

# APA Newsletters

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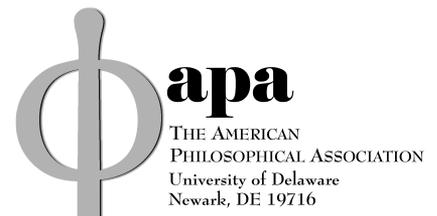
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## FROM THE EDITORS

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This edition recognizes emerging scholars in the philosophy of law with essays that were produced through a conference at the University of Baltimore. Each participant submitted an article for publication in this *Newsletter*, which then became the materials for the conference proceedings. Each scholar critiqued the others' writings through a day-long public exchange that included faculty, students, and members of the Baltimore community. We thank the Hoffberger Center for Professional Ethics at the University of Baltimore and Director Fred Guy for co-sponsoring this event.

Conference participants included Assistant Professor Josh Kassner of the University of Baltimore, Associate Professor David Lefkowitz of the University of Richmond, Assistant Professor Anthony Reeves of Binghamton University, and Assistant Professor Stefan Sciaraffa of McMaster University.

This edition is a variation from the *Newsletter's* long-standing series to honor and analyze the writings of influential theorists in legal, social, and political philosophy. The format for these on-going tribute editions is to invite several commentaries and responses by a featured philosopher. In this edition, we recognize emerging scholars. All of our editions support the goal to establish an engaging and lively exchange of ideas that contributes to the profession and is accessible to a broad audience, as befits the unique place of the *APA Newsletters*.

Steven Scalet  
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## ARTICLES

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### *Uti Possidetis: A Philosophical Critique*<sup>1</sup>

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#### 1. Introduction

It would be hard to overstate the importance of international political boundaries. For more than three-and-a-half centuries the normative relationships between independent political communities have been grounded in a commitment to the sovereign territorial state.<sup>2</sup> The extent of a sovereign state's

rights are largely determined by the boundaries that separate one political community from another. In addition to their impact on the relations between states, international political boundaries have an impact on individuals and political groups.<sup>3</sup> On one side of a border an individual may be subject to gross violations of her human rights. Just meters away—across the border—individuals just like her experience wealth, opportunity, and the protection of political and civil rights. Similarly, the ability of political communities to govern themselves is greatly hindered or enhanced by the boundaries that separate (or combine) political groups.

With so much at stake when we have the opportunity to consider or reconsider them, political boundaries should be drawn/re-drawn conscientiously. At the very least, this requires that we act consistently with morally justifiable principles. I cannot adequately address the wide range of circumstances under which we may have the opportunity to draw or re-draw international boundaries, and a construction of a moral justification for international territorial boundaries from whole cloth is too large a project. As such, the discussion that follows focuses on a specific evolving norm of international law and relations that is intended to govern such matters, *uti possidetis*.

Application of *uti possidetis* establishes the international boundaries of new or emerging independent political communities, and has been invoked by new and emerging independent political communities, as well as the international community.<sup>4</sup> *Uti possidetis* has been the subject of significant discussion by scholars of international law and relations, but there has been scant commentary by philosophers. This is surprising when one considers the importance of the principle as it relates to questions of political self-determination, state sovereignty, and human rights. This dearth of analysis can be explained in part by the fact that philosophers tend to look at such issues in the abstract and use philosophical analysis as a basis for constructing the ideal principle, practice, or institution. I am beginning with an evolving but operative norm and then offering a critical assessment of the various moral justifications that might be offered in defense of the principle.

The discussion that follows proceeds in three steps. First, I explicate the principle of *uti possidetis* and the role it plays in international law and relations. Second, I offer two distinct but related critical analyses of *uti possidetis* as it is currently employed. Specifically, I argue that invoking *uti possidetis* to establish the territorial extent of new and emerging independent political communities results in the illicit attribution of sovereign rights to an entity without a concern for whether that entity has a legitimate claim to sovereignty. There may, however, be other moral reasons that provide an independent moral justification for *uti possidetis*. With this in mind, the second criticism assesses the arguments that might be offered as independent moral justifications for the principle. Lastly, I offer some thoughts regarding the construction of an alternative rule.

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Realists might object at this point; arguing that morality is simply irrelevant when discussing matters of international law and relations. I am unable to offer a full reply; nonetheless, a few words are in order to explain why this discussion is a discussion worth having. I believe that the skepticism of realists is based on unjustified assumptions about the nature of interactions in the international arena. Perhaps most troubling is the fact that for many realists the international arena is assumed to be a Hobbesian state of nature. As Charles Beitz has argued, the analogy does not stand up to scrutiny.<sup>5</sup> Since the analogy fails, the skeptical arguments fail.

Alternatively, there are realists who contend that states are simply incapable of doing anything other than acting in pursuit of the nation's interests.<sup>6</sup> First, this position depends on an artificially limited, and I believe unjustifiable, understanding of national interest. Second, the actual behavior of states in the international arena indicates that states can and often do engage in practical deliberation and action that is guided by moral value judgments. The realist bears the burden of explaining why moral theory is irrelevant to our understanding of this phenomenon.

## 2. Explicating the Principle

To understand the critical analysis that follows it is necessary to have an understanding of the principle and the role it plays in the relations between states. As such, there are two aspects of the principle of *uti possidetis* that are of particular importance. What sort of principle is it, and what are the practical implications of its application?

### 2.1 Nature of the Principle

To understand the nature of the principle it is useful to juxtapose the contemporary version of the principle with its Roman ancestor. In its original form *uti possidetis* was invoked in domestic disputes over property. The principle established burdens of proof and persuasion at the outset of litigation over the rightful ownership of property. The principle established that the possessor of the disputed property stood in a privileged legal position in relation to the property in question. Litigation would start with the non-possessing claimant bearing the burden of proof. Thus, in its Roman form invocation of the principle merely established, as a contingent matter, the standing of the parties in relation to the disputed property; it did not settle the dispute. As a consequence, the eventual resolution would be based on substantive reasons related to rightful claims, not the invocation of the principle.

In its contemporary incarnation *uti possidetis* bears little resemblance to its Roman ancestor. The international community uses the principle when drawing/redrawing the international political boundaries of new and emerging independent political communities. Specifically, under the principle the administrative (internal) boundaries and international (external) political boundaries of a predecessor state are used to determine the international political boundaries of new and emerging independent political communities.

In addition to the obvious difference over the scope of the two versions of the principle, one domestic and one international, for this discussion, the more significant difference is that the contemporary version of the principle is not merely a presumption. When invoked, rather than set the stage for a substantive discussion, the principle is dispositive of the question over the location of the new boundaries. Thus, the Roman version of the principle was merely a procedural measure necessary to set the stage for a substantive discussion, whereas under the contemporary version the principle *replaces* the substantive discussion.

### 2.2 Operation and Impact

Before discussing the impact of the principle it may be useful to have an understanding of the circumstances to which the principle is applied. Whether one is addressing a secessionist movement, the dissolution of a state, or the emergence of a new state from the rubble of civil war, one of the most pressing issues that must be addressed is where to establish the international political borders that will define the territory of the new or emerging independent political community.

There are numerous alternatives through which the new boundaries might be determined. We could imagine a deliberative process involving negotiation and compromise, perhaps ending with a referendum on the terms of the separation. This process would be informed (at least in part) by principles of justice relevant to the matter at hand. On the other hand, employing the principle of *uti possidetis* in such circumstances simply results in the transformation of internal administrative borders into external international borders.

An example may help to explain. Recently, after decades of civil war, Sudan held a referendum on independence for the political communities in Southern Sudan. As part of the separation, the location of the international borders of the newly independent political community must be determined. Like any other modern state, Sudan (the predecessor state) had at least two types of political boundaries: internal boundaries marking different administrative divisions within the state, and external boundaries marking the difference between Sudan and all other sovereign states. Under *uti possidetis*, Southern Sudan's borders would be carved out of the internal administrative borders that divided the predecessor state of Sudan. No discussion of the justification for those specific borders would be needed, and no discussion of altering those borders warranted.

Regarding the impact of the principle, my concern is with the impact the principle has on sovereign states, political groups, and individuals. Since the modern state is defined territorially, though not the same thing as sovereignty, the establishment of international political boundaries is determinative of the reach of a sovereign state's rights. Its rights to territorial integrity, political independence, and nonintervention are defined and limited by the territorial extent of the state. As such, where boundaries are drawn dramatically impacts the scope of a sovereign state's rights.

The next two sections will deal with the impact the principle has on the interests of political groups and individuals; consequently, my remarks here will be brief. Even if we assume that in many cases the application of *uti possidetis* will benefit some political groups the benefit does not necessarily follow from the application of the principle. Any such benefit is merely contingent. Similarly, in some cases the application of the principle will serve individual interests and human rights, but as that is not the focus of the principle it is just as likely that individual rights are less rather than more secure. In either case, the fact that the principle operates as a dispositive rule regardless of the substantive moral reasons relevant to the determination of the location of international political boundaries means that the impact on the interests of political groups and individuals—both positive and negative—is a contingent matter.

## 3. Critical Perspectives

The critical inquiry that follows focuses first on the fact that implicit in the application of the principle is the attribution of sovereign rights to a new independent political community. I argue that this results in an unjustified attribution of sovereign rights without regard for the legitimacy of the political community's claim to sovereignty. The fact that the principle

of *uti possidetis* results in an attribution of sovereign rights that is incompatible with a concern for the values upon which legitimate claims to sovereignty are based does not mean that the principle cannot be independently justified. As such, the second critique focuses on possible independent moral justifications for the principle. In the end, I argue that the principle of *uti possidetis* fails to advance the moral values that are intended to be served by international legal and political institutions, and that an alternate principle should be constructed.

As it is the role of the principle in the deliberative process that must be justified, understanding the moral justifiability of *uti possidetis* requires that we have an understanding of how the principle operates as a reason for action/decision. As discussed above, when faced with a new/emerging independent political community in need of a determination of its international political boundaries the application of *uti possidetis* is determinative of the new boundaries. In other words, the principle operates as an all-things-considered conclusive reason for action. Application of the principle supersedes substantive deliberation over the appropriateness of the borders. As such, if the principle is to be justified, the justification must be able to support a principle with such an exclusionary and determinative impact on the matters to which it applies.<sup>7</sup>

### 3.1 The Argument from Arbitrariness

Before proceeding I think it appropriate to recognize one oft-cited objection that I do not intend to address. It is often argued that using the existing political boundaries (internal and external) of a predecessor state to determine the international political boundaries of a new political entity is unjustified because the existing political boundaries are arbitrary.<sup>8</sup> For example, imagine an emerging state in Africa that was once part of a former colony which then became the fiefdom of an autocratic dictator; one might argue that the borders being relied upon to establish the international political boundaries of the new state are arbitrary, and for that reason morally unjustified.

Though I am sympathetic to this criticism I have become convinced that this is a controversial proposition that deserves its own analysis and/or defense. In short, those who reject the proposition that the problem with using the existing internal and external boundaries is their arbitrariness contend that to be arbitrary essentially means to be unprincipled; to lack a rational basis.<sup>9</sup> As a matter of historical fact the borders that were initially imposed were likely based on principled considerations. For example, in Africa the borders established by the colonial powers were not accidents. The borders were drawn to avoid clashes between colonial powers. As such the borders were arguably based on moral and practical considerations. Nonetheless, I believe that what we are concerned with is not merely that the borders were arbitrarily drawn, but that in many cases the original borders, though arguably having a principled origin, were unjust; and the application of *uti possidetis* merely perpetuates the injustice. As such the critical analysis that follows focuses on whether using the existing borders is unjust or not; not whether they were arbitrarily imposed.

