the necessary information are likely to succeed and require small sacrifices and whenever there is some chance for the prevention of at least some harm. (Filice 1990, 401)

Filice's argument is specifically tied to major atrocities, making it a weaker claim (and stronger argument). However, the principle can be more broadly applied, suggesting the significance of keeping informed not only about major atrocities, but also about other types of preventable harm. Global contracts do put a high burden on individuals, then, but perhaps this problem is surmountable.

A more challenging problem is the difficulty in garnering consent where individuals are parties to contracts. Although individuals may be required to know or be informed about international action issues, it is not as easy to see how they might be able to register their consent on the world-stage. If their consent takes the form of actual voting practices, practical obstacles prevent implementing voting procedures worldwide. On the other hand, if tacit consent is the relevant sort of consent, then there are difficulties in the ability to see individual action as representative of global choices. Are their daily actions and choices representative of individuals' decisions? Individuals may not be faced with the sort of choices that relate to international decision-making. Furthermore, collective action problems can prevent individuals from making choices that reflect their interests or preferences. For example, the decision to comply with an international norm to reduce carbon emissions through recycling program expansion is a decision that requires group agreement. Individuals who agree to compliance cannot register this consent without the parallel compliance of many others. If these collective action problems block individuals from representing their choices, the legitimacy of their



consent is undermined.

The last problem I consider with individuals as parties to global contracts—and a related problem—is that currently some major political actors in the international realm are states. Circumventing states for theoretical reasons presents difficulties in evaluating circumstances at the global level because many of the instances where a theory of justice would come to bear is in evaluating governmental action or inaction. For example, if individuals in Tunisia consent to grant asylum to 300,000 Libyan refugees, then Tunisia's government is responsible for implementing this agreement.<sup>121</sup> However, multiple difficulties in arise in assessing individual consent and state action. For example, given that some individuals consent to agreements and others withhold consent or dissent, there are problems in respecting these decisions. Individual rejection of a contract is meant to prevent compliance, but states have to act in ways that either accept or reject contracts and cannot respond to these nuanced disagreements. Granting asylum to refugees does not register the dissent of individuals who disagree, nor does refusal of asylum register the consent of individuals who agree.<sup>122</sup>

Given the difficulties associated with the choices for who the parties to the contract should be, I am open-minded about what how this component of the view is cashed out. In many circumstances, I take individuals to be the more successful option. For example, when individuals are citizens of states that are tyrannical, oppressive, or otherwise do not represent their constituents, we have reason to take individuals as party to the contract over representatives of states. In these cases, no other consent is morally

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<sup>121</sup> As reported in (Nuri 2011), 300,000 Libyan refugees have recently entered Tunisia.

<sup>122</sup> However, using a threshold to determine what counts as a sufficient number of individuals consenting seems to be theoretically closer to relying on representatives and the institutions in place to create and hold accountable those representatives than it does to maintaining individuals as parties to the contract.

or politically relevant. Because there are many states and groups for which oppressive regimes block the ability for individuals to express autonomy on global matters, focusing on the individual can allow contracts to gain legitimate support or dissent.

Furthermore, sometimes individuals are major actors in the global arena. For example, CEOs, heads of central banks, and other individual leaders can be global contractors when circumstances permit. Although acting in an official capacity, these individuals are not always representing others' interests. Their decisions, preferences, and interests determine global decision-making. Furthermore, some international laws apply to individuals directly. For example, in Chapter 7, I consider international legal institutions that apply directly to individuals, such as designated non-financial businesses and professions (DNFBPs) such as real estate agents, precious metal and stone dealers, and selected lawyers and accountants. (FATF 1997, 17) When these global actors contribute to and engage, participate, and determine global contracts, it makes sense to include them as parties to contracts.

However, there are some circumstances in which representatives should be taken as valid options for parties to global contracts while avoiding some of the problems enumerated above. First, we can expand the notion of representative to include more than just representatives of states. By allowing corporations, banks, and other organizations to act as parties to the contract, we can be sure to include the most significant global actors. This policy accommodates more variation in the participation of global actors because it allows for a wide range of global actors to act as parties to contracts.

Second, we can rule out representatives that act contrary to the interests of their citizens, overreach in representing groups that do not want to be members, or otherwise

violate autonomy are the negative effects of counting the consent of representatives which do not count the consent of their constituents. By restricting the legitimacy of international consent to representatives that represent their citizens, no contradictions in respecting autonomy emerge. Furthermore, there is reason to respect the self-determination of representative or democratic states. Contra Pogge, these representatives do preserve the autonomy of individuals insofar as they are successfully representatives of those individuals. Far from undermining autonomy, successful representatives encourage and support autonomy.

In this schematic, which permits representatives to act on behalf of others in global contracts, measuring representation takes on more significance. Pitkin analyzes representation, differentiating four concepts each of which articulate a definition. For example, she identifies formalistic representation, in which representation means either having authorization to act on someone's behalf or held accountable to someone, (Pitkin 1972, 39, 55) descriptive representation, in which representatives correspond or resemble constituents (Pitkin 1972, 60), symbolic representation, in which representatives symbolically stand for constituents (Pitkin 1972, 101), and substantive representation, in which representatives' activities further constituents' objectives. (Pitkin 1972, 116) On the other hand, Mansbridge further evaluates the concept of representation. She delineates promissory representation, in which representatives are evaluated on the basis of keeping campaign promises, anticipatory representation, in which representatives act in ways they think constituents will reward in upcoming elections, gyroscopic representation, in which representatives "look within" and act based on character without external incentives, and surrogate representation, in which there are no formal

connections to a constituency. (Mansbridge 2003) Determining whether parties to the contract sufficiently represent their constituencies depends on what notion of representation one considers. A representative could fail on one dimension, such as promissory representation, while succeeding in another, such as anticipatory representation.

In short, the inclusion of representatives as legitimate parties to global contracts depends on concepts of national justice and successful representation, which are beyond the scope of this chapter. However, given the varied interpretation of representation not only by political theorists, but also by constituents, we have reason to take seriously Mansbridge's assertion that, "...there is more than one way to be represented legitimately" (Mansbridge 2003, 515). In that case, what we need is not necessarily an agreed-upon definition, but merely a threshold by which to evaluate representation. If representatives meet a certain minimal threshold of representation, they count as autonomy-preserving and thus acceptable stand-ins for the represented individuals.

What of the nature of the consent? The consent can be hypothetical or actual, tacit or explicit. Like the parties to the contract, there are benefits and problems associated with each. Having already defined and discussed these versions of contract theory in Chapter 3, I here proceed to the version of consent I take to be most promising: tacit consent. Tacit consent is the best alternative because it is practically feasible and morally relevant. When I defend tacit consent, I am not arguing that explicit consent is unnecessary or uninformative; rather, I argue that tacit consent can count as a legitimizing force for global contracts.

In his landmark 1976 paper, A. John Simmons defines tacit consent as “given by remaining silent and inactive” (Simmons 1976, 279). Simmons notes that tacit consent is expressed, but that its mode of expression involves failing to do something rather than doing something. This definition correctly picks out a mode of expression that confers tacit consent. However, I think we can also expand the notion of tacit consent to other modes of expression that fall short of explicit consent. For example, compliance with global contracts does not constitute explicit consent, nor is it accurately described by Simmons’ definition. Insofar as it constitutes action rather than inaction, Simmons’ definition would seem to exclude it. While compliance with global contracts is one way of “remaining silent” in opposition to those contracts, under the right conditions, it also seems like it is a clearer endorsement of those norms. It is not necessarily the silence or the lack of action that confers tacit consent; it might well be an action that confers the tacit consent.<sup>123</sup> For example, the Cayman Islands and its private banks might resist signing global contracts governing terrorist financing or may never get the opportunity to sign. However, the Cayman Islands might also change legislation to meet international standards, hire lawyers to ensure compliance, and generally implement anti-terrorist-financing protocols in both the public and private sphere with the aim of reducing terrorism. Under the right circumstances, we should take these actions combined with endorsement as indicative of tacit consent to legal institutions, despite their falling short of explicit consent like signing treaties.

The reason for valuing tacit consent derives from the role it plays in the hybrid theory. Because consent does the work of choosing among multiple possible means

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<sup>123</sup> Simmons directly argues against most such examples as counting as legitimate consent, tacit or otherwise. For reasons I discuss below, if such actions meet the relevant criteria, I think they should be included as actions that express tacit consent to norms.

towards attaining an end, under some circumstances, cooperative acts with one method over another are a vote in its favor, whether that cooperative act is tacitly compliant with the method or an explicit vote in its favor. For example, in the case of which side of the road to drive on, my consistent driving on the right side of the road reinforces the convention of driving on the right side of the road, whether or not I explicitly vote in its favor. The same can be said of transportation infrastructure in general. The more people drive, the more they fill up the roads. The more they fill up the roads, the more resources are needed to accommodate them in the form of upkeep and expansion. The more resources are put into upkeep and expansion, the better it is to drive, and the more people drive. The same principle holds true of public transit. The more people use public transit, the more resources are spent on upkeep and expansion: more trains coming more often and more stops covering more distance. These conveniences in terms of frequency and accessibility increase public transit's value, which increases its demand. With respect to the end of transportation, the means we choose can sometimes represent a tacit vote in its favor and has a tangible influence on possibilities of norms going forward.<sup>124</sup> Tacit compliance is indicative of individual consent without facing the problems of low participation or mere nominal consent.