### 3.2 *Uti Possidetis*: Unjustifiable Ascription of Sovereign Rights

As discussed above, the application of *uti possidetis* is not about setting provisional borders so that negotiation about the location of the permanent borders can begin; rather the application of *uti possidetis* determines the permanent territorial extent of new and emerging independent political communities. Along with this comes the right to territorial integrity based on the political boundaries established under *uti possidetis*. Historically, this has been the very point of invoking the principle.<sup>10</sup>

The right to territorial integrity is a right of sovereign states. I take it to be a generally accepted proposition that rights should only be attributed to those entities with the moral status of a right holder. To use a non-moral (and not very original) example, the rights of membership in a golf club require, at the very least, that an individual be a member of the club. We would not recognize a non-member as a holder of the rights associated with membership; or at the very least, a non-member could not claim those rights as a member.

What we learn from the example of the golf club is that the normative standing of the individual as a holder of membership rights in the club is dependent on the possession of certain characteristics or properties (viz. membership in the club). In other words, the attribution of rights that are based on normative standing is conditional. As such, for an individual or collective to be a holder of rights as a matter of moral standing an implicit requirement is that the potential rights holder fulfills the conditions necessary to have such standing.

Returning to the discussion of *uti possidetis* and the implication that its application results in the attribution of the right to territorial integrity (among other sovereign rights) to new and emerging independent political communities, if the application of *uti possidetis* results in the attribution of sovereign rights to a group that lacks a legitimate claim to sovereignty, then there is a conflict between *uti possidetis* and the conditions necessary for an independent political community to have moral standing as a holder of sovereign rights.

In assessing the conditions necessary for a legitimate claim to moral standing as a rights holder one should look at the moral basis (bases) for the attribution of the rights in question. If we take rights to be tied to interests worth protecting,<sup>11</sup> then in the case of sovereignty there are two sets of interests that could be served by the rights in question. The individual inhabitants of the political community have an interest in having their interests (including human rights) protected,<sup>12</sup> and there are the interests of the political community itself. With regards to the latter, there is a growing consensus that certain qualified groups have a right to political self-determination.<sup>13</sup> Assuming that the interests of individuals and political communities are worth protecting, legitimate claims by an independent political community to moral standing as a holder of rights that are tied to these interests would require that the claimant be able to protect and promote these interests.

One might contend that the interests of the international community are also relevant to this discussion. Though not irrelevant to a broader understanding of the various moral considerations that influence the relations between and actions of states in the international arena, if our focus is on the moral standing of rights holders, we should be seeking relevant attributes of the rights holders rather than general moral good that might be a goal of the larger community; in this case the international community.

If we take the moral standing of sovereign entities to be tied to their ability to promote and protect the relevant interests of individuals and qualified groups, *uti possidetis* proves problematic. The application of *uti possidetis* excludes from consideration any regard for the interests upon which the moral standing of sovereign entities as rights holders depends, viz. the interest individual inhabitants have in the protection and promotion of their human rights, and the interest qualified groups have in political self-determination. As a consequence, whether the borders that are established through *uti possidetis* actually serve the interests upon which the moral standing of a sovereign state depends is accidental.

It may be objected that *uti possidetis* could still be justified as essential to the transition of new or emerging independent

political communities to sovereign statehood. Under the current system of international relations a political community must be organized as a territorially defined state to be an actor in and subject of the normative framework governing the relations between states (international law and relations). Furthermore, to serve the very interests upon which the moral standing of states as rights holders depends requires that the territorial extent of the political community be established before sovereignty can be attributed to the political community. Therefore, since the establishment of the international borders is necessary to establishing sovereignty and as *uti possidetis* serves this function, adherence to the principle does not involve the illicit attribution of sovereign rights to an entity without a legitimate claim to sovereignty.

This objection misunderstands the concern I have with *uti possidetis*. It is not that *uti possidetis* should be rejected because it establishes the international political boundaries of a new or emerging independent political community. Rather, I contend that *uti possidetis* is problematic because it establishes the international political boundaries of new and emerging independent political communities *without regard for the very moral values that justify the moral standing of states*. It is certainly possible to draw or redraw the borders in a way that best serves those underlying interests. To point to the fact that the territorial extent of a political community must be defined before it can have a viable claim to standing as a sovereign state does not dictate how that determination should be made.

An additional objection that has been brought to my attention relies on the domestic analogy that states in the international arena are like individuals in domestic society. If this is true, then our understanding of the nature of the rights of sovereign states should be similar to our understanding of the nature of the rights of individuals. When we ascribe a right to an individual the conditions necessary for the ascription of the right don't stand as a bar to the exercise of the right. Individual rights holders have discretion over how to exercise the right, and this discretion includes making choices that fail to promote the good (of the individual or others).

Why, if states and independent political communities are like individuals and can legitimately be rights holders, should the exercise of their rights be limited by a demand that the exercise of those rights must serve the underlying values upon which the conditions for legitimate claims to moral standing are based? In short, why don't states have the same discretion that individuals do? There are at least two reasons why I believe that this fails. First, even the rights of individuals are limited by the rights of others. My right to liberty does not include a right to harm you. As such, if the domestic analogy is correct, the rights of groups should be similarly limited by the rights of other relevant moral agents—individuals and groups.

Second, I reject the claim that the nature of groups as rights holders in the international arena is relevantly similar to that of individuals in domestic society. Individuals have standing as rights holders because of the capacities they possess (autonomy, rationality, humanity). It is the value of the capacity itself that grounds the right, not how the capacity is used. On the other hand, the standing of groups as rights holders depends on how they serve the interests of their constitutive members; as such, you cannot separate the conditions necessary for an independent political community to have a legitimate claim to sovereignty from the underlying values that justify its claim to moral standing.

One final objection that has been brought to my attention is that the practical implications of my critique may be minimal. If the conditions necessary for an independent political community to have a legitimate claim to moral standing are

respect for basic human rights and political self-determination, then in nearly every case, the application of *uti possidetis* is likely going to serve those ends. In which case, many regimes that we might otherwise judge to be unjust will have legitimate claims to sovereignty over the territory established by the application of *uti possidetis*.

First, this is a factual claim that the application of *uti possidetis* will not result in an unjustifiable ascription of rights to an entity that lacks a legitimate claim to moral standing. This is an empirical question, and one need only look to the various crises around the globe to recognize that in many cases where borders have been drawn it has had a dramatic negative impact on individual and group rights. Second, the focus on human rights and political self-determination is intended to demonstrate that some relatively uncontroversial moral claims about the conditions necessary for legitimate claims to sovereignty can be used to demonstrate the problematic nature of an evolving norm of international law and relations. The objection implicitly accepts my conclusion; that *uti possidetis* should not operate as a dispositive reason for action/decision and that what matters is the degree to which international territorial borders serve the interests of individuals and groups. Lastly, since *uti possidetis* should not operate as a dispositive reason for action/decision, in those cases where individual human rights are undermined and/or group rights to political self-determination are violated *uti possidetis* should not prohibit a decision that better serves these underlying values.

### 3.3 Moral Critique

The fact that the principle may be problematic because of its illicit ascription of sovereign rights does not imply that the principle cannot be morally justified. There may exist an independent moral justification for the principle. The possible justifications are likely to be found along two lines of argument. First, the principle of *uti possidetis* could be morally justified if there was something intrinsically valuable about the principle or the results which it produces. Alternatively, one might justify the principle by pointing to its instrumental value to some other important moral good.

#### 3.3.1 Intrinsic Value

As to proposition that the principle is intrinsically valuable, the most charitable construction of such an argument is one that focuses on the state of affairs that results from the application of the principle—that the establishment of international political borders of new and emerging independent political communities is valuable in and of itself. There are a number of reasons why I find this potential line of argument unconvincing. First, one implication of the claim that the application of the principle results in an intrinsically valuable state of affairs is that the boundaries established are valuable regardless of their service to the interests of the groups and individuals affected.

Alternatively one might argue that the intrinsic value of the boundaries produced by application of the principle is derived from the intrinsic value of the internal and external borders of the predecessor state. Though, as I discussed previously, I am not pressing the argument that the internal and external political boundaries of the predecessor state are arbitrary; it is also the case that the value judgments that caused their creation are not likely to be the same ones that would be relevant in a moment of political transition.

In assessing this alternative argument I will assume for the sake of argument that the external borders of predecessor states should remain unaltered; not because I believe that they are above criticism, but because the additional ethical and political issues that arise are too complicated to be dealt with here. The functional origin of internal administrative boundaries is likely

to be found in considerations of governance and control.<sup>14</sup> It has often been the case that these boundaries were created with the specific purpose of dividing groups so that they would not pose political threats to the ruling elites.<sup>15</sup> Even if in particular instances the internal administrative boundaries of a predecessor state do not carry with them a legacy of intentional injustice, what determines whether they would be justified as external international political borders of a new or emerging independent political community would depend on a substantive evaluation of the justice of such boundaries in the present. They are not valuable in and of themselves.

Lastly, even if it is the case that the application *uti possidetis* results in a state of affairs that is intrinsically valuable, this does not support a dispositive reason for action/decision as is claimed by *uti possidetis*. It explains why we ought to give moral weight to the borders that would be established by the application of *uti possidetis*, but it does not explain why other relevant moral considerations should be excluded from our deliberations. Though I have not canvassed all of the possible arguments for the intrinsic value of the internal and external political boundaries of predecessor states, I am confident that whatever the value of political boundaries is, it is not likely intrinsic.

### 3.3.2 Instrumental Value

Under an instrumental argument for the moral justifiability of the principle of *uti possidetis*, the principle would be justified as a means to achieving some other moral good. Assuming some instrumental relationship between the principle and the moral good it serves, the strength and nature of the principle as a reason for action/choice is going to depend on the extent to which the principle serves the underlying moral good.

As a general matter, instrumental arguments can be understood to be making either weak or strong claims. Under the weak interpretation all that is claimed is that the means make the ends being sought more likely; but the means are neither necessary nor sufficient for achieving the desired ends. Alternatively, under the stronger interpretation, the means are claimed to be necessary to achieving the underlying justificatory end. In either case, to understand and evaluate the instrumental argument one must understand the end being sought. What is the moral good that the principle of *uti possidetis* is thought to be serving?

Since Westphalia (1648) the normative framework of international relations has been directed at the promotion and maintenance of international order—international peace and security.<sup>16</sup> It should be uncontroversial to claim that international order, understood as the peace between and security of states, is a morally valuable good; and that, all other things being equal, international order ought to be promoted. As such, the instrumental argument for the moral justification of the principle of *uti possidetis* depends both on the nature of the instrumental relationship between *uti possidetis* and international order and the relative moral significance of international order itself.

Dealing with the latter first, under either understanding of the instrumental relationship between *uti possidetis* and international order (weak or strong), as the value of *uti possidetis* is dependent on the value of international order, it is necessary to understand the moral nature and significance of international order before one can adequately assess the instrumental argument for *uti possidetis*. If international order is itself instrumentally valuable, then to understand the value of *uti possidetis* we need to understand the ultimate moral good towards which international order is directed and the relationship between international order and that ultimate moral good. Alternatively, one might argue that the value of international order is intrinsic; that it is valuable in and of itself.

Though I am convinced that the value of international order is instrumental, in either case, understanding the moral significance of international order ultimately depends on understanding the importance of international order in relation to other values relevant to relations between actors in the international arena. Consequently, to understand the instrumental argument for the moral justification of *uti possidetis*, unless one can defend the unlikely proposition that international order is the only moral value relevant to the normative framework of international relations, one must also understand the relative moral value of international order.

Though I am unable to offer a complete defense, I would like to propose two moral goods towards which the normative framework of international relations may also be directed. First, there is a growing consensus that political self-determination by groups is an important moral value to be served by the normative framework of international relations. Second, there seems to be little reason to reject as an ethical claim that respect for basic human rights should be a matter of concern for the international community. In addition, there has been greater recognition of the importance of the self-determination of peoples and basic human rights<sup>17</sup> by the international community.

Turning now to the instrumental arguments, under the weaker understanding of the instrumental relationship between *uti possidetis* and international order, the claim is that *uti possidetis* makes achieving and maintaining international order more likely. As such, any instance in which the application of *uti possidetis* does not have an impact on international order there is no instrumental reason in support of the application of the principle. In those cases where application of the principle will actually undermine international order there is an instrumental argument against application of the principle. Likewise, in those cases where the moral benefit to international order is outweighed by the harm to group self-determination or respect for basic human rights, the instrumental argument for the application of the principle is at least open to challenge. What is not justified is a dispositive reason for action/decision.

Perhaps the stronger understanding of the instrumental relationship between *uti possidetis* and international order will fare better. Under the stronger understanding of the instrumental relationship *uti possidetis* is necessary to the promotion and maintenance of international order. As such, it would never be the case that one could have international order without the application of *uti possidetis*. However, if we accept the proposition that there are other relevant moral values to be served by the normative framework of international relations, then the mere fact that *uti possidetis* is necessary for international order does not imply a dispositive reason for action/decision. It may be the case that following *uti possidetis* establishes borders that undermine political self-determination or make the violation of basic human rights inevitable. In either case, in particular instances, those considerations might outweigh the harm done to international order.

In the end, my argument depends on the truth of the proposition that continued use of *uti possidetis* to determine the international territorial boundaries of new and emerging independent political communities will undermine the promotion of individual human rights and right of qualified groups to political self-determination. This is a speculative claim about the difference between the world in which we live, one where *uti possidetis* is an evolving and operative norm of international law and relations, and a counterfactual world in which an alternative process is used to determine the international territorial boundaries of new and emerging independent political communities.

One might not share my intuition regarding the instrumental value of the principle of *uti possidetis*, arguing instead that without such a rule individual human rights and group political self-determination are more rather than less likely to be undermined.<sup>18</sup> The stability of expected outcomes provided by such a robust rule would provide states with a great degree of assurance of an orderly future state of affairs. In which case, states would be more likely to support secessionist and independence movements. The greater support of states would result in more new and emerging independent political communities receiving the support of the international community in their efforts to separate from a predecessor state, thus, leading to greater respect for individual human rights and political self-determination.

As to the competing speculations regarding the instrumental value of *uti possidetis*, the question is an empirical one. In short, to answer the matter with certainty we would need to compare examples of the implications of *uti possidetis* on the promotion of individual human rights and group political self-determination with cases under which the territorial boundaries of new and emerging independent political communities were determined in some other way that is more directly concerned with the moral values to be served. I am unable at this time to offer such comparisons in large part because the alternative I am suggesting has not (to my knowledge) been tried.

Nonetheless, though I understand the concern that lies at the heart of the objection, I think it is a misplaced one. First, for secessionist and independence movements to pose a threat to the stability of the international order, no matter how the territorial boundaries are determined, there would have to be a great many of them. If there were, I doubt that maintaining rules that perpetuate rather than solve the injustices that motivate independence movements is going to promote stability. If, on the other hand, the claim is that in individual cases states are more likely to support dissolution if they know with certainty what the territorial boundaries of the new political community are going to be and we concede that the moral worth of those boundaries are tied to their ability to protect and promote human rights and group political self-determination, it is not the case that the only institutional solution capable of providing such certainty is the application of a dispositive rule like *uti possidetis*. Rejecting *uti possidetis* does not imply that there should be no rule at all. Rather, one could provide sufficient certainty and stability with an institutionalized procedure that determines the territorial boundaries of new and emerging independent political communities prior to dissolution of the predecessor state, but also allows for some substantive deliberation over where those boundaries should be.

#### 4. Conclusion and Suggestions for an Alternative Principle

In the end, the principle of *uti possidetis* as a dispositive reason for using the external and administrative boundaries of a predecessor state to establish the international political borders of a new/emerging independent political community cannot be justified. This should not be taken to imply that I believe that I have demonstrated that the establishment of international political borders of new/emerging states should be treated as an open question; I am simply rejecting the idea that we are justified in deciding the placement of such boundaries without considering the impact those boundaries will have on various moral values toward which the normative framework of international relations is directed.

This merely begs the question, How should we determine where those new borders should be drawn? In light of the foregoing argument, one might wonder why we need a rule

at all. Why not treat each instance in which we are faced with the possibility of drawing the international political borders of new independent political communities as an open question; weighing those reasons in favor of using the extant internal and external political boundaries of the predecessor state against other (competing) moral values of the normative framework of international relations?

There are a number of reasons, both practical and moral, for rejecting this approach. First, without a rule to define the initial bargaining position deliberations and negotiations over the placement of new external political borders are likely to be *ad hoc* and unprincipled. Assuming that such an approach can be effective, the resultant borders are even more likely to institutionalize existing power disparities rather than serve moral ends. In addition, there is a value to determining how such contentious matters are to be dealt with when cool and calm deliberation is possible, rather than in the heat of a dispute. If we were to treat the matter as an open question, the *ad hoc* nature of such determinations in the face of crisis is likely to lead to instability and injustice.

Assuming that the principle of *uti possidetis* is instrumentally valuable to international order, and that international order is an important value to be served by the normative framework of international relations it is reasonable to claim that using the external international political borders and internal administrative boundaries of the predecessor state to identify the *provisional* international political borders of new and emerging independent political communities is justified. The fundamental difference between this version of the principle of *uti possidetis* and the version of the principle that was the focus of the foregoing critical assessment is that the version I am proposing does not operate as a dispositive reason. Rather, the principle I am proposing is much more like the original Roman version. As proposed, the principle would merely establish the initial bargaining situation in which the existing boundaries are privileged and departures from the existing political boundaries must be justified by an appeal to other values that can be impacted by the placement of international political boundaries.

I am not ignorant of the broader implications of my argument. First, if I am correct, the moral justifiability of all international political boundaries should be understood in instrumental terms. If the lines we draw on a map serve morally valuable interests without demanding too great a moral sacrifice then they ought to be maintained. However, if the lines on the map fail to advance the morally valuable interests that international political borders are intended to serve or if their maintenance demands too great a moral sacrifice, then those lines should be subject to alteration. Second, though merely a microcosm within the larger discussion over issues like self-determination and secession, I believe that one cannot adequately address these matters without explicitly addressing the question of the moral justifiability of borders. Lastly, I hope that by addressing an emerging operative principle of international law and relations that I have helped to add critical insight into the actual operation of the normative framework of international relations.

#### Endnotes

1. I would like to thank those who attended the Mini-Conference in Philosophy and Law, Sponsored by The Hoffberger Center for Professional Ethics at the University of Baltimore, and *The American Philosophical Association Newsletter on Philosophy and Law* for their questions and comments. I would also like to give special thanks to David Lefkowitz, Christopher Griffin, Anthony Reeves, Steven Scalet, and Stefan Sciaraffa. I thoroughly enjoyed discussing this paper with them, and

- their critical comments and insights helped to make this a much stronger piece.
2. Many point to 1648 and the Treaty of Westphalia as the defining moment marking the conceptual origin of the principle.
  3. For example, see Christopher Heath Wellman, *A Theory of Secession: A Case for Political Self-Determination* (Cambridge: Cambridge University Press, 2005).
  4. Enver Harsani, "Uti Possidetis Juris: From Rome to Kosovo," *Fletcher Forum of World Affairs* 85 (Summer/Fall 2003): 94.
  5. Charles R. Beitz, *Political Theory and International Relations* (Princeton, New Jersey: Princeton University Press, 1999).
  6. Roger D. Spegele, *Political Realism in International Theory* (Cambridge: Cambridge University Press, 1996), 19.
  7. For a discussion of exclusionary reasons and their operation in the practical deliberations of agents see Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1999), 35-42.
  8. Harsani 2003. See also Steven R. Ratner, "Drawing a Better Line: *Uti Possidetis* and the Borders of New States," *American Journal of International Law* 90 (1996): 590.
  9. *Ibid.*
  10. Harsani 2003.
  11. George Rainbolt, "What are Group Rights," in *Groups and Group Rights*, ed. Christine Sistare, Larry May, and Larry Francis (Lawrence: University of Kansas Press, 2001), 71-81. See also Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986).
  12. For example, see *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001).
  13. Growing importance (philosophically and legally) of political self-determination as a basic norm of international law and relations.
  14. See Harsani 2003.
  15. *Ibid.*
  16. Mark W. Janis, *An Introduction to International Law*, 3rd ed. (New York: Aspen Law and Business, 1999), 159-160.
  17. *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001).
  18. I would like to thank Stefan Sciarafa and Anthony Reeves for pressing me on this point. I hope that the response I give engages, if not answers, their concerns.

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## ***On the Scope of a Professional's Right of Conscience***

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Under what conditions, if any, do medical professionals enjoy a right of conscience? That is, when must a just state accommodate a physician's, pharmacist's, or other medical professional's refusal to provide legally and professionally sanctioned services to which she morally objects; for example, by enacting laws that enable her to do so without fear of losing her job or her professional privileges?<sup>1</sup> Recent assertions by several pharmacists of a right to conscientiously refuse to fill prescriptions for the so-called morning-after pill, and by a California fertility doctor of a right to conscientiously refuse to provide fertility treatment to a lesbian, have once again made this question a prominent topic of discussion amongst philosophers and professional ethicists. Nearly all argue (correctly, in my view) that if it entails the imposition of excessive burdens on others, then the state may justifiably refuse to recognize

a professional's right of conscience. However, a number of prominent applied ethicists also endorse a second constraint on the professional's right of conscience, arguing that it extends only to certain kinds of beliefs; specifically, only those that are reasonable, or integral to the ethical practice of medicine, or not at odds with a principle of non-discrimination. This I think mistaken. As I will now demonstrate, if the fundamental moral importance of preserving an agent's integrity provides the justificatory basis for a professional's right of conscience, a position most of the authors I consider here explicitly adopt, then medical professionals enjoy a *pro tanto* or defeasible claim to accommodation by the state regardless of the content of the belief to which they wish to remain true.

One of the most common arguments offered by contemporary writers in defense of a medical professional's right of conscience appeals to the fundamental moral importance of preserving an agent's integrity.<sup>2</sup> A person acts with integrity in a particular case if and only if she conforms to certain standards that she believes apply to her in that case. To compromise one's integrity, then, is to fail to conform to a certain standard in circumstances where one believes that one could, and should, do so. Though these standards need not be moral ones—for example, a musician might compromise her integrity as an artist by "selling out" to a large corporation—I will focus here solely on moral standards, and so moral integrity. The preservation of a person's moral integrity is of greater prudential and moral concern the more central conformity to a particular moral standard is to that person's identity or sense of self, and her conception of what makes her life meaningful or worthwhile. If an agent betrays one or more of her core moral commitments, then her ability to lead what she believes to be a good life will be grievously harmed. Typically, when a person asserts that she cannot in good conscience perform a certain action, what she means is that were she to do so she would compromise her moral integrity.