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<sup>124</sup> One might worry that these examples do not adequately exemplify tacit consent because there is too much restriction in decision-making to constitute free choice. Because tacit consent cannot be obtained through this type of coercion, these features would undermine the legitimacy of it. For this reason, at least one safeguard prevents us from counting mere convention as consent. A second safeguard, which I discuss below, is the combination of assent or endorsement with convention in order for such activity to count as tacit consent. Thus, unwillingly using a car when individuals would rather take public transportation would not count as tacit consent. On the other hand, building up the requirements needed to achieve tacit consent raises other worries that it is less likely to occur in the world or that it is difficult to identify when it does occur. However, it is more central that conventions exemplify true consent than that they be found commonplace in the real world. Responding to this concern may require counting the number of cases we find tacit consent, which is beyond the scope of this paper. In Chapter 7, I consider cases pertaining to the international legal institutions governing money laundering and terrorist financing. In some such cases, we find examples of individuals and representatives tacitly consenting to global contracts, despite failing to explicitly sign multilateral treaties.

Like all forms of consent, what counts as tacit consent is limited, and these limits help to identify the background conditions for tacit consent acting as legitimacy conferring. For example, tacit consent of individuals does not count as morally legitimate if it is achieved under oppressive regimes. Tacit consent achieved through coercion cannot be called consent except by changing the meaning of the word beyond recognition. Governments are not the only institutions that can undermine consent through coercion. Gangs, tribes, insurgents, rebels, families, and oppression from other sources can also alter the circumstances of a contract such that the consent is no longer meaningful. Oppression and coercion, however, are not specific terms. What exactly is it about oppression that undermines the legitimacy of consent?

First, using physical force to obtain consent undermines its legitimacy. When individuals are physically forced into offering consent we cannot plausibly take that consent seriously. The force undermines their consent because their actions are being controlled by external powers. Additionally, using force when someone does not consent has the same effect. Killing, jailing, seizing property, or physically restraining, those who do not “consent” to a norm, law, or practice also undermines the legitimacy of the consent because it is coercive. Similarly, threatening these penalties or retaliating against the loved ones of the individual is also coercive. Individuals making decisions amidst these threats of physical violence cannot make free choices. Extracting signs of consent under these conditions do not meaningfully reflect the decisions of rational agents.

Some level of freedom of expression is also required for consent. Discussion, including in a public forum, is necessary for meaningful consent. Without the possibility to openly consider alternatives and benefits of a given norm, individuals will not be

making an informed or free choice. Dissent must also be tolerated and the proper avenues for it must be protected in order for consent to be meaningful. If individuals cannot talk about a norm or oppose it, then their consent to it will not reflect their considered opinions.

Next, severe restrictions or limits on information, systematic dissemination of false information, or even lack of news sources can undermine the legitimacy of consent. Freedom of expression without free access to information pertaining to a decision will not be helpful. Individuals making decisions under these circumstances may not be aware of the options they are choosing among or may have a skewed sense of the consequences of their actions.

The necessity of decisions to be freely chosen and fully informed to count as consent is not specific to tacit consent. These conditions would be necessary for valuing any form of consent, whether actual or hypothetical, tacit or explicit. However, the nature of tacit consent necessitates further background conditions.

First, mere convention does not necessarily indicate tacit consent, even though tacit consent may involve an informal convention. While individuals working together to act in ways that endorse a convention or norm comprise a significant portion of tacit consent, this activity must also be combined with an approval or support for that cooperative system. Jean Hampton, who defends a convention model in her book, *Political Philosophy*, calls this feature of the model “endorsement consent.” Says Hampton, “A regime that receives what I call *endorsement consent* gets from its subjects not just activity that maintains it but also activity that conveys their endorsement and approval of it” (Hampton 1997, 96). Here, Hampton acknowledges that cooperative



conventions that make governing institutions possible do not necessarily lead to complete consent. Endorsement consent is not only epistemologically helpful in identifying consent among conventions; it is also a necessary feature of consent. I consider ways that tacit consent can do this work in the next chapter.

Another consequence of a tacit consent view is that it places a higher burden on individuals opting out of a contract. In cases of explicit consent, there is a higher standard for the expression of opting in. Even clear signs of consent like signing documents or voting on a contract are sometimes insufficient. On the other hand, tacit consent requires higher standards for opting out. To refrain from becoming parties to a contract, individuals will have to explicitly dissent or withhold their consent through overt signs. If mere silence can be counted as consent under the right conditions, then the standards for registering dissent are higher. In other words, lowering the standards for consent correspondingly raises the standards for dissent. Accordingly, there must be a means to register dissent.

By positing rules governing the use of dissent, Simmons brings clarity to this issue. In particular, Simmons requires first, that the time period for dissenting must be clearly defined and reasonably long; and second, the means for dissenting must not be too burdensome.<sup>125</sup> These basic requirements contribute to the legitimate use of tacit consent because they clarify both for the governing institution and for the individuals what

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<sup>125</sup> (Simmons 1976, 279) Simmons gives five requirements governing the use of silence or inaction as a relevant mode of expression for consent. Above, I highlight what is relevant for my purposes. Simmons also argues that the consequences of dissent must not be dire, a consideration I have already discussed. Furthermore, Simmons requires that the individuals be aware of consent, which I leave out because it governs tacit consent rather than dissent.

actions or inactions count as consent or dissent. Furthermore, they do not overly burden either the parties to the contract or the institutions establishing or enforcing norms.

Simmons cautions us against confusing signs of tacit consent with acts that would merely seem to imply consent, such as participation in a practice or enjoyment of certain benefits. Unless these actions take place under the proper circumstances, they do not count as tacit consent because simply because they would otherwise seem to signify consent.<sup>126</sup> The confusion arises because certain actions and inactions seem to meet Simmons' criteria but in fact do not. Voting for a political candidate seems like tacit consent to a political institution and participating in a baseball game seems like tacit consent to the umpire's play decisions. However, unless participants are aware of the implications of their actions signifying the requisite consent, then their "consent-implying enjoyments" are in fact a bait and switch.

Taking advantage of Simmons' requirements for tacit consent helps clarify the issues and fix the point at which individual expression counts as tacit consent. However, these requirements should not be taken as objections to tacit consent grounding political obligation, as Simmons would have them be. According to Simmons, the conditions for tacit consent are just as robust as explicit consent, and do not ever occur. Says Simmons,

All of this has been leading to the conclusion that tacit consent must meet the same fate as express consent concerning its suitability as a general ground for political obligation. For it seems clear that very few of us have ever tacitly consented to the government's authority in the sense developed in this essay; the situations appropriate for such consent simply do not arise frequently. (Simmons 1976, 290)

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<sup>126</sup> As a result, Simmons argues that tacit consent cannot properly ground political obligation. Says Simmons, "For while political participation may 'imply consent' (or might *under special arrangements* be a sign of consent), it is not under current arrangements in most states a sign of consent" (Simmons 1976, 289). Simmons rightly points out that tacit consent does ground existing political institutions as Locke and others have intended. However, that is not to say that it cannot ground political institutions.

Although Simmons is addressing national justice and not international justice, his attack on tacit consent could easily be expanded to include global justice.

Simmons asserts that the conditions for tacit consent are rarely met; but not that they can never be met. He does not argue, that is, that it would be impractical to require tacit consent as a basis for political obligation, but only that we do not already rely on it. In fact, his view is seemingly compatible with raising the standards for political obligation and requiring tacit consent. Therefore, I run the risk of advocating a view tantamount to international political anarchy. Insofar as current international practices do not place a high value on tacit consent, as I argue they should, and insofar as changes must be met to set up international political institutions in such a way as to promote the satisfaction of the hybrid view I defend, I run the risk of setting the bar too high. I address this concern below.

#### **IV. Non-constructivism and social contracts combined**

In the forgoing sections, I argued that non-constructivism was required to complete social contract theory and social contracts were required to complete non-constructivism. I also specified each component of the theory and explained the characteristics of each component view, explaining what version of non-constructivism I endorse and what the components of social contract are.