Most people will readily agree that states have a duty to ensure that their subjects enjoy their basic moral rights. Suppose, somewhat more controversially, that people have basic moral rights to those goods in the absence of which it is extremely unlikely that they will live a good life, whatever its specifics. I suggest that the preservation of an agent's integrity constitutes a necessary condition for living a good life, and therefore it is something to which all people have a basic moral right. It follows that if it is to be legitimate (and perhaps if it is to be just), the state must at least make a good faith effort to protect its subjects' attempts to act with integrity. That is, it must grant them a right of conscience. This right is not absolute; rather, in some cases the moral demands it generates will be outweighed or defeated by duties that correlate to other basic moral rights, or perhaps other types of moral considerations. That is why nearly all theorists (though, alas, not all laws) characterize the right of conscience as a conditional, qualified, or *prima facie* one. Nevertheless, the critical importance of acting with integrity for a person's ability to lead a good life grounds a weighty moral claim against the state that it refrain from compelling people to betray their deepest commitments.<sup>3</sup>

The foregoing account of the right of conscience clearly justifies the state in investigating the sincerity of a conscientious objector's belief. After all, if that person does not truly believe that his legal and professional obligations are at odds with his moral ones, then acting as the law requires will not actually cause him to compromise his integrity. Grounding a right of conscience in the fundamental importance of preserving an agent's integrity also justifies the state in exploring the centrality of the commitment threatened by compliance with the law to the agent's sense of self and her understanding of

life's meaning and worth. The more peripheral compliance with the standard in question is to a person's self-worth, self-respect, and ability to lead a good life, the less weight her right of conscience will carry in cases where it conflicts with other moral considerations, and vice versa. However, nothing in the argument from integrity warrants the state making its accommodation of a conscientious objector conditional on the justifiability or reasonableness of the commitment *she believes* she will betray if she obeys the law. The point of a right of conscience is to protect a person's ability to conform to those standards she believes are binding on her, regardless of whether they actually are. All the state need ascertain, therefore, is that the agent sincerely believes that complying with the law will require her to violate certain moral commitments, in which case the law threatens her integrity. This does not mean that the state should rescind from making any judgments of moral truth or rational justifiability; it will (or at least should) do so when it legislates, and it will (or should) do so when, in cases of conflict, it balances the professional's right of conscience against competing moral considerations. Nevertheless, if the fundamental moral importance of preserving an agent's integrity does provide a sufficient justification for a conditional right of conscience, then it does so for any belief an agent might have, no matter how unreasonable or reprehensible it may be.<sup>4</sup>

Dan Brock explicitly endorses the argument from integrity for a conditional right of conscience. Preserving an agent's integrity, he writes, "gives others reason to respect her doing so [i.e., not violating her moral commitments], not because those commitments must be true or justified, but because the maintenance of moral integrity is an important value, central to one's status as a moral person."<sup>5</sup> Yet immediately after presenting this rationale for a right of conscience, he maintains that a white physician who sincerely believes in the immorality of the mixing of the races lacks even a conditional claim to accommodation by his employer, the professional organizations to which he belongs, or the state that (indirectly) licenses him to practice medicine. Why? Brock answers as follows:

a social consensus (not to say unanimity) exists in the United States that racial discrimination in access to services like health care is unethical, and this is reflected in the law as well. Most people would consider Dr. A. [the racist physician] unjustly prejudiced, despite his offering a moral or religious defense of his position. Dr. A's belief does not deserve respect, even if his moral integrity does. Public policy holds that social justice requires prohibiting this form of discrimination and that if Dr. A's moral beliefs and integrity are in conflict with this policy, they and not the policy must give way.<sup>6</sup>

By itself, the fact that most people think Dr. A's moral belief mistaken does not justify denying him even a conditional right of conscience. After all, a liberal state guarantees its citizens a great deal of freedom to act in ways the majority believes to be immoral. More importantly, given that Brock thinks the right of conscience has its justificatory basis in the importance of acting with integrity, and that the value of acting with integrity does not depend on the truth or justifiability of a person's commitments, the unjustly prejudicial nature of Dr. A's beliefs makes no difference to his claim to accommodation. While Brock rightly claims that "Dr. A's belief does not deserve respect, even if his moral integrity does," he fails to draw the proper conclusion from this observation, which is that respect for Dr. A's moral integrity requires that the state acknowledge Dr. A's conditional right to act as his conscience dictates.

In many circumstances, the cost to patients in need of the services that Dr. A can provide, and/or the cost to the state (and

so its citizens) of accommodating Dr. A's conscientious refusal to treat black patients may be excessive. That is, accommodating Dr. A's conscience may make it unreasonably burdensome for black patients to get the medical treatment to which they are morally and legally entitled, or for the state to ensure they have access to such treatment. When this is so, the state will not wrong Dr. A if it forces him to choose between providing legal services he believes to be immoral or exiting the medical profession (or at least the particular professional role he currently occupies).<sup>7</sup> Yet there is no reason to assume that the cost of accommodating a professional's desire to conform to a principle that conflicts with legal and professional prohibitions on discrimination will always be excessive. Consider, for example, *Benitez v. NCWC*, a recent case in California in which two physicians at a fertility clinic conscientiously refused to provide treatment for an unmarried lesbian woman. The actual grounds for the physicians' refusal to treat Benitez are a matter of dispute; they claimed to object to providing services to unmarried women, while Benitez claimed they discriminated against her on the basis of her sexual orientation. For the purposes of this paper, we can simply stipulate that the physicians conscientiously objected to using their services to help homosexuals have children, say because they thought doing so would make them complicit in a sinful activity. As Jacob M. Appel points out, neither a commitment to ensuring the availability of fertility treatment for lesbians, nor the harm caused by the social stigma and discomfort associated with being refused care, warrant the state's failure to accommodate the physicians' desire to remain true to their beliefs.<sup>8</sup> Benitez had no difficulty finding another physician willing to provide the services she sought. Nor is there any evidence that the number of fertility doctors conscientiously opposed to treating lesbians is large enough that some prospective homosexual patients are likely to have a significant burden imposed upon them if the state acknowledges a right of conscience in such cases, even if Benitez did not. As for the discomfort of being refused care, Appel suggests that it is (or could be made to be) relatively easy for lesbians seeking fertility treatment to identify and avoid those physicians that refuse to serve them. It might be said in response that merely knowing that you cannot obtain services from certain medical professionals because they think a central feature of your way of life immoral harms a person. But even if it does, it is not obvious that this setback to a lesbian's ability to lead a life she finds meaningful or worthwhile is weighty enough to justify the state's refusal to accommodate a physician's conscience.

Mark Wicclair also maintains that the importance of protecting an agent's integrity provides the justificatory basis for a physician's conditional right of conscience. The moral weight of a conscience-based objection to performing a legal service, Wicclair writes, "can be grounded in the value of moral integrity and self-respect as well as the significant harm associated with self-betrayal and loss of self-respect."<sup>9</sup> Like Brock, however, Wicclair also attempts to limit the kind of commitments for which a medical professional may seek accommodation. Specifically, he contends that a physician's assertion of a right not to provide a particular treatment to which he conscientiously objects carries moral weight only if the standard he seeks to uphold references the goals and values of medicine. To illustrate, on Wicclair's account a physician enjoys a conditional moral claim to exemption from a legal requirement to provide a given medical service if his reason for doing so appeals to an understanding of the duties to advance patients' interests in life and health that is at odds with the one the law reflects. Brock's racist doctor, however, lacks even a conditional claim to the state's accommodation of his conscience, since the standard to which he wishes to conform is foreign to the goals

and values of medicine.

Why should our concern with preserving physicians' moral integrity and self-respect, and with protecting them from the significant harm associated with self-betrayal and loss of self-respect, be limited to cases where the objector aims to uphold a commitments that "correspond[s] to one or more core values in medicine?" Surely there is nothing inherently different between the betrayal of principles integral to the ethical practice of medicine and those that are not, such that the former necessarily impose a far greater cost on people than does the latter. Why, then, does *Wicclair* shift from a concern to protect moral integrity *per se* to a concern to protect moral integrity only insofar as the principles to which a physician wishes to conform correspond to a core value in medicine? The answer is that he thinks it necessary to explain why medical professionals ought to enjoy a conditional claim to accommodation when most other professionals (and non-professionals) do not.

Suppose, as is almost always the case, that when an agent's legal and professional obligations conflict with her moral beliefs, she can resolve the conflict and avoid self-betrayal by exiting the profession (or at least that particular role within the profession). In many cases, that is what a person must do if she wishes to preserve her moral integrity. Why is the same not true for medical professionals? Some justification must be given for why the state should acknowledge a conditional right to accommodation for a physician that conscientiously objects to providing certain legal services to her patients, as in the case of a Catholic doctor who thinks abortion is never morally permissible, but not for an advertising executive who conscientiously objects to working on an advertising campaign that promotes smoking because she thinks it would make her complicit in causing tobacco-related harms to people that have not freely and knowingly exposed themselves to the risk of those harms. *Wicclair* argues, correctly in my view, that this differential treatment cannot be grounded in a necessary inequality in the impact that physicians and other professionals can have on others' well-being, autonomy, or life prospects. Whatever wrong or harm is involved in a physician's conscientious refusal to heed a terminally ill patient's request to have his feeding-tube removed may pale in comparison to the harm caused by an advertising campaign encouraging the use of tobacco. Instead, *Wicclair* suggests that a justification for according medical professionals, but not others, a conditional right of conscience can be found in the fact that medicine is a moral enterprise. This means that physicians should act on the basis of their obligations to patients, not self-interest, and that they should conduct themselves according to ethical values and professional standards, rather than as mere technicians providing whatever services their patients demand. What follows from this conception of medicine, *Wicclair* maintains, "is not that physicians should be guided by their personal values, irrespective of their content. Rather, the implication is that physicians should be guided by the goals and values of medicine."<sup>10</sup> Medicine's special moral character, he seems to suggest, explains both why medical professionals, but not others, ought to enjoy a conditional right to accommodation by the state, and why that right encompasses only fidelity to principles that are integral to the practice of medicine.

This argument suffers from two defects. First, *Wicclair* needs to show that in their professional lives physicians should be guided *only* by the goals and values of medicine, so that he can then argue that only appeal to these ends can ground a physician's right of conscience. No such inference follows from his characterization of medicine as a moral enterprise, however. A female doctor who sincerely believes that morality forbids her from treating men, and who asserts a conditional

right to practice in accordance with this belief, acts neither from self-interest nor as a mere technician. Rather, she seeks to uphold the practice of medicine as a moral enterprise *and* conform to a further moral principle that does not correspond to any value in medicine. *Wicclair* might respond that non-discrimination in the provision of treatment is a value integral to the practice of medicine, and cite in support of such a claim the World Medical Association's 1948 Declaration of Geneva, as amended in 1994 and 2005, which states that a physician will not (or, more accurately, should not) permit "considerations of age, disease, or disability, creed, ethnic origin, gender, nationality, political affiliation, race, sexual orientation, social standing or any other factor to intervene between [her] duty and [her] patient." Despite the World Medical Association's assertion, one might contest the claim that non-discrimination is a value integral to the practice of medicine, even if it is a true moral principle. More importantly, by hypothesis our physician is not denying that she has some duty to male patients—after all, the right she asserts is a conditional one. What is at issue is the specific content of the physician's duty to male patients. Suppose that the objecting physician acknowledges a duty to ensure that male patients receive the types of treatment she is licensed to provide, but objects only to providing those services herself (as might be the case if her reason for refusing to treat male patients rests on her belief in a duty of sexual modesty). If this is all our physician asserts, then I maintain that either the actions the physician seeks to carry out without penalty do not violate her duty as described in the Declaration of Geneva, or that declaration's characterization of the physician's duty is morally unsound.

Note that I am not claiming that professional medical associations err when they assert that their members act unethically if they discriminate in the provision of their professional services on the basis of race, sex or gender, ethnicity, creed, nationality, political affiliation, or sexual orientation. Rather, I maintain only that even if this assertion is true (as I believe it is), it does not necessarily follow that those physicians who disagree with it have no claim to accommodation by the state or the professional bodies to whom it delegates some of its authority to regulate the practice of medicine.

Recall that *Wicclair* limits a physician's right of conscience to cases of fidelity to a principle consonant with the goals and values of medicine because he thinks it necessary to explain why physicians have a defeasible claim to accommodation by their employer and the state, while advertising executives, and many other professionals and non-professionals, have no such claim. But simply limiting the scope of a right of conscience to certain features that are allegedly unique (or nearly unique) to the medical profession does not suffice to justify such a restriction. Rather, *Wicclair* must explain what is special about these values, such that fidelity to them but not to other values warrants accommodation. His failure to do so constitutes a second shortcoming with his argument. I conclude, therefore, that *Wicclair* fails to establish that when the principle or commitment a physician seeks to uphold does not correspond to a core value in medicine, he or she lacks even a conditional moral claim to accommodation.

Were *Wicclair* to abandon any attempt to defend the current asymmetry in the respective legal accommodations extended to physicians and advertising executives, then it seems he would have no reason to place any constraints on the kind of moral beliefs the desire to remain true to which justifies a moral claim to accommodation. Alternatively, it may be possible to offer a justification for the differential treatment afforded to medical professionals that does not place any restrictions on the sort of commitment for which a physician might seek

accommodation. For instance, differences in the institutional context in which professionals (and non-professionals) practice may justify legal accommodation for some, e.g., physicians that conscientiously object to providing certain treatments, but not others, e.g., advertising executives that conscientiously object to working on tobacco promotion campaigns. Given the highly regulated environment in which medical professionals already practice, it may be possible to implement a scheme for accommodating conscientiously objecting physicians without imposing much cost on potential patients, professional colleagues, employers, taxpayers, or the state. The same may not be true for advertising executives. If so, then the advertising executive's claim to accommodation may be defeated by other moral considerations, such as the cost to employers and to the taxpayer of institutionalizing such a scheme. The key point here is not the truth of these claims regarding the relative costs of accommodating conscientiously objecting physicians and advertising executives. Rather, it is that *if* these claims are true, then the current practice of treating physicians and advertising executives differently may be consistent with according all persons a conditional right of conscience, regardless of the kind of belief they seek to uphold.

Though they are not as clear as Brock and Wicclair, Eva and Hugh LaFollete also appear to endorse the preservation of a person's moral integrity as a sufficient justification for according her a defeasible right of conscience. They write that "individuals want to live their lives as they think best, and for many of us our moral beliefs are especially important," and that we empathize with those who are forced to do what they think immoral.<sup>11</sup> Nevertheless, they too argue that the right of conscience does not extend to any and all beliefs to which a person might seek to remain true, even at the expense of violating the law and/or certain professional standards. Instead, they contend that a person enjoys a conditional claim to accommodation only if her beliefs are broadly similar to recognizable moral views, they are ones for which the conscientious objector can offer a defense, and they do not depend on implausible empirical claims or clearly mistaken inferences. As I will explain, however, they are wrong to do so.

Consider, first, LaFollete and LaFollete's claim that "we demand that someone who claims to be taking a stand on conscience has views and employs reasoning reflecting values and empirical beliefs broadly similar to recognizable moral views."<sup>12</sup> They think such a demand justified because

otherwise it makes the notion of a "moral belief" meaningless. If someone said that she was conscientiously opposed to feeding [her] children or stopping at traffic lights, then, barring some powerful explanation, we would not think that they are forwarding moral beliefs, no matter how sincerely uttered. If someone said that she was conscientiously opposed to paying parking fines because it killed humans, then, barring some powerful explanation, we would likewise deny that she is forwarding a moral claim.<sup>13</sup>

No doubt if someone advanced such a claim we would judge it to be seriously mistaken, an obviously false belief. But I see no reason to deny that these are moral beliefs (or, given that the examples are under-described, that they could be). After all, a person may conscientiously object to feeding her children because she believes she has a duty not to do so (just as Abraham believed he had a duty to sacrifice Isaac), or because she thinks parental autonomy encompasses a right to use starvation as a means for disciplining her children. Similarly, she may believe that stopping at traffic lights constitutes the acknowledgment of the state's authority over her, and believe

that she is under a duty to acknowledge no earthly authority. In each case, we can contrast the agent's reason for behaving as she does with prudential reasons a person might have for doing so; for instance, the financial benefits of not having to spend money on her children, or the thrill of running a red light. As long as the contrast with self-interested reasons for action remains, characterizing the objector's beliefs as moral, no matter how strange we may think it, does not render the notion of a moral belief meaningless. As for the third example LaFollete and LaFollete give to support their claim, involving conscientious objection to paying parking fines, it does not even involve a mistaken moral belief (at least if we assume the humans referred to are innocent), but only an erroneous belief regarding the causal connection between the payment of parking fines and the killing of human beings.

Of course, to acknowledge that the examples LaFollete and LaFollete give do constitute moral claims does not commit us to accommodating those who wish to act on them (in violation of the law). Rather, and as should be clear by now, the objector's claim to accommodation must be balanced against competing moral interests, and in each of the examples LaFollete and LaFollete give it seems quite clear that the objector's right of conscience will be defeated or outweighed by some other moral consideration. For example, the state's duty to ensure that the objector's children receive adequate nutrition defeats its duty to accommodate her conscientious objection to her children being fed. Thus LaFollete and LaFollete neither demonstrate that, on pain of rendering the idea of a moral belief meaningless, we must reject as moral those beliefs that are deeply at odds with prevailing views, nor that doing so is necessary to justify the conclusion that certain demands for accommodation clearly ought to be rejected.

Unfortunately, LaFollete and LaFollete's explication of the claim that conscientious objectors must be able to offer a defense of the principle they seek to uphold is brief and somewhat muddled. For example, it is unclear whether a conscientious objector herself must be able to provide a minimally acceptable rational justification for the principle in question, or if it suffices that she is an active member of a community whose leaders can offer such a justification even though she cannot, or weaker still, that it merely be possible for someone to offer such a justification. More importantly, however, LaFollete and LaFollete misidentify the reason the conscientious objector offers the state in support of her claim that it ought to accommodate her. That reason is not the truth or reasonableness of the principles to which she wishes to remain true; rather, it is the importance of preserving her moral integrity, and so her sense of self-worth and of the meaning she finds in the way of life she leads. In seeking accommodation from the state, the conscientious objector does not rest her case on the assertion that compliance with a particular law or professional standard would be wrong.<sup>14</sup> She likely believes that, of course, and if the state fails to accommodate her then that belief will likely figure in an explanation for her subsequent actions and attitudes (e.g., her disobedience to law, or the guilt she feels over having acted as the law requires). Still, the conscientious objector's claim vis-à-vis the state is that she cannot *in good conscience* act as the law or professional code would have her act. This is so because *she believes* that the law or professional code conflicts with what morality truly requires, regardless of whether her belief is warranted. The professional's claim that she cannot obey the law in good conscience highlights the state's reason for accommodating her, namely, its defeasible duty to refrain from compelling agents to act contrary to their sincerely held moral beliefs. What requires a defense, then, is not the particular belief or commitment for which the conscientious objector seeks accommodation, but the claim

that people's interest in maintaining their moral integrity is of sufficient moral importance to ground a conditional right of conscience. This position is one that LaFollete and LaFollete appear prepared to accept.

Indeed, there is some reason to think that it is a conscientious objector's sincerity, and not the reasonableness of her beliefs or the quality of her inferences per se, that concern LaFollete and LaFollete. Having pointed out that conscientious refusal to fill prescriptions for emergency contraception rests on moral and non-moral beliefs that few people in the United States accept, they do not conclude that such refusals are unreasonable and so ought not to be accommodated. Rather, LaFollete and LaFollete write that "although this does not necessarily mean that the advocates of COP [a right of conscience to refuse to fill prescriptions for emergency contraception] do not hold moral views, it explains why their need to demonstrate that these are sincere moral beliefs is even higher than for the COW [a right of conscience to refuse to wage war] advocates."<sup>15</sup> This is a very different position than the one they endorse elsewhere. The reasonableness of a conscientious objector's beliefs is no longer an independent condition for a right of conscience, but instead an evidentiary rule of thumb the state ought to employ in determining whether a conscientious objector satisfies a condition for such a right, namely, that he is sincere when he asserts a belief in the immorality of the law, and that violating it will require him to betray one of his deepest commitments. Whatever the merits of employing such an epistemic rule, it does not entail that there are certain sorts of beliefs that do not fall within the scope of a conditional right of conscience.

The discussion above also explains why neither implausible non-moral claims nor mistaken inferences vitiate a physician's defeasible claim to accommodation. In their discussion of some pharmacists' assertion of a right to conscientiously refuse to fill prescriptions for the morning-after pill, LaFollete and LaFollete challenge the claim that the use of this drug constitutes murder. Robert F. Card pursues this issue in even greater detail, and concludes that emergency contraception is problematic only if contraception itself is considered morally unacceptable.<sup>16</sup> Though I find these arguments compelling, I also think them beside the point when it comes to the question of whether pharmacists enjoy a conditional right to conscientiously refuse to fill prescriptions for emergency contraception. No matter how unreasonable a physician's moral or non-moral beliefs, and no matter how egregiously mistaken her reasoning may be, if she believes that obedience to law will require her to act immorally then the law threatens her integrity. If, as I have argued, the state has a duty not to compel people to compromise their moral integrity, then regardless of the kind of belief to which a person seeks to remain true the state has a moral reason, albeit not a conclusive one, to accommodate her.

Card briefly considers the position defended here and offers three reasons to reject it. The first is a *reductio ad absurdum* argument: if the right of conscience is not limited to reasonable moral beliefs, he writes, then a person who objects to military service because he believes that wearing green in battle is morally evil has a right to accommodation.<sup>17</sup> I find this rebuttal unconvincing for several reasons. It is hard to imagine a person sincerely holding this belief, and even harder to imagine circumstances in which we could have good evidence that the objector was sincere and not simply seeking to avoid military service for self-interested reasons. Moreover, some would argue that the belief in God (or in some specific conception of God), or the belief that God's will can be known through specific texts, and so on, are just as absurd as the belief that wearing green in battle is morally evil. If the former are thought to provide an acceptable basis for a conditional right of conscience, a position

Card does not challenge, then why not the latter?<sup>18</sup> Besides, as should be clear by now, acknowledging a defeasible right of conscience on the part of a person who objects to wearing green in battle does not entail that, all things considered, this person should be accommodated. All that follows is that the state must not dismiss the objector's claim out of hand, but instead offer a justification for its refusal to accommodate him (if, in fact, it does not do so) that identifies the competing moral considerations the state believes defeat or outweigh the objector's right of conscience. Why think it absurd to require such a rationale?