I offer two criteria for grounding norms which are each necessary and jointly sufficient to create a complete and successful theory of international justice. An agreement must actually achieve goods, and the method to achieving those goods should be obtained through consent, as characterized below in this following Venn diagram:

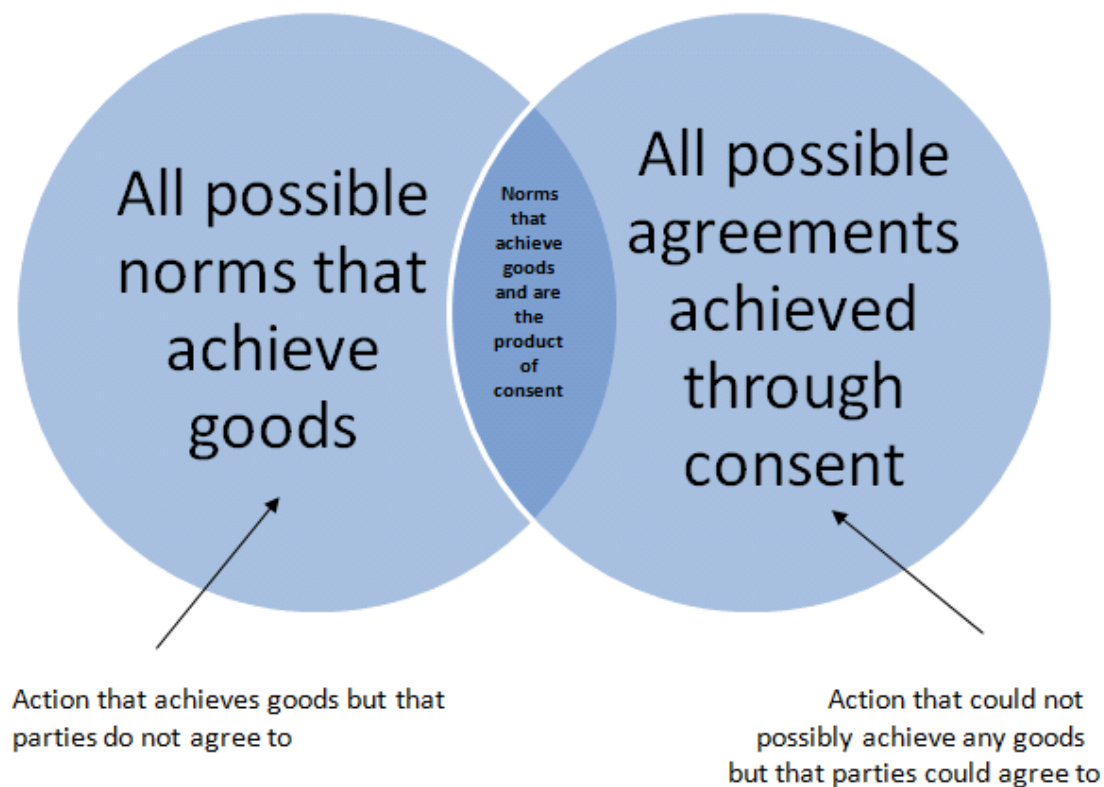


Figure 1.

The center of Figure 1 illustrates the way my criteria work together to produce binding norms in a hybrid theory. It also shows what actions are ruled out by the theory because they only meet one half of the composite view of global justice. This Venn diagram is meant to show visually how the two components work together to explain and justify global political norms of justice.

However, increasing the criteria a norm must meet in the way I propose runs the risk of setting the standard of justice too high. This risk may lead to bad consequences because it leaves open the possibility of vast permissibility in action. Given the high standard for norms in my view, agents will frequently act in the absence of any

substantive governing norms. For example, what does the proposed hybrid view say about norms that do not meet the criteria I set out, actions performed in the absence of norms, norms that are not very effective, and those not party to a contract?

The hybrid theory does not commit me to the view that we cannot say anything about such actions. Even in the absence of a complete theory of international justice, the components of the view provide some basis with which to evaluate actions. For example, we can criticize some actions because they do not achieve goods. In the case of malicious actions that are meant only to harm others with no resulting goods achieved, we can make certain pretheoretical judgments. We can say that because of the range of possible norms that achieve goods, this action will not fall under any such norm. Thus, we can criticize the action because it would not be in compliance with the range of possible norms that achieve goods on any specification. A limited number of agreements can choose or specify norms, and this action is not in keeping with any of them. In other words, we can say of the action and the hypothetical norm that underlies it that it fails to meet one of the two criteria in the view, and thus is wrong. In the above Venn diagram, actions falling within the right circle but outside the left circle exemplify such actions. Therefore, even in the absence of social contract theory making a choice through consent, non-constructivism provides a basis with which to eliminate some norms.

One might think that not many actions will fall in this category, either because very few people would choose to pursue actions that do not achieve goods on any understanding, or because very few actions fail to achieve any goods at all. However, the view rightly rules out the most heinous actions. It constraints the set agreements that meet

this criterion. In doing so, it restricts the range of possible agreements that count on this view.<sup>127</sup>

Ruling out norms, then, that do not achieve any goods, what can we say about agreements that do achieve goods, but either do not seem to achieve very many goods or do not achieve very much of each good? These agreements complicate the issue of determining what counts as achieving goods in my view. What if parties to the contract agree to norms that sacrifice most goods for the sake of one, or if they agree to norms that achieve very few of each good? Will any agreement that achieves goods succeed on this view?

I do not defend a dubious response to this problem of vagueness by setting out an answer that takes the form, “something counts as a norm if it achieves  $x$  number of goods for  $y$  people to  $z$  extent.” The clarity of such answers is undermined by their implausibility. Furthermore, the use of exact numbers would be indefensible, since it would serve the purpose only of drawing a line in the sand. Instead, the hybrid theory provides a framework with which to measure the justifiability of norms. It would be irrational in the most basic sense of the term to recommend that parties endorse a norm 1, which achieves fewer goods than norm 2. Norm 2, then, is more justified than norm 1.

For example, consider the international law of royal fish. The law states, “In the case of the whale, it suffices, according to some, if the king has the head and the queen the tail” (Bracton 1968, bk. 3, chap. 3). This requirement of turning over the head and the tail abolishes all incentive to hunt whales. That’s because it is, “A division which, in the

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<sup>127</sup> There are also corresponding actions ruled out because they could not possibly be the product of consent. These actions we would also expect to be rare. In fact, coming up with examples without stipulating that the coercive action is done with explicit dissent and for a reason nobody could possibly accept is difficult.

whale, is much like halving an apple; there is no intermediate remainder” (Melville 1967, 334). According to this law, then, all whales captured on or near the coast of England, or brought to the coast of England belong to the royal throne. Assume, for the sake of the example, that the sperm whale is necessary to society because no taper, lamp, or candle can burn without it, but that it is both difficult and deadly to kill (Melville 1967, 99). Suppose this law brings wealth to the crown in the short term, but is much more harmful than a law which allows those mariners who pursue, catch, kill, and beach a whale to benefit from its sale. If those who labor are not allowed to reap the reward, this law would prevent the pursuit of whales altogether. In this case, the law of royal fish is not as justified as one which allows some portion of the proceeds to go to those who invested their time and livelihood in hunting whales.

But we can make stronger statements about what the hybrid theory rules out. The left side of Figure 1 includes the range of norms in compliance with derived non-constructivism.<sup>128</sup> The choice problem points out that non-constructed goods are multiply realizable, that several prioritizations of goods are possible, none of which are privileged, that there are conflicts in goods, that some goods are incommensurable, and that we face epistemic problems in the choice of norms. Each component of the choice problem multiplies the number of norms that are properly responsive to the non-constructed facts in my view. For example, for each incomparable good, there are several norms that are also incomparable because their success at achieving norms is incomparable. In the case of incomparable norms, consent can choose either one.

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<sup>128</sup> This section proceeds on the basis of the precise version of hybrid theory I defend. For that reason, I consider derived non-constructivist theories and the choice problem rather than underived natural law theories and the specification problem. However, if I have not convinced the reader along the way, she can substitute the specification problem for the choice problem or make other appropriate substitutions where relevant.

However, in addition to increasing the freedom in choosing norms, the choice problem also restricts the freedom in choosing norms. When correct prioritizations of goods do exist, or when conflicts have correct resolutions, the non-constructivist component of the theory prevents the selection of the incorrect norms. These norms, which prioritize goods wrongly or imply some other false judgment, are not properly responsive to those non-constructed features. The choice problem does not implicate every norm derived from facts and the specification problem does not permit any specification.

Similarly, the constraint problem describes the proliferation of agreements that meet the consent requirement but are flawed. Rather than posing a series of norms any of which are acceptable, social contracts pose a series of norms some of which are not acceptable. For example, since individuals may agree to norms that are not properly responsive to non-constructed goods, an external component is needed to restrain them. In this way, the hybrid view advocates two criteria for justice not only because both are necessary, but because conceptual holes prevent them from working alone. This view distinguishes the role of each component from Grotian and Hobbesian theories, which take natural law and social contracts to be independently valuable, complete views.

The above discussion suggests that norms are more justified based on a hybrid theory when they achieve more goods. But that rule of thumb only addresses a small portion of cases. We can expand this notion to cover more by expanding on the dimensions of the theory. For example, a norm is more justified when it achieves consent from a greater number of relevant parties and less justified when it achieves consent from a lesser number of relevant parties.



Given the need to know what the hybrid says about norms that fail the above criteria or do not ideally satisfy them, it is useful to set out a rubric to evaluate norms. This rubric allows us to assess norms in the absence of ideal circumstances. The list should be as cohesive as possible, and while open for discussion, I set out an initial list here:

- 1) A norm is more justified when it achieves a greater number of goods
- 2) A norm is more justified when it achieves a greater amount of each good
- 3) A norm is less justified when it fails to achieve a quantity of goods that is also practically achievable
- 4) A norm is more justified when more individuals have tacitly consented to it
- 5) A norm is less justified when less of the conditions for consent are met, such as that the consent is not voluntary
- 6) A norm is less justified when more individuals not tacitly consenting are also dissenting or rejecting the norm

This set of rules for evaluating norms does not solve every problem with the view. Individuals may still consent to seemingly irrational norms, and norms that do not achieve the fullest number of goods may still persist due to inertia. However, this list provides us with the tools to evaluate and assess norms, to compare norms, and to provide a basis in discussions of justifiability. It establishes when norms are more or less justified, even if there are epistemological obstacles to achieving certainty with respect to their relative success. Other theories do not have the same benefit of this rubric. For example, some non-constructivist theories cannot speak to norms that fail to meet their criteria. For this reason, this set of rules of thumb improves our pre-theoretical situation with regard to determining action.

## V. Conclusion

In Chapter 3, I defended three desiderata for a global theory of justice that arose from objections to social contract theory.<sup>129</sup> The first desideratum was that a theory must not violate our intuitions about duties to those outside the contract or to weak or vulnerable populations. This desideratum emerged from a critique of Nussbaum's, which suggested that the rough equality constraint on the circumstances of the contract could not be met by contractarians. The second desideratum was that there must be available alternatives to a contract. The third desideratum was that a successful theory of justice must not violate our intuitions about duties to help—or not to harm—others. According to the discussion in Chapter 3, contractarianism faced significant problems. However, in the context of a hybrid theory, contractarianism emerges unscathed: all three desiderata can be addressed insofar as contracts must also pursue non-constructed goods. The objections to contractarianism all appealed to the inadequacy of the view to account for non-constructed goods. Thus, when combined with non-constructivism, contractarianism meets that standard.

Contractarianism, which could not succeed alone, when paired with non-constructed facts about what is good for human beings can and must meet these desiderata because it requires the content of the contract to meet certain conditions that a pure contractarian theory does not rule out. To meet the criteria of the hybrid theory, a contract must be endorsed by tacit consent *and* achieve objective goods contributing to the common good. Thus, hybrid theory, when drawn out worldwide, will not fail to include non-compatriots or exclude human beings in morally relevant ways. Second, in

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<sup>129</sup> In Chapter 4, I addressed the ability of the hybrid theory to address other desiderata, including meeting the choice, specification, and constraint problems.

the global arena, there are alternatives to contracts and opt-out chances. Individuals are not forced to join contracts by virtue of where they live or through oppressive coercion. Third, the interests of weak or vulnerable populations are included. There are safeguards against a tyranny of the majority, for example. If the interests of such populations are violated in an agreement, then the non-constructivism requirement is not being met. Contracts that fail to achieve non-constructed goods fail not only to meet the above desiderata, but also fail to include a non-constructivist element.

The worry raised at the outset of Chapter 5, then, is averted. Not only do we find a general defense of hybrid theory, but there also remains a particular version of this theory that meets the criteria stated in the foregoing chapters without any resultant inconsistencies.

In this chapter, I argued for a version of a hybrid theory of justice. By specifying each component of the view as well as establishing how the components fit together, I show the success of this theory in addressing the problems that commonly plague rival views. I next proceed to a particular example facing international justice today, with the aim of further illustrating the view.

## Chapter 7

### *Hybrid theory in action*

In this chapter, I take the working hybrid theory defined and defended in Chapters 4-6 and apply it to a critical issue in international justice, namely, terrorism. Although terrorism can sometimes be a problem of national concern, often, it comes into play in the international arena. Is there an international interest in ending terrorism? What duties are there to combat terrorism or to be a part of institutions that fight against it? What should those institutions look like? In this chapter, I address these questions using hybrid theory. Because terrorism is discussed in many contexts, I narrow my sights by focusing on “anti-money laundering” (AML) and “combating the financing of terrorism” (CFT) as ways of responding to terrorism.

First, I define terrorism, which helps provide the basis for questioning when, if ever, terrorism is justified. Second, I argue that ending terrorism is a worthwhile endeavor by appeal to non-constructivist and social contract-based reasons. Next, I analyze AML/CFT through the lens of the hybrid theory I defend in Chapters 4-6. Having established the motivation for ending terrorism I consider AML/CFT institutions as a method for doing so and provide background information on these institutions. I here argue that international cooperative efforts using consent are needed to end terrorism. This discussion highlights the relevancy of counter-terrorism for a theory of international justice. I consider whether non-constructivist considerations can alone justify international norms governing terrorism and conclude that they cannot. I next look at ways in which AML/CFT successfully achieves non-constructed goods. I then consider whether consent can supply the needed role to fill the gap in non-constructivist views. I

argue that it should fill this role by appeal to arguments in Chapter 3 and that it can fill this role by consideration of current legal institutions. Lastly, I look at flaws in the current practices and argue that hybrid theory can identify these problems and that it can suggest revisions.

### **I. The definition of terrorism and justification for fighting it**

The definition of terrorism matters for this discussion for several reasons. First, the term itself is particularly fraught such that the mere labeling of terrorism can be misconstrued as a condemnation of it. The position that terrorism is sometimes justified is a minority position, especially among those involved in the international institutions governing it. Arguably, many more people think that terrorism is never justified. Therefore, defining terrorism in a neutral, descriptive way and calling attention to the term as descriptive rather than normative becomes crucial in an assessment of it.

Although many have tried to standardize the definition of terrorism internationally, no single definition is internationally accepted. The International Convention for the Suppression of the Financing of Terrorism held by the United Nations in 1999 offers a definition of terrorism with eye towards outlawing terrorist financing:

[ (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or] (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act. (U.N. 1999)<sup>130</sup>

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<sup>130</sup> Definitions in this literature abound and part (a) of this definition prevents the exclusion of other, previous definitions. “The annex” includes nine conventions and protocols each of which include a definition and which I do not discuss here, such as (U.N. 1970). (U.N. 1999, 15) Instead, my aim is to offer representative definitions in common use in international legal institutions.

Alternatively, the U.S. Code defines terrorism in Title 22, Section 2656f: “(1) the term ‘international terrorism’ means terrorism involving citizens or the territory of more than 1 country; (2) the term ‘terrorism’ means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents; (3) the term ‘terrorist group’ means any group practicing, or which has significant subgroups which practice, international terrorism...” (U.S.C. 2010). Both definitions identify primary targets as noncombatants and distinguish them from secondary targets as political goals.

There have been attempts to define terrorism in the academic setting as well. Such definitions will serve my purposes in addressing terrorism as an international political problem. For example, Carl Wellman defines terrorism as, “the use or attempted use of terror as a means of coercion” with a subsequent distinction between primary and secondary targets. (Wellman 1979, 250) All of these definitions identify the actors, the victims, and the purpose of the action.<sup>131</sup> These definitions are non-evaluative and leave open the question of whether or not terrorism is sometimes justified.<sup>132</sup> This lack of normativity is important because I do not want to assume that terrorism is necessarily unjustified in every case. However, the definitions do help us evaluate terrorism as well as help us identify specific acts as acts of terrorism.

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<sup>131</sup> One important difference between the two definitions is that the definition from U.S. Code includes acts targeted at noncombatants as part of its definition. This might seem to bias opinion against terrorism since many people think that targeting noncombatants is never justified, and since such actions are ruled out by just war theory. Says Marilyn Friedman in her essay, “Terrorism: Definition, Defense, and Women,” “If terrorist acts were limited, by definition, to acts that aim intentionally at the death of innocent persons, then terrorist acts by definition would violate a principle that is central to just war theory and a cornerstone of international humanitarian law. Calling an act one of terrorism would immediately invoke this wrong and make such acts difficult to defend” (Friedman 2008, 208). However, such a definition only makes terrorism difficult to defend; not impossible, as discussed below. Furthermore, I include the definition for its obvious legal import.

<sup>132</sup> The definitions serve the purpose of criminalizing terrorism, but that does not mean their definitions are biased. We can distinguish the requirement to define terrorism from the requirement to outlaw it, despite the fact that outlawing it requires a definition.

Is terrorism ever justified? If terrorism is sometimes justified, then we may not have sufficient reason for working to end terrorism through international cooperative institutions. For example, it has been said that one person's terrorist is another's freedom fighter. If this is the case, then putting up obstacles to terrorism would work at odds with the pursuit of justice. Obstructions to terrorism would, in effect, keep despots in power and give those who employ terrorism as a last resort to fight against oppression no last resort. Or, if one endorses the political purpose of an act of terrorism, one might also agree with terrorism in pursuit of that political purpose on utilitarian grounds. For example, one might think that the moral wrongness of the political oppression outweighs the moral wrongness of killing innocent people and inducing terror in a population. One might also dispute the innocence of the victims of terrorism and therefore the wrongness in targeting them. Even in acts of terrorism that target noncombatants, while the death or injury of the noncombatant direct targets of terrorism might not be the goal of that act of terrorism, it might be argued that those non-combatants are not truly innocent because they are complicit in an unjust regime. If any of these reasons holds true, even of a minority of terrorist acts, there might be no independent reason for working to end terrorism on the general level.