The second reason Card offers for rejecting a right of conscience that encompasses fidelity to any moral belief, no matter how unreasonable, is that "on this understanding a provider can acceptably refuse EC [emergency contraception] based on (e.g.) sexist beliefs that women are inferior and should be pregnant as often as men want them to be."<sup>19</sup> Card claims that this is a "troubling implication," though he does not explain why this is so. Admittedly, it would be a troubling implication if the right of conscience were absolute, but I do not claim that it is. Besides, it is not clear how a requirement that a conscientious objector be able to demonstrate the reasonableness of his belief addresses the challenge of weighing his claim to accommodation against others' competing moral claims, including a woman's (liberty-) right to become pregnant only if she chooses to do so. Neither the plausibility of an objector's belief nor the quality of his moral reasoning make any difference to the cost he will bear if the state refuses to accommodate him, or the costs others will bear if it does exempt him from particular legal and professional requirements (costs which may determine the conditions under which a physician's desire to be exempt from the law ought to be accommodated). Finally, we must be careful not to confuse the state's accommodation of a conscientious objector with an endorsement of the principle he seeks to uphold. Indeed, legal recognition of a sexist physician's right of conscience (under certain conditions) is perfectly consistent with criticism by the state of the principle the physician believes ought to guide his conduct.

Card's third reason for rejecting an unrestricted right of conscience is that such a conception is at odds with the one currently employed by the military. Conscientious objectors to military service must defend themselves before a review board which awards an exemption from military service only for certain reasons (or, in many countries, only one reason, namely, opposition to killing (humans) in any circumstance). Were Card to raise the example of conscientious objection to military service solely for the purpose of challenging the claim that pharmacists enjoy an absolute right to conscientiously refuse to fill prescriptions for emergency contraception, as LaFollete and LaFollete sometimes seem to do, then it would carry some argumentative weight. Given that the right to conscientiously refuse to perform military service is a conditional one, it would be surprising were the same not true of a right to conscientiously refuse to fill prescriptions for emergency contraception. But current practices vis-à-vis conscientious objection to military service do not support Card's claim that the right of conscience is limited to reasonable moral beliefs and valid arguments. When a military review board investigates a putative conscientious objector's claim to accommodation, it focuses almost exclusively on evidence for the sincerity of the objector's opposition to killing in all circumstances. It makes no effort to assess the reasonableness of the world view that has led the objector to view all killing as immoral, nor to the quality of the objector's reasoning (or that of the community to which he belongs and from which he has acquired his belief). Moreover, the fact that states currently place certain restrictions on the sorts of beliefs fidelity to which they will accommodate does

not justify those restrictions. That is not to say that the current policy regarding conscientious objectors to military service is unjustified. Rather, it is only to point out that, in the absence of a clearly articulated rationale for the current policy, we cannot infer from it that the state ought to acknowledge a defeasible claim to accommodation only for those objectors with beliefs it judges to be reasonable.

The arguments to this point, I believe, strongly support the position that there are no restrictions on the kind of commitments a person may assert a conditional right to uphold in the face of legal and professional obligations to do otherwise. Still, might the fact that a physician voluntarily enters the profession, and so freely and knowingly takes on the obligations attached to her professional role, entail that the state has no duty at all to accommodate her conscientious refusal to provide legally and professionally sanctioned services? LaFollete and LaFollete think so; they write that the case for even a conditional right of conscience is “far from overwhelmingly convincing, in large part, because they [medical professionals] entered the profession voluntarily, and because what they are being asked to do is a core part of their respective professions.”<sup>20</sup> Brock, too, argues that in many cases a person’s freely choosing to take on a certain professional role, one she knew, or ought to have known, would require her to perform certain tasks, entails that she must either do so or exit that role (and, possibly, the entire profession).<sup>21</sup> Were the argument from consent successful, it would render all of the previous discussion moot. The argument fails, or at least it is incomplete, and an explanation of its shortcomings reveals the importance of resolving the dispute over restrictions on the scope of a professional’s right of conscience that has been the focus of this essay.

The appeal to a professional’s voluntary entry into the profession to rebut her assertion of a right of conscience either evidences a failure to grasp the fundamental nature of the conscientious objector’s claim against the state, or begs the question against her. In declaring a right to conscientiously refuse to provide a particular service, a professional contends that neither the profession nor the state are morally (or, perhaps, legally) entitled to make provision of that service, in all circumstances, a condition for being licensed to practice. It is no response to this contention to simply assert that the objector voluntarily entered the profession. Rather, what the state (and the profession) must offer is a justification for making the right to practice conditional on a willingness to provide the service in question, with no accommodation for conscientious objectors other than in those cases that the state and the profession already recognize. Surely it will be able to do so in some cases. In others, however, it may not; that is, it may have no justification for refusing to accommodate those who conscientiously object to performing the service in question, at least under certain conditions. If, nevertheless, the state makes no attempt to accommodate these conscientious objectors, then it makes the freedom to practice dependent on conditions it lacks a moral right to impose. That claim—that neither the state nor the profession may make the liberty to practice conditional on consent to provide particular services in the circumstances in question—is the heart of an objector’s claim when she asserts a right of conscience. Where the protest is to the terms to which a person must agree in order to enjoy a particular privilege, the claim that the person did agree to the terms fails to grapple with the objection.

Disputes over the specific terms the state may justly impose on those who wish to practice medicine highlight the need for a compelling account of legitimate state authority, one that can provide the background against which the argument from consent may be more compelling. In particular, some

justification must be offered for why the conscientiously objecting physician or pharmacist has a moral duty to defer to the state’s judgment that the present terms to which medical professionals must agree in order to enjoy a license to practice do not violate her right of conscience. Possibly that justification also rests on the physician’s consent, in this case to the state’s rule, though as I argue elsewhere there are good reasons to doubt that modern states’ moral authority rests on the consent of the governed.<sup>22</sup> The point I wish to emphasize here, however, is only that the argument from consent does not suffice by itself to establish that physicians lack a conditional moral right to conscientiously refuse to provide specific legal and professional services.<sup>23</sup>

#### Endnotes

1. Though obviously crucial for a complete account of a medical professional’s right of conscience, the question of exactly what type of legal accommodation a just state ought to offer professionals who object to providing particular services is not one I explore in any detail here.
2. Such a right may also be justified on instrumental grounds, say because legal accommodation of medical professionals that conscientiously object to fulfilling certain legal obligations strengthens the state’s and the profession’s *de facto* legitimacy, which leads in turn to greater overall compliance with the law and the profession’s code of conduct than would occur were the state to refuse to accommodate them. Though I think there are good instrumental reasons for accommodating conscientious objectors in certain circumstances, they do not exhaust the reasons for doing so had by a just state, or the private actors to which it delegates some of its authority.
3. In a paper entitled “Petitions for Conscientious Objector Status: Right, Excuse, or Plea for Mercy?” (unpublished manuscript on file with author), I examine in detail the case for grounding a right of conscience in the importance of protecting an agent’s integrity, as well as in respect for a person’s status as an autonomous agent. Here I largely assume that a person’s interest in preserving his or her integrity suffices to ground a right of conscience—which, again, is a view that many philosophical defenders of a right of conscience explicitly adopt—and consider whether the state’s reason to protect a person’s integrity depends on the content of the particular belief to which that person wishes to remain true.
4. Might a person’s integrity merit preservation only insofar as the standards to which she wishes to display fidelity are true, or at least reasonable? To give an affirmative answer to this question seems to me to be too dismissive of the suffering that even someone with reprehensible beliefs will experience should she be compelled to betray them, or else suffer the myriad negative consequences associated with breaking the law. Admittedly, however, the question of how much *weight* a just state should give to such a person’s suffering deserves more systematic treatment than I can offer here.
5. Dan Brock, “Conscientious Refusal by Physicians and Pharmacists: Who Is Obligated to do What, and Why?” *Theoretical Medicine and Bioethics* 29 (2008): 189.
6. *Ibid.*, 190.
7. Note that the issue here concerns a tradeoff between two rights—the right to integrity and the right to medical treatment (conditional, perhaps, on the ability to pay for it). In Dworkinian terms, it is a conflict within the domain of principled arguments, not between principle and policy.
8. Jacob M. Appel, “May Doctors Refuse Infertility Treatments to Gay Patients?” *Hastings Center Report* 36, no. 4 (2006): 20.
9. Mark R. Wicclair, “Conscientious Objection in Medicine,” *Bioethics* 14, no. 3 (2000): 214.
10. *Ibid.*, 216. See also Mark R. Wicclair, “Reasons and Healthcare Professionals’ Claims of Conscience,” *American Journal of Bioethics* 7:6 (2007): 21.

11. Eva LaFollete and Hugh LaFollete, "Private Conscience, Public Acts," *Journal of Medical Ethics* 33 (2007): 249.
12. *Ibid.*, 252.
13. *Ibid.*
14. Of course, a person who petitions the state for accommodation of her conscience may also contest the justice of the law from which she seeks an exemption, either by legal or illegal means (e.g., civil disobedience), or both. Still, conceptually, and sometimes in practice, we can distinguish between an agent's seeking an exemption from a legal requirement and contesting its justice for the purpose of reform or repudiation. For discussion, see Lefkowitz, "Petitions for Conscientious Objector Status: Right, Excuse, or Plea for Mercy?" unpublished manuscript on file with author.
15. *Ibid.*, 250.
16. Robert F. Card, "Conscientious objection and emergency contraception," *American Journal of Bioethics* 7, no. 6 (2007): 11.
17. *Ibid.*, 13.
18. As one discussant said, there are all sorts of beliefs that would strike us as crazy if held by only one person but that are not so viewed because they are held by a group of people.
19. *Ibid.*, 13.
20. LaFollete and LaFollete, "Private Conscience," 254.
21. Brock, "Conscientious Refusal," 191.
22. David Lefkowitz, "The Duty To Obey the Law," *Philosophy Compass* 1 (2006): 1-28.
23. I wish to thank the Hoffberger Center at the University of Baltimore, and especially Fred Guy, for the invitation to present this paper at the conference on Philosophy and Law. I benefited greatly from the comments of Josh Kassner, Tony Reeves, Stefan Sciarraffa, and the editors of the *APA Newsletter on Philosophy and Law*.

for an ability to generate general moral obligations for subjects more difficult. First, standard accounts of political obligation (even if viable) are either irrelevant or apply weakly. I will say more concerning this below, but it seems unlikely that political obligations to international law will find firm ground in the traditional terrain of such theories, e.g., in consent, fairness, or natural duties of justice. Second, international law, at least in much of its current manifestation, is a *nascent* legal system. By that I mean that international law does not fully possess some central characteristics of well-developed and flourishing legal systems (though, it resembles flourishing systems in a variety of respects and may come to possess these central characteristics eventually). More specifically, it lacks features that normally assist or facilitate a municipal legal system's performance of morally valuable functions associated with the rule of law.