However, this claim is too broad and not necessary to prove in order to evaluate international institutions aiming at reducing terrorism. I need only discuss the much less controversial claim that terrorism is sometimes or often unjustified. And this claim receives broader support. First, I discuss non-constructivist reasons to fight terrorism. In the following sections, I look at contracts as a way of completing these *prima facie* non-

constructed norms. Third, I consider what the hybrid theory has to say about existing institutions and potential improvements.

Terrorism violates both *jus ad bellum* and *jus in bello* principles of just war theory. According to most accounts of just war theory, one requirement of *jus ad bellum* is the “legitimate authority” requirement, which would rule out most forms of terrorism.<sup>133</sup> This requirement states that only states can be justified in waging war, ruling out private wars and wars waged by nonstate actors out of hand.<sup>134</sup> Another *jus ad bellum* requirement is that military actions have a reasonable chance at success. However, terrorism often fails this requirement. In many cases, terrorism is used in conflicts with a vast disparity of power. Often, terrorist groups are outnumbered, out-strategized, have fewer weapons and have weapons that are less powerful. This disparity of power that so often accompanies terrorism would seem to undermine the possibility of success. Furthermore, terrorist organizations are often extreme, and having extremist, even fanatical policies also undermines their success. Finally, many states and non-governmental organizations have stated policies of refusing to negotiate with terrorists (and often do not have these policies in regard to other states and non-governmental organizations). These policies, when implemented, are meant to undermine the possibility

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<sup>133</sup> Valls argues against the just war theory requirement of nonstate actors in (Valls 2000). According to Valls, that requirement amounts to a double standard in which theorists give more moral leeway to states engaging in war than nonstate actors. He therefore offers a just war theory in which this requirement is excluded. Valls argues that terrorism can be justified in principle according to just war theory tenets after discarding with this requirement. Hugo Grotius also defends the justifiability of private wars, resulting in a just war theory that excludes the requirement of legitimate authority.

<sup>134</sup> Aquinas, one of the first to argue for this requirement of legitimate authority, argues that private citizens should not wage war because they can look to their governments to redress wrongs and because it is the government’s job, not the people’s to look out for the common good (Thomas 1997, Second Part of the Second Part, Question 40). However, these arguments seem to beg the question against the terrorist. Often groups engage in terrorism when the government is not looking out for the common good or does not consider the wishes of its citizens. So, while Aquinas might speak properly to the sort of private war Grotius defends in which colonialists go to war with other countries to protect their interests abroad, he does not address terrorism within a state. See also, (Lowe 1993, 47).



of terrorist organizations ever attaining their goals, and therefore undermine the possibility of terrorism meeting this *jus ad bellum* requirement. While this requirement would not rule out terrorism in principle as the first one does, it would seem to rule out terrorism in practice quite often. The last requirement, that military action be a last resort also fails to rule out terrorism in principle. Although some terrorist acts surely are not acts of last resort, this requirement applies no more to terrorism than to other types of conflict.

A *jus in bello* requirement also would rule out terrorism: that of requiring targets to be legitimate military targets and not non-combatants. This requirement results in a view of terrorism as always unjustified because terrorism by definition uses non-military and non-combatant targets. In other words, it rules out the possibility of terrorism ever being justified in principle.

In addition to just war theorists excluding terrorism as ever justified, rights theorists would also find terrorism to be unjustified. According to rights theorists or deontologists, it is never permissible to kill some people to save others. It would not, then, be permissible to kill innocent people to overthrow an unjust regime. Some theorists think that terrorism cannot be shown to be immoral in principle because we can construct cases in which it would be justified. On this view, terrorism, like torture, is normally unjustified, but when it would save the world or avert some terrible disaster, then it could be acceptable.

Terrorism can also be justified as sometimes acceptable on utilitarian grounds. On utilitarian grounds, it is not only acceptable to sacrifice some individuals for the sake of a greater good, but obligatory. Therefore, certain kinds of terrorism may be able to be

justified on this view. However, not all utilitarians will be able to argue that terrorism is sometimes justified. For example, rule utilitarianism could deem terrorism to be wrong if the rule to outlaw it brings about more good than the possible acceptance of it. Since terrorism causes so much damage, both to its direct and indirect targets, a rule to exclude it as ever justified is certainly plausible. Furthermore, some utilitarians argue against the permissibility of terrorism due to the probability of it not being successful. This argument, similar to the *jus ad bellum* reason above, would rule out terrorism in most cases. For example, Peter Singer argues that terrorism rarely, if ever, achieves its secondary political goals.<sup>135</sup>

I argue that ending terrorism is a worthwhile pursuit even if terrorism is sometimes justified. First, although justified terrorism would presumably be a case of terrorism as a last resort for a vulnerable population wishing to overthrow a brutally oppressive regime, many acts of terrorism are clearly not acts of last resort. For example, we rarely (if ever) see cases of peaceful dissenters, secessionists, or oppositionists to oppression turning violent after initial setbacks.<sup>136</sup> Terrorism is such an extreme measure that it would be odd to see pacifists turning to it after failed attempts at attaining their political goals. Furthermore, it is particularly difficult to prove that every other option has been tried before dissidents turn to terrorism. Time is a mitigating factor, as is the creativity of political activists at gaining attention for their cause.

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<sup>135</sup> See (Singer 1993, 307-313).

<sup>136</sup> Is the civil rights movement in the United States a counter-example to this view? Presumably, one could argue that Malcolm X's movement of ending oppression "by any means necessary" was a last resort after initial failures of Martin Luther King Jr.'s peaceful movement to make significant strides in ending oppression. On this view, Martin Luther King Jr.'s movement was more successful because of the threat of Malcolm X. However, proving that Martin Luther King Jr. would have failed if not for the looming threat of Malcolm X's tactics would be difficult. Malcolm X was killed before Martin Luther King Jr., and also seemed to be more open to nonviolent means before his death. And, in any case, it is only one example.

Next, many victims of terrorism are in fact innocent. Although it is possible to come up with cases of terrorism in which the victims were guilty or in which there were no human victims (especially if the definition of terrorism does not include reference to attacks on noncombatants), many cases of terrorism do not follow this model. Furthermore, as Marilyn Friedman points out, terrorists do not often pick their targets so carefully as to ensure guilt: “In any case, terrorists do not employ methods of due process when judging their victims, so terrorist attacks kill or wound such individuals [individuals in some sense complicit in an unjust regime] without a proper legal finding of guilt” (Friedman 2008, 211). Far from ensuring the guilt of their direct targets, terrorists may be ambivalent on this point. Similarly, Friedman points out that babies and young children are innocent of agreement with unjust regimes because they have not yet reached the age of reason. Therefore, terrorist attacks which hurt or kill these members of society are ruled out on the grounds that the targets are not guilty of any wrongdoing.

Furthermore, terrorism involves prima facie violations of consent. Although a group of people could theoretically endorse norms that justify terrorism and then be killed by terrorists, such cases are understandably rare due to certain anachronisms of its use. For example, terrorism is often the method of choice in cases of asymmetrical power. While a terrorist using terrorism to attack another terrorist might fall in this category, other, more common cases fall outside of this category.

Additionally, terrorists sometimes directly support each other, as evidenced by the Lod Airport massacre in 1972.<sup>137</sup> This means that terrorism is often self-perpetuating, which is undesirable even when it is a reaction to injustice. This fact also means that

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<sup>137</sup> For a discussion of this point, see (Wieviorka 1993, chap. 4). This argument is related to the “broken windows” argument (Kelling and Wilson 1982).

efforts to end specific cases of terrorism might be doubly effective by disrupting a network of terrorism. Furthermore, increasing the opportunity cost of terrorism is desirable because it pushes terrorists to find nonviolent means to their goals. Next, even if terrorism is sometimes justified, it often is not justified, and international legal norms should address unjustified terrorism.

If terrorism is sometimes justified, then a policy of combating some terrorist organizations and not others makes more sense than combating terrorism in every case. In fact, current international legal institutions work in just this way. For example, combating the financing of terrorism (CFT) policies are enforced using a list of names of terrorist organizations, such as the list that the U.N. determined of terrorist organizations. Therefore, this list can be reasoned and revised so as to leave off the names of terrorists thought to be justified in their efforts.<sup>138</sup> In other words, if justified terrorism does exist and if the majority of the international community wishes to turn a blind eye to it, then this method is possible under current international institutions.

The fact that terrorism might sometimes be justified also does not rule out that discouraging or fighting against terrorism is desirable. Minimizing the occurrence of terrorism is imperative in the same way it is imperative to pursue peace alongside justice. One cannot simply address the injustices that terrorists wish to draw attention to without also trying to stop terrorism itself, just as one cannot simply work to end injustices that cause wars without also pursuing peace accords and diplomacy to prevent war. Just as war is undesirable even when it is justified, so is terrorism and indeed all violence, even

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<sup>138</sup> This tactic may undermine the rule of law by falling prey to selective enforcement; however, if morally relevant distinctions can be made between terrorist groups in order to separate justified from unjustified terrorism, selective enforcement can be avoided. For this reason, to establish just terrorist theory in the same way that just war theory already exists would be valuable.

when it is justified. Addressing the root cause of violence and terrorism is always important, but when that root cause is addressed, for example by overthrowing a colonial power or by secession, it is still necessary to establish peace. If such efforts keep the framework of violence intact, then peace and stability will become that much more difficult to attain.

In the next section I look at anti-money laundering efforts and efforts to combat the financing of terrorism (henceforth referred to as AML/CFT) through international institutions as international contracts. I first give an account of the legal institutions in place for AML/CFT. I then evaluate the institutions based on the hybrid theory I defend. I pose problems with non-constructivism as a means for producing international political norms and pose solutions through consent. I argue that consent can and should supplement non-constructivist components governing terrorism. I then argue that AML/CFT institutions are desirable methods fighting terrorism. In addition to being appropriately tied to the non-constructed goods like reducing terrorism and promoting peace and security, they also involve consent in various ways. Finally, I suggest some changes to the current practices in order to make the practices legitimate from the perspective of a hybrid theory of justice.

## **II. Background on international legal institutions for AML/CFT**

Why think that international cooperative efforts are needed to address terrorism? Terrorism can be directed across national boundaries and can have causes that are international in nature, including terrorism as a means to secession or political sovereignty, as well as terrorism as a response to colonialism or international war. When

terrorism transcends national boundaries, or when terrorism within national boundaries is rampant, a nation cannot deal with it on its own. International efforts are then required to adequately address the situation. I argue that international cooperative efforts are needed to end terrorism.<sup>139</sup> Specifically, I look at AML/CFT institutions on this basis.

Lack of enforceability at the international level makes any legal institution or practice suspect. However, AML/CFT institutions have a long and successful history.<sup>140</sup> The creation of these international legal institutions originally arose from a desire to fight against international drug trafficking. Money laundering, or concealing the origins of profits from illicit activity, became especially problematic with the proliferation of international drug trafficking.<sup>141</sup> To deter the illegal drug trading, international standards were put in place to prevent criminals from profiting from this illegal activity. These standards have since been expanded to address other international necessities such as combating the financing of terrorism (CFT). In other words, the predicate offenses that lead to money laundering have been expanded from drug trafficking to a much broader range of illegal activity and the goal of AML expanded to a broader goal than just covering up predicate offences. I focus on several AML/CFT international institutions, including the United Nations (U.N.), the Financial Action Task Force (FATF), formed in 1989, and FATF-Style Regional Bodies (FSRBs). The FATF and FATF-Style Regional

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<sup>139</sup> For example, Singer states, “To stop international terrorism requires international cooperation” (Singer 2002, xiv).

<sup>140</sup> Others have suggested the necessity of financial regulation in response to terrorism. For example, Archibugi and Young list “increase financial regulation” as one of five principles necessary to guide international policy in response to terrorism and violence. Their preliminary discussion of the need and difficulty in pursuing regulative institutions corroborates this discussion. (Archibugi and Young 2003, 164-165)

<sup>141</sup> The term “predicate offenses” refers to the range of illegal activity disguised by money laundering. For example, Special Recommendation II requires terrorism be listed as a predicate offense.

Bodies are the international standard-setters which also monitor and evaluate compliance.<sup>142</sup>

One of the first major actions the U.N. took against money laundering was the *United Nations Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances* in 1988, which as of 2011 has 185 participants.<sup>143</sup> (U.N. 1988, 6.19) This convention, also known as the *Vienna Convention*, recognized the problem of drug trafficking and that the solution would have to be international in nature. For example, it states, “The purpose of this Convention is to promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension,” (U.N. 1988, 2). As previously stated, this early action took drug related offenses as the only predicate offenses relevant for money laundering. Later conventions, such as the *Palermo Convention*<sup>144</sup> and the *International Convention for the Suppression of the Financing of Terrorism*<sup>145</sup> extended the number of predicate crimes and the scope of the *Vienna Convention*. However, by requiring cooperation with respect to information (Articles 7 and 9), jurisdiction (Article 4), and extradition (Article 6), this Convention laid the groundwork for future cooperative efforts to minimize money laundering.

The U.N. is an important feature of AML/CFT institutions in part because it is the strongest source of international law. Although it is questionable whether or not it can effectively enforce its treaties and conventions, parties to its contracts are expected to

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<sup>142</sup> The International Monetary Fund and World Bank also monitor compliance with AML/CFT measures.

<sup>143</sup> Other actions include (U.N. 1961) and (U.N. 1971).

<sup>144</sup> Also known as *The International Convention Against Transnational Organized Crime* (U.N. 2000).

<sup>145</sup> (U.N. 1999)

view those contracts as having the binding force of law. Nevertheless, the *Vienna Convention* is itself limited by state sovereignty. For example, it states, “The Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States” (U.N. 1988, 2). In other words, the *Vienna Convention* does not necessarily justify intervention on the part of the U.N. in sovereign countries.

In addition to conventions, which require parties to sign on to the terms to give the force of law, the U.N. has also passed United Nation Security Council Resolutions (UNSRs) in response to money laundering problems. UNSRs bind all U.N. member countries without their explicit or expressed consent. For example, Resolution 1373, discussed in Chapter 1 (U.N. 2001), and Resolution 1267, which targets Al-Qaida specifically, fall under this category (U.N. Security Council 1999).<sup>146</sup>

In addition to the U.N., I focus on the Financial Action Task Force (FATF). The FATF was formed by seven countries, often called the G-7: Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States. The FATF is an intergovernmental body that sets the standard for AML/CFT with its 40 AML recommendations and 9 CFT recommendations (40 + 9 recommendations). It also determines compliance with those standards through an independent review process. The FATF was originally created to combat money laundering and was expanded to include combating the financing of terrorism after the terrorist attacks of September 11<sup>th</sup>, 2001.

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<sup>146</sup> This UNSCR has been updated several times, including, (U.N. Security Council 2011). For discussion see (IMF Legal Department 2003, 17-19).



The FATF consists of a multilateral intergovernmental body to govern AML/CFT purposes with its recommendations. Those recommendations are analogous to civic law. The 40 Recommendations that the FATF enumerates include a broad range. (FATF 1997) For example, they require a country criminalize money laundering and recommend the largest number of predicate offenses be enforced. They also contain recommendations to cooperate with other countries and international institutions, and to regulate banks and monitor them. In some cases the Recommendations are more specific, explaining what to monitor and how to monitor it. For example, they require that countries pay special attention to large transactions, and detail what non-financial businesses need to be monitored, like real-estate agents and casinos.

The 9 Special Recommendations are similar to the 40 Recommendations in kind. (FATF 2008) They require criminalization of financially supporting terrorist organizations, they require reporting standards for suspicious activity, they require freezing or confiscating terrorist assets, and they require international cooperation on these matters. The Recommendations pertaining to international cooperation, for example, are vague, while the Recommendations pertaining to what it is necessary to regulate are more specific, with Recommendations pertaining to wire transfers of money, non-profit organizations, and cash couriers.

The FATF is an institution that functions somewhere between U.N. conventions and U.N. Security Council Resolutions. Like U.N. conventions, the FATF only binds those parties who agree to the terms. This important aspect of the FATF allows for the consent of the governed when it comes to AML/CFT. However, like U.N. Security Council Resolutions, there are ways in which FATF applies to countries that do not have

an explicit say in being bound by it. For example, non-FATF members are independently assessed just as FATF members are. Although the FATF has no authority over such countries, it nevertheless evaluates them, and if they are deemed to be an obstacle to AML/CFT or cooperation internationally in those pursuits, they are published on a publicly available list as a means of international peer pressure. The FATF works with other institutions in pursuit of compliance with their recommendations, such as the International Monetary Fund (IMF), World Bank, and independent consulting agencies.

### **III. Hybrid Theory**

In this section, I first argue that non-constructed goods concerning the reduction of terrorism and the norms governing these goods fall prey to the choice and specification problems I outlined in Chapter 2. Next, I look at social contracts as a method for completing these gaps. In the next section, I consider AML/CFT institutions as desirable though flawed methods for implementing norms. I then evaluate and critique these methods through the lens of the hybrid theory I endorse. I describe how the hybrid theory I defend would construct and justify AML/CFT measures. I also analyze this case and show how it bears some similarities to my view. Next I critique it from the perspective of the hybrid theory and show how it can be more effectively and justly enforced.