Accounting for the moral authority of international law, then, is likely a somewhat different matter than substantiating the authority of municipal law. Nonetheless, consideration of the former may shed light on the latter. Addressing the question of the authority of international law is interesting in its own right, but it may also go some way towards illuminating the general question in normative jurisprudence of how law can give rise to moral reasons for action. If we can explain the continued attractiveness of the rule of law in circumstances where a legal system cannot lay claim to traditional grounds of political obligation, and show that such a legal system is still capable of some kind of moral authority, then we will probably have characterized one general way in which legal standards generate reasons for acting. In other words, it may offer insight into responsible practical reasoning under legal systems generally. This will remain a suggestion here—though hopefully, by the paper's completion, a well-motivated one. A full consideration would be its own undertaking.

The paper proceeds as follows. In sections three and four, I further develop the points made above concerning the special challenges an account of the moral authority of international law faces. I then argue that, although international law is currently unable to generate general, content-independent obligations, that it nonetheless deserves a significant role in its subjects' practical reasoning. International law is in a unique position to produce morally desirable, and perhaps morally mandatory, goods of legal governance, and thus subjects ought to comply with international law in a way that makes it likely to produce those goods. A prospective, rule-sensitive particularism with regards to international legal norms is thus appropriate. The existence of international law does change the moral situation of its subjects. However, given its status, subjects must be considerate of issues of good governance not simply at the point of legislation, but also at the point of compliance.

## II. Authority

Before moving to the central arguments of the paper, I should say a word about my use of the concept of authority. I understand an authority to generate significant, non-optional, normally defeasible, moral reasons to comply, in some sense, with the authority's directives within some domain of action. As I put it above, if x (e.g., a person, institution, or law) has authority over an agent, then the directives of x produce a significant reason for the agent to comply with the terms of the directive. The agent would be obligated to do (in some sense) what x directs, unless countervailing reasons prevail. "In some sense" is important. The manner in which authoritative directives ought to figure into the practical reason of its subjects depends on the character of the authority. Without providing the argument of the paper here, I will say that the task of the paper is to show what kind of authority international law is and consider what this implies about the sense in which its subjects ought to comply with its

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## ***The Authority of International Law***

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### **I. Introduction: The Problem of the Moral Authority of International Law**

How should international law figure into the practical reasoning of agents who fall under its jurisdiction? How should the existence of an international legal norm regulating some activity affect a subject's decision-making about that activity? This is a question concerning the general moral authority of international law. It concerns not simply the kind of authority international law claims, but the character of the authority it actually has. An authority, as I will use the term, is moral obligation producing: if x (e.g., a person, institution, or law) has authority over an agent, then the directives of x produce a significant reason for the agent to comply with the terms of the directive. This paper concerns the sense in which international law, and the law of nascent legal systems generally, generate moral obligations for their subjects, i.e., for those who fall under their claimed jurisdiction.

A perhaps tempting initial answer to the question is that international law generates moral obligations in the same way as the laws of municipal legal systems. Of course, as the extensive literature on political obligation makes clear, even defending a general authority on the part of domestic law in reasonably just states is a difficult matter. In any case, whatever the success of existing theories of political obligation, accounting for the authority of international law is especially challenging. Two features of international law make the case

directives. In other words, I will be considering authority from the first-person standpoint: If one is a subject of international law, in what way (morally speaking) is this important for you?

My use of the concept of authority is intended to be ecumenical with regards to more detailed conceptions of authority. It might be thought, though, that it is *too* schematic in that it fails to capture what is most distinctive about authorities: their ability to replace judgment. Practical authorities do not merely produce obligations, they should replace their subjects' judgment about what ought to be done concerning some matter(s) with their own judgment about what ought to be done concerning those matter(s). In reply, I want to remain non-sectarian here amongst different accounts of authority so that I can address directly a moral question of how to decide responsibly under law. Nonetheless, I remain attached to the language of authority because it captures an important way in which law can change the moral situation of its subjects (in a way, perhaps, not unrelated to judgment replacement). If x gives an authoritative directive, the directive will give x's subjects significant reason to comply (in some sense) even if x's subjects believe that x ought to have issued a different directive or x really ought to have issued a different directive. If international law is an authority, then its directives will give its subjects reason to comply (in some sense) even if they think that international law should direct otherwise (and even if they are right).

### III. Political Obligation and International Law

#### A. Consent

One reason substantiating a general, content-independent obligation for subjects of international law to comply with its demands is unpromising is because traditional theories of political obligation are either irrelevant or apply weakly. In one sense, this might seem surprising given the role of state consent in the production of international law. One major strand of political obligation theory is based in the consent of subjects, and much international law (e.g., treaties and governance regimes based in treaties) is apparently consensual in a way residence in a state is not.<sup>1</sup> However, state consent is an unpromising ground for the general moral authority of international law. Apart from the fact that it would be difficult to construe *customary* international law as consensual, state consent is insufficient for such authority in several ways. First, the consent of many states is not terribly morally significant. As Keohane and Buchanan put it:

[I]t is hard to see how state consent could render global governance institutions legitimate, given that many states are non-democratic and systematically violate the human rights of their citizens and are for that reason themselves illegitimate. State consent in these cases cannot transfer legitimacy for the simple reason that there is no legitimacy to transfer. To assert that state consent, regardless of the character of the state, is sufficient for the legitimacy of global governance institutions is to regress to a conception of international order that fails to impose even the most minimal normative requirements on states.<sup>2</sup>

If an illegitimate regime consents to international rules that are not in the interests of its people, then it is hard to see how that consent generates an obligation to obey those rules for members of the regime or anyone else. Second, even if all consenting states are legitimate and adequately represent the interests of their people, consent can still be objectionably involuntary. Stronger states can impose costs on non-consent to proposals that make it unreasonable for weak states to not assent.<sup>3</sup> If a weaker state's consent was partly motivated by fear of coercion, then it lacks the voluntariness required to generate

obligations.<sup>4</sup> Finally, there is the problem of bureaucratic distance. A significant amount of international law is produced by international institutions that are far-removed from the popular will of democratic states. As Buchanan explains, "[e]ven though these institutions are created by state consent and cannot function without state support, they engage in *ongoing* governance activities, including the generation of laws and/or law-like rules, that are not controlled by the 'specific consent' of states."<sup>5</sup>

#### B. Fairness

Fairness seems to demand that if one benefits from the sacrifices of others in some cooperative scheme that one reciprocate with like or equal sacrifices.<sup>6</sup> At least, that is, so long as one consented to the cooperative scheme and its benefits. One of the central challenges for understanding fairness as a source of political authority has been to account for its ability to produce obligations to contribute to a political scheme when the scheme and its benefits are unavoidably foisted onto citizens—one has little choice but to accept the benefits and their source.<sup>7</sup> One well-received response to this challenge is George Klosko's suggestion that certain *cooperative* benefits are essential to any life plan, and thus capable of generating obligations of fairness even when one cannot opt out of the specific scheme of cooperation.

I will argue that the principle of fairness is able to generate powerful obligations to contribute to nonexcludable schemes if three main conditions are met. Goods supplied must be (i) worth the recipients' effort in providing them; (ii) "presumptively beneficial"; and (iii) have benefits and burdens that are fairly distributed...Basically, what characterizes [presumptively beneficial goods] is indispensability: they are necessary for an acceptable life for all members of the community.<sup>8</sup>

Whatever the success of Klosko's approach for municipal law,<sup>9</sup> it cannot found a general authority for international law since international law fails to, as things stand, meet these conditions. I will not say anything here about (i), though perhaps there is reason for doubt there as well, but it seems clear that international law fails to meet conditions (ii) and (iii). First, it does not provide presumptively beneficial goods for the citizens of most states. International law does not remove citizens from the state of nature, provide basic personal security, ensure access to goods required for biological functioning, or (in most cases) freedom from aggression. These goods, rather, are usually supplied by states. Perhaps there are exceptions, e.g., where the international law facilitates the provision of basic security to a particular people. But this circumstance is unusual and certainly not general. In fact, it is probably the case that the states whose actions we are most interested in constraining through international law, i.e., powerful states, are least in need of international law's assistance in providing presumptively beneficial goods to their citizens.<sup>10</sup>

Regarding condition (iii), that benefits and burdens be fairly distributed, Klosko demands that the procedures be *both* fairly constituted, such that they provide significant popular control over political power, and that they have minimally substantively just outcomes.<sup>11</sup> Procedural fairness, in this sense, is not likely to be had for international law for reasons already canvassed. Given the dearth of popular sovereignty in much of the world, even law produced by state participation or consent does not appropriately represent the citizens of states. Moreover, international legislative procedures do not give states roughly equal control over legislation.<sup>12</sup> International law, then, is likely to reflect the interests of the powerful, both within states and

between states.

Speaking to the substantive issue of fair distribution of benefits and burdens is made moderately difficult given the lack of consensus on what counts as a fair distribution of benefits and burdens, or what just international arrangements would involve. We need not disagree with Klosko that “[t]o break this impasse, a tolerably fair decision procedure should be employed to select a particular principle of fair distribution from the class of defensible principles”<sup>13</sup> to notice international law’s incompatibility with the requirement. Setting aside the lack of a fair decision-procedure, it is hard to conceive of a defensible theory of justice that endorses the international status quo as satisfactory. One need not be a cosmopolitan or endorse the Rawlsian difference principle as a basis for global justice<sup>14</sup> to regard the current international law as seriously iniquitous,<sup>15</sup> particularly if international arrangements are *implicated* in the violation of basic human rights.<sup>16</sup> Perhaps the point that international law is seriously unjust is more controversial than I suggest, and it certainly depends on empirical assumptions. So, I will instead make the somewhat weaker claim that the procedural problems identified above, as well as the vast inequality in wealth and access to basic resources, indicate that the burden of proof falls on the person claiming that the global status quo is minimally just.

### C. Natural Duty of Justice

It is perhaps clear, then, what I will say about a natural duty of justice as a basis for political obligations to international law. A natural duty of justice “requires us to support and to comply with just institutions that exist and apply to us.”<sup>17</sup> International legal institutions may, in the relevant sense, apply to us, but they are not just. Nonetheless, to foreshadow a bit, one additional point worth making here is that if such a duty can be construed to engender obligations to bring about just institutions when they are feasibly attainable, then the duty is relevant to decision-making under international law. It could not support a general, content-independent obligation to comply (since much about the institutions are unjust), but it would demand that international actors be responsive to such institutions *in a way* that would improve their justice. If an important doctrine might be reinterpreted so as to be more equitable, and the reinterpretation is likely to serve as a basis for common, coordinated activity in the future, then a prospective natural duty of justice would require such reinterpretation. The existence of the unjust institution, i.e., of the specific doctrine, changes the moral situation of the international actor (compared to what it would be without the doctrine) because it may be transformed into an instrument of justice. Assuming, that is, that effective reinterpretation is possible.

### D. Associative Accounts

Given what has been said above, the inapplicability of associative accounts is relatively easy to see. Although such accounts do not typically demand that the institutions be fully just, they must treat subjects with roughly equal concern to generate obligations.<sup>18</sup> If institutions are not even minimally just, then this condition is unlikely to be met. Also, it is even more difficult to construe the global human population as a kind of community or association than it is a large, multi-cultural state.

## IV. International Law as a Nascent Legal System

The traditional grounds of political obligation, then, look unpromising as a basis for international law’s moral authority. Such authority, though, faces additional challenges given that international law is currently a *nascent legal system*. It resembles flourishing municipal legal systems in a variety of respects (it has, for example, legislative and adjudicative institutions), but still lacks important qualities that permit modern legal systems

to perform their characteristic and morally valuable functions. This should leave us less-inclined to accord international law authority.

Here is the basic line of thought. Part of the reason we are interested in establishing the moral authority of law in general is that the rule of law is capable of performing worthwhile (and perhaps practically necessary) services in the circumstances of human social life. It seems important to secure compliance with the law because law is, or at least can be, a valuable social institution. Law’s value is based on its ability to perform a variety of functions in human society, e.g., provide coordination, facilitate democratic governance, resolve disagreements for practical purposes, etc. Law’s ability to perform these functions resides in its possession of certain characteristics: settled secondary rules, formal excellence, and perhaps certain procedural mechanisms (all explained below). International legal institutions substantially lack these. Thus, since our allegiance to the rule of law is based partly in its possession of these characteristics, we have less reason to be concerned about straightforward compliance with international law. (As a note, none of this is to challenge legal positivism. It is perfectly consistent with what I have said here that these important features can also be used for great iniquity.<sup>19</sup> The point is simply that these features are regular contributors to, though by themselves insufficient for, the achievement of various goods of governance.)

### A. The Problem of Unsettled and Indeterminate Secondary Rules

As Hart recognized, one way that law can serve as a valuable tool for human society is by providing authoritative criteria for the identification, modification, and adjudication of the primary rules that are to regulate common social life. It provides an official basis for settling which rules count (and how they count) concerning communal matters. Primary rules are rules requiring or forbidding certain conduct. A society governed merely by unofficial primary rules would face a number of problems in a social setting marked by any divergence of belief, moral sentiment, or interest—problems the institution of law would help resolve. These problems include: (1) Uncertainty about which rules are to actually regulate social affairs; (2) Inability to modify rules to reflect changing circumstances, concerns, or beliefs; (3) Inefficiency in the application and enforcement of primary rules in particular circumstances. Law addresses these problems through the introduction of secondary rules, power-conferring rules that concern, in the following ways, primary rules. First, law addresses the problem of uncertainty through a *rule of recognition*, a rule that stipulates the characteristics other rules must possess in order to count as regulating. Second, law provides for rules of change, which identify the conditions under which official rules might be modified, introduced, or eliminated. Third, law provides rules of adjudication, indicating how and who is to authoritatively determine the application of the rules to circumstances.<sup>20</sup>

Determinate and settled secondary rules, then, facilitate law’s coordination of people’s affairs in a complex and diverse social setting. As Samantha Besson notes, however, there is significant disagreement and indeterminacy in the secondary rules of international law.<sup>21</sup> Taking the international rule of recognition, even if we agree that there is a single, unitary international rule of recognition, it is nonetheless the case that there is no consensus about the precise sources of international law, or about the hierarchy of the sources about which there is consensus (e.g., whether customary, treaty-based, or institutionally-legislated law is superior in cases of conflict). Relatedly, and of special concern to customary international law, it is not always clear how to modify international legal

standards, or when exactly they have been modified. A UN General Assembly declaration, for example, may or may not come to be commonly regarded as legally binding, and whether it achieves recognized legal status may depend in part on the extent to which its demands are actually complied with by states (and the requisite extent is normally unclear).<sup>22</sup> Finally, despite the recent development of international courts, there is no single, superior authoritative institution to settle disputes about the meaning or application of international law.<sup>23</sup> In fact, much international law is seen to be self-enforced.<sup>24</sup>

In many ways, then, the international order resembles a social circumstance governed merely by primary rules of obligation. Insofar as it has failed to make the transition from the pre-legal to the legal world, it will be restricted in terms of its ability to coordinate common conduct in the presence of disagreement and changing circumstances (things I think we can safely predicate of the global state of affairs). Its inability to serve this role limits its ability to provide valuables often associated with the rule of law: prospective use of political power, procedural equality, coordination, disagreement resolution, governance by desirable institutional procedures, and the like. It is sensible to speak in terms of degree here. It is appropriate to call international law a *nascent legal system* because it has gone some way to developing secondary rules. In fact, the reality that it occupies this intermediate, transitional stage goes some way, I will argue, to accounting for its moral authority. Nonetheless, its systemic defects prevent it from securing our moral allegiance on the same footing as a fully developed municipal legal system. The latter can claim our allegiance on the basis of the goods it extensively and reliably facilitates (so long as it is using legal mechanisms to secure goods). International law cannot.

#### *B. The Problem of International Law's Formal Defectiveness*

A similar point will be made more briefly in this section, though here I will be discussing the character of the *norms* that constitute much international law rather than the international legal *order*. Fuller's famous parable of Rex, the well-intentioned but failed ruler, brings into relief desirable qualities of governance norms: generality, prospectivity, clarity, consistency, achievability, publicity, stability, and actual constraint of political power within the terms of the norms.<sup>25</sup> Irrespective of whether Fuller succeeds in establishing a conceptual connection between law and morality, a system of norms possessing these qualities does seem to be a facilitator of good governance. Although it is unlikely that even the best of legal systems realize these qualities as much as would be desirable, for much international law, they seem markedly lacking. Doctrines are developed and applied after the fact, there are inconsistencies between various governance regimes, there is a lack of clarity concerning the content of many norms (e.g., in human rights doctrines), and general compliance for much international law is not to be had. The situation varies by the department of international law in question (and again, it is a matter of degree), but international law's formal defectiveness compromises its ability to secure goods associated with the rule of law. This limits its ability, I suggest, to possess moral authority.

#### *C. The Problem of International Law's Procedural Values*

Perhaps, as Jeremy Waldron argues, the rule of law as an ideal encompasses procedural values. What we appropriately expect from a legal system are institutions like courts offering procedural due process, systematicity and consistency amongst its requirements, orientation to the public good, and the existence of public law-producing processes.<sup>26</sup> I will not comment on whether Waldron succeeds in showing that these procedural aspects expected of legal systems are conceptually connected to the idea of law. Nonetheless, we often do regard

these qualities as aspirational in a system of governance, and it is easy to see how the above discussed defects prevent their realization. Ambiguity about how to modify international law implies, e.g., that there is no public law-producing process.

### **V. The Moral Authority of Nascent Legal Systems**

International law's moral authority can rest neither on the traditional grounds of political obligation, nor on its general and reliable performance of morally valuable functions often associated with more fully developed legal systems. How, then, is international law capable of generating reasons for compliance? In what sense are subjects of international law obligated to respect its norms? Of course, one way of answering the question is to say that it does not generate compliance reasons—reasons to act, in some sense, in accordance with its demands. In fact, I think this skepticism is correct with regards to the notion that international law gives rise to obligations to treat it opaquely in practical reason. To treat a rule *opaquely* is to treat it as somewhat insensitive to its underlying justifications, as producing a reason to comply even when the justification for having the rule is not being served. This is contrasted with treating a rule transparently, “modifying it when and as it is unfaithful to the rule's underlying justifications.”<sup>27</sup> When it comes to international law, content-independent obligations, which could justify opaque treatment, are not to be found in the terrain of political obligations, and straightforward compliance does not have a reliable relationship to the generation of rule of law valuables.

However, general skepticism about the moral authority of international law is mistaken. The existence of international law does change the moral situation of its subjects in the sense of giving them reason to have regard for the norms of international law *because* they are norms of international law. International law ought to figure into the practical reasoning of its subjects partly because it is law. The reason I offer here is related to my suggestion in the last section that our allegiance to the rule of law is based in its (contingent) ability to secure valuables of good governance. A nascent legal system is less able to do this than a well-developed one, but it still may, on particular occasions, have a special role in the production of these goods. It is out of consideration of these goods that agents falling under a nascent legal system's claimed jurisdiction have a reason to be responsive to its norms—though only insofar as, and only in a way in which, the norms are related to the production of these goods. In other words, international law is an authority when compliance with its norms has a special relationship to valuables of international governance.

An illustration will be useful here. International law with regards to armed intervention for humanitarian purposes is more or less settled. Such intervention is legally permissible only with the prior authorization of the United Nations Security Council (SC). I say “more or less settled” because of complex cases like the 1999 NATO intervention in Kosovo, which proceeded without prior SC authorization. In that case, many states contended intervention was legally permissible because of the impending humanitarian catastrophe.<sup>28</sup> What non-prudential reasons do states have for complying with a restriction on humanitarian intervention requiring SC approval? Such a rule is far from morally optimal. SC membership is unrepresentative (globally speaking), veto prone, and relatively indifferent to humanitarian crises unrelated to its member's interests. A more representative and impartial multi-lateral process is desirable. When a state's own judgment about the propriety of humanitarian intervention departs from that of the SC, then, what moral reason does it have to abide by the legal rule (*or*, to help establish the rule via compliance)? The compliance reasons, I take it, have to do with the value of having such a

rule recognized in international legal practice. It is valuable to have forceful intervention constrained by *some* determinate, multi-lateral process.<sup>29</sup> The fact that alternative procedures would be morally preferable is, in one sense, irrelevant to the decision-maker.<sup>30</sup> The choice-situation is one of whether to help sustain or abandon certain specified institutional rules, and that choice has to do with the value of those rules in international governance *compared to* other moral matters at stake. Were there no specified institutional rules, or customary practices to select amongst, the description of the choice situation of the international agent would look much different.

*Prospective, rule-sensitive particularism*, then, is the appropriate model of practical-reasoning under international law. Rule-sensitive particularism is, as Schauer puts it, a “form of decision-making treats rules as rules of thumb in the sense of being transparent to their substantive justifications, but allows their very existence and effect *as* rules of thumb to become a factor in determining whether rules should be set aside when the results they indicate diverge from the results indicated by direct application of their substantive justifications.”<sup>31</sup> Agents must countenance the justifications for having the rules in determining whether and how to comply with international law, including justifications for having settled rules in the first place. In determining the compliance reasons that apply to them, subjects of international law must not only consider its justice, but its ability to generate rule-related goods characteristic of developed legal systems and its ability to facilitate desirable global governance (including governance by desirable procedures). This particularism is prospective in that it demands consideration of future goods. Compliance *now* may help establish a rule that will secure good (though, perhaps not optimal) governance *later*.

The authority of international law, on this view, depends on its ability to secure valuables of international governance. It is obligation-producing only when, and insofar as, it is in a special position to realize these goods, and these goods are at stake on particular occasions of acting. I argued in previous sections that there are no other moral requirements that could bind subjects to international law in a way that would require them to treat it opaquely. The existence of international law does not absolve actors, *in the least*, of the responsibility for considering the justice of their actions and the justice of the norms they comply with. Considerations that normally ought figure in at the moment of legislation in domestic legal systems ought to have a regular role in the reasoning of subjects of international law at the point of compliance. This is even clearer once we recognize, and as we have above, that international agents develop legal doctrine through actual practice. As Waldron puts the point in terms of states, “it must be understood that the state is *not just* a subject of international law; it is additionally both a *source* and an *official* of international law...it is horizontal law...that depends largely on treaties between states or the emergence of customs among states for the generation of new norms.”<sup>32</sup> The central argument of this paper is that the authority of international law for its subjects resides in their responsibility to govern well.

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### Endnotes

1. For worries about consent as a basis for the authority of domestic law, see A. John Simmons, *Moral Principles and Political Obligations* (Princeton, NJ: Princeton University Press, 1979), 57-100.
2. Allen Buchanan and Robert O. Keohane, “The Legitimacy of Global Governance Institutions,” *Ethics & International Affairs* 20, no. 4 (2006): 413.
3. Allen Buchanan, “The Legitimacy of International Law,” in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (New York: Oxford University Press, 2010), 91.

4. David Lefkowitz may be correct that genuine consent does not require the ability to do otherwise, but only that the consent