Given the above arguments about terrorism, some acts of terrorism are not justified and there is reason to prevent terrorism. But norms of this nature face choice and specification problems. For example, even after establishing the goods of reducing terrorism and violence, these goods must be weighed against other goods we pursue in the international realm. Furthermore, the evaluation of terrorist acts will depend on a

controversial weighing of non-constructed goods, many of which may face the choice problem. For example, this norm would face the weighting of goods like stability and security against freedom, which I directly discuss in Chapter 2 as facing problems of incomparability.

Furthermore, if it is true that a preliminary norm to discourage terrorism exists, as I have argued, a practical discussion about how best to implement this norm will be necessary. There are many ways to work to prevent terrorism or fight it where it exists, none of which is privileged. I have argued that reducing terrorism achieves more goods for human beings than not. This assertion is a significant component of applying the hybrid theory, since it establishes the relevant multiply realizable non-constructed facts. However, multiple ways of achieving this good are successful, including war, lesser military action, economic sanctions, and more. I argue we should not fix which methods of reducing terrorism are justified and which are not without agreements. Epistemic problems also prevent us from knowing which policies are most successful. On the other hand, constraint on time and resources prevent following all of them. Second, identifying instances of terrorism becomes a crucial endeavor. The aforementioned list of terrorist organizations takes on increased significance, and a fair and consistent method for determining it is necessary. Given that the norm can be specified in many various ways, some method of choosing among these specifications is required.

Having argued that non-constructivist components cannot by themselves establish international norms governing AML/CFT, I show consent can and should fill this role. First, it should fill this role. As argued in Chapter 3, if the choice problem and specification problem really prevent a single correct answer to the choice or specification

of a norm, then consent is the best way of completing non-constructivism. It respects autonomy and self-determination, makes obligations known, and increases compliance. Furthermore, the alternatives to using consent to choose or specify norms are flawed. Finally, even if non-constructed norms face epistemic, rather than metaphysical problems, we have reason to believe that consent is the best mechanism to fill this gap.

Furthermore, current AML/CFT institutions like the FATF 40 + 9 recommendations can use consent for this purpose. For example, some aspects of the institution take on characteristics of social contracts and have consent-based components. Countries can voluntarily choose to enter into contracts that make them accountable for AML/CFT compliance to international standards through law.<sup>147</sup> In the UN, their consent is two-fold: first, they consent to be member countries to the organization, and second, they consent to a particular contract drafted by that organization. With regard to the FATF, consent is more direct: countries agree to follow the recommendations and agree to be accountable for that agreement. When they do agree to be held to these standards, their compliance is rated by independent groups who investigate their laws to determine whether or not they are meeting standards or by mutual evaluation. Countries then get the benefits that accompany being a part of the institution: good ratings on banks, which are encouraging to customers; public commitment to prosecuting illegal activity, which is discouraging to criminals; and the international good will that goes with a public stance on combating terrorism.

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<sup>147</sup> The parties to the contract in AML/CFT institutions are countries, not individuals. However, this fact is consistent with my claim in Chapter 6 that despite the fact that individuals are a better choice, states tend to be the political actors in the global arena. In these cases, the hybrid theory would recommend extensive accountability of representatives to citizens.

Support for the idea that consent can play this role also comes from the fact that states are not forced to join; they have other options. The FATF and U.N. organizations are non-violent, effective means to reduce the incidence of terrorism. But they are not the only way of reducing terrorism. Although international cooperation is crucial towards effective AML/CFT legal institutions, other ways of combating terrorism are possible. If countries choose to spend their anti-terrorism time and resources through other means, this activity may be justified. In such cases, so long as countries are engaged in counter-terrorist or CFT activity, it may be illegitimate to hold them accountable to international legal institutions.

Nevertheless, some countries may be justifiably and legitimately held accountable to AML/CFT institutions even where no explicit consent occurs. Current institutions are set up to preclude explicit consent by any other country than the G-7. In other words, for some countries, no explicit consent is possible. However, because I endorse a model of tacit consent, situations still occur in which these institutions can legitimately hold countries to the standards when those countries are engaged in activity that expresses tacit consent. For example, when countries make good faith efforts to implement AML/CFT standards, they are engaging in tacit consent to these models.

Some features of AML/CFT legal institutions function the way I proposed. For example, the FATF and FSRBs take as basic that terrorism is wrong and that it needs to be stopped. At no point in any FATF literature or any literature in the AML/CFT tradition is there an argument for why terrorism should be stopped or whether terrorism can ever be justified. Presumably, these institutions take acts of terrorism to violate objective non-constructed goods.

U.N. Security Resolution 1373 also acts in this way. It condemns terrorism and assistance of terrorism. Insofar as it is enforced as law through the CTC, it transcends these bounds and strays into the waters of illegitimacy; however, the moral precept it contains exemplifies natural law theory features.

#### **IV. AML/CFT legal institutions as desirable methods for responding to terrorism**

AML/CFT legal institutions are nonviolent responses to terrorism and thus important constituents of broader efforts to end terrorism. Nonviolent means should always precede violent answers, meaning that AML/CFT institutions are a good first response to terrorism. For example, one of the tenets of the *jus ad bellum* doctrine in just war theory is that war should always be a last resort. While this restriction on the justification for going to war is oft-discussed as an important limitation on war, it is rarely fleshed out. How should we determine whether war is a last resort? What measures must be taken before war is waged? What span of time is adequate to determine those measures are insufficient?

While diplomacy and economic sanctions are usually cited as examples of measures to be taken before war, both face significant problems. Diplomacy is not always effective and can be insufficient or impossible when dealing with brutal dictators. Economic sanctions can also fail to be effective and can sometimes cause unintended harms like depressing an economy or harming the poor in society. AML/CFT international legal institutions are a tangible example of measures that can be taken prior to terrorism-incited war that are long-term solutions (as opposed to diplomacy and

economic sanctions), have a history of success, and are much more direct. Furthermore, they target petty criminals, white-collar criminals, organized crime, and terrorists.

Therefore, they do not face the same danger as economic sanctions which can sometimes hurt poor farmers, small businesses, and laypersons, who are rarely those we would like to harm.

In fact, AML/CFT legal institutions target those in society who are depressing the economy or making the economy less stable. This means that the institutions will more likely help innocent citizens as well as help the country as a whole. For example, when stringent AML/CFT laws are in place, a country's banks become more reputable, encouraging investment from abroad. This investment in turn helps small businesses and upstarts that are good for a developing economy. To bring the point full circle, it has been shown that stronger economies are less likely to engage in war or violence. Economists such as Paul Collier argue that a higher per capita income is strongly correlated with decreased violence.<sup>148</sup> AML/CFT measures may then be a low-cost, risk-free way of decreasing the likelihood of violence.

Although AML/CFT institutions did not prevent the U.S. from going to war with either Afghanistan or Iraq following the September, 11<sup>th</sup> 2001 terrorist attacks, AML/CFT provisions were taken after the attack. For example, just days after the attacks,<sup>149</sup> the U.N. passed Security Council Resolution 1373 outlawing active or passive support for terrorist groups and mandating international cooperation to investigate and prevent terrorist attacks. At the same time, the U.N. started the Counter Terrorism

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<sup>148</sup> Says Collier, "If a country's per capita income doubles, its risk of conflict drops by roughly half" (Collier 2003, 41)

<sup>149</sup> The Resolution was passed on September 28, 2001.

Committee (CTC). This committee is in place to further the objectives of Resolution 1373. A year later, the *International Convention for the Suppression of the Financing of Terrorism*, which requires signatories to make terrorism and terrorist support illegal, was passed with 132 parties to the Convention.<sup>150</sup> Clearly, these efforts were not meant to replace more direct responses to the terrorist attacks, as the U.S. invaded Afghanistan on October 7<sup>th</sup>, 2001, less than a month after 9/11. Neither do I wish to argue that they should have replaced war as the only response to terrorism. However, this case is an example of how AML/CFT institutions might work when they are suitable alternatives to war.

In addition to being proper and legal venues for prewar environments, AML/CFT institutions are necessary even when war is inevitable. First, nonviolent means should always accompany violent responses to terrorism. Also, AML/CFT pursuits are always necessary even when violent means such as attacks and wars are also being pursued. While not necessarily diplomatic, these efforts increase the likelihood of stability both during and after conflict.

Furthermore, international institutions can actually change the debate. For example, in *Institutionalizing the Just War*, Allen Buchanan argues, “Whether a norm is valid can depend on institutional context” (Buchanan 2006, 5). He has argued this point in the case of preventative war, saying that we can have a more permissive norm allowing preventative war when we have stronger international institutions in place holding actors accountable for their actions. Similarly, the same argument can be made about terrorism. Even if countries want to support terrorism, they have an interest in supporting international institutions that limit it because stronger institutions might make people

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<sup>150</sup> The convention was written in 1999 but was put into force on April 10<sup>th</sup>, 2002.



open to more permissive norms allowing terrorism in the extremely rare case that terrorism is justified.

The last concern about AML/CFT has to do with the insufficiency or inefficacy of these institutions. It is hard to determine whether or not AML/CFT institutions are insufficient or inefficacious at achieving their aims. Estimates about how much money is being laundered are always suspect due to the secrecy of the actions in question and is often out of date. One commonly cited estimate is that money laundered funds are about 2% to 5% of the world's gross domestic product, or U.S. \$90 billion to \$1.5 trillion. This statistic is from 1998; however, it indicates the large scope of the problem. (Schott 2006) Even with more recent statistics, it would be near impossible to determine whether an increase or decrease in the amount of money laundered funds would be a result of international institutions, or the international climate, or the recent wars in Afghanistan and Iraq, or any number of other important causal factors.

However, it seems clear that AML/CFT international legal institutions have been successful. First, they have successfully resulted in reviews of some countries' banking laws, which increase the amount of information available for analysis. Second, they have successfully resulted in the revision of some countries' banking laws, including some of the worst offenders like Switzerland and the Cayman Islands. Third, they have indicated an international consensus at combating the financing of terrorism, which sends a strong global message. Fourth, they have successfully resulted in more arrests and investigations of money laundering in some countries.<sup>151</sup>

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<sup>151</sup> On the other hand, arrests and investigations do not always lead to conviction and a lack of connection between arrests and conviction can be an indicator of problems.

## **V. Legitimacy and proposed changes**

Some aspects of the current international legal institutions are explicitly non-consensual. The 40+9 Recommendations for AML/CFT were written by a few select countries and currently remain unsigned by the majority of nation states, so they are clearly a case of soft law, or law not subject to enforcement. However, some features also take on characteristics of hard law—law that is enforced and binding on subjects—and they are being enforced as if they were signed internationally by all countries. In other words, they are being enforced in countries that have not signed on as member parties of the FATF. Similarly, U.N. Security Council Resolutions seem to take on characteristics of natural law. These resolutions ignore the consent of most parties as a way to hold all countries accountable to the same explicit laws, regardless of consent.

We can thus question current practices. When the U.N. or FATF fails to get consent for what it puts into law, is there a problem with fairness when enforcing those laws? What reason could there be for not getting the consent of the affected parties? On the other hand, if the laws are important for justice and for the legitimacy of the government, what reason is there for needing the consent of the affected parties? Furthermore, international institutions are importantly not like national ones in part because the parties to contracts are states. What does getting the consent of a country mean exactly?

One problem with the current approach is that it does not systematically differentiate those international institutions and laws that require consent from those that do not. This undermines both practices. It undermines the practices that do seek consent by making them seem soft and unimportant; and it undermines the practices that do not

seek consent by making them seem illegitimate, colonialist, and arbitrary. By differentiating these two practices and seeking consistency we can both improve international institutions and also give them a theoretical grounding.

FATF also evaluates countries on the basis of its recommendations without first receiving those countries' consent to membership of the FATF. It is understandable that they do so. It increases the collective information on banks and bank policies and helps business and countries determine the worthiness of investment in those banks. Furthermore, it allows for pressure from the international community on the worst offenders, which arguably makes the world safer.

However, the illegitimacy of holding countries to a standard to which they have not agreed is also relevant. The FATF and FATF-Style Regional Bodies function on the basis of consent of its members; it is clearly an internal contradiction to require the same of members as it does of non-members. Furthermore, it underestimates the punishment of there being no public information about the country. Although a bad report from the FATF is bound to decrease financial investment in a country's banks from legal sources, the absence of a report from FATF should have the same effect.

Some U.N. actions also violate the theory I propose. No consistent rule distinguishes UNSCRs that are enforced universally without consent and conventions that are enforced selectively on those who agree to them. This conduct runs the risk of losing legitimacy for the most important aspects of U.N. positions.

Another concern is the unwillingness of countries to combat terrorism or certain types of terrorism because of implicit or explicit support for that terrorism, which I have addressed. But what about the benefits to a country for resisting AML/CFT reforms

unrelated to support for terrorism? For example, the Cayman Islands, by allowing secret bank accounts, were able to attract a huge amount of foreign investment. In 2001, with a population of about 47,000, the Cayman Islands had about 570 banks whose assets exceed \$670 billion.<sup>152</sup> They were home to almost as many offshore businesses as citizens, about 45,000.<sup>153</sup> The Cayman Islands, then, represent what sort of benefits go along with ignoring international standards and failing to cooperate with foreign governments on the issues of AML/CFT.

However, for many reasons, the Cayman Islands do not offer an easily replicable model for those countries which wish to share in the benefits they once had by flouting these measures.<sup>154</sup> First, attracting a comparable number of foreign investments in local banks as a result of ignoring international banking standards requires a stable political environment and being geographically close to more tightly regulated countries such as the U.S. and E.U. countries. Political stability might be too high a threshold for the type of country that ignores international law and would like to harbor terrorists. And geographical location is not subject to change.

Furthermore, one has to take into account the financial losses that accompany lack of banking regulation and failure to comply with international standards. It is estimated that developing nations lose \$50 billion a year due to money laundering and other

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<sup>152</sup> Currently, the population of the Cayman Islands is about 51,000 (Central Intelligence Agency 2011), but at the time of the above comparison to offshore businesses, the population of the Cayman Islands was 47,000, which is closer to a 1:1 ratio.

<sup>153</sup> See (Wechsler 2001, 42). Currently, the Cayman Islands no longer allow secret bank accounts and are increasing cooperation with international law enforcement mechanisms.

<sup>154</sup> Switzerland is comparable in some ways. Says Wechsler, “Switzerland still refuses to cooperate with international tax matters, but is steadily improving its efforts against money laundering. Indeed, Swiss measures to combat money laundering are now superior to U.S. approaches in some areas” (Wechsler 2001, 42).

financial abuses, while countries like the U.S. lose \$70 billion a year in tax evasion alone. (Wechsler 2001, 45) Countries that ignore these regulations risk increasing crime, since crime is more profitable when criminals can keep the proceeds of their illicit actions. Furthermore, non-complying countries can expect to see decreased investment from legitimate sources, decreased legitimate business in the face of front companies, decreased demand for legitimate and profitable loans, or liquidity problems as criminals withdraw large amounts of money or as legitimate customers withdraw association from disreputable banks and financial institutions.

It would be difficult to argue that cooperation with international legal institutions is always the most prudent route for a country to take or that it will always be in a country's national interest to comply with AML/CFT institutions like the U.N. or the FATF. This is not my argument. Furthermore, it will be impossible to convince every country resisting the U.N. and FATF laws that doing so will not result in some financial benefit. Sometimes, crime does pay and sometimes, harboring criminals also pays. Developing countries and countries in need of foreign investment can hardly afford to dispense with their current banking customers or to scare them away by increase regulation. However, the costs to flouting international norms are very real, and it is important to focus on those costs when discussing international cooperation. Furthermore, developing countries are not doing themselves any favors by alienating first-world countries and harboring those countries' criminals.

Rather, I think tacit consent can play a key role in closing the gap between illegitimate or questionable measures and legitimate ones. When individuals and states seek compliance with AML/CFT measures, even in the absence of explicit consent, these

actions can sometimes confer legitimacy through tacit consent. For example, compliance combined with assent or endorsement of the relevant norms does constitute a legitimate basis with which to coercively apply those norms. On the other hand, when states explicitly flout AML/CFT measures and participation in the FATF, FSRBs, IMF, and World Bank, but work to end terrorism in other ways, this method of opting out of international contracts should be respected.

Hybrid theory cannot perfectly describe current international institutions. However, it can provide the normative framework for evaluating these institutions and can also act as a source for revisions. By creating an explicit distinction between practices that require consent and practices that do not, current international legal institutions could benefit from transparency, legitimacy, theoretical grounding, and consistency while avoiding “might makes right” justifications for law enforcement, violations of sovereignty, and arbitrariness. Applying my hybrid theory to the current international institutions can achieve both these goals: it can provide the theoretical groundwork for them and can improve international institutions by conferring legitimacy to them.

## **Conclusion**

In this dissertation, I argued that current answers to questions of global justice, while crucial to a successful theory, are by themselves conceptually flawed. I defined the three major types of theories in this regard: non-constructivist theories, social contract theories, and hybrid theories that combine the two. I argued that non-constructivist theories are incomplete due to the choice and specification problems and that social contract theories are incomplete due to the constraint problem. I also defended non-constructivist and social contract theories. I argued that social contracts best solve the choice problem and the specification problem, that non-constructivism best solves the constraint problem, and that there are independent reasons supporting both views. The fact that social contract theory and non-constructivist theory are individually necessary and jointly sufficient for a theory of global justice set the stage for the hybrid view I defended. However, I argued that while hybrid theories are theoretically complete and successful, that existing versions of this view are problematic. Instead, I advocate a new version of hybrid theory that achieves the desiderata for a theory of global justice while avoiding the objections that plagued other theories. In the last chapter, I applied this theory to terrorist financing, money-laundering, and the international institutions that govern these activities. I showed that this application of the hybrid theory not only distinguishes between right and wrong coercion from global institutions, but also maps a path forward for changing global action to better achieve justice.

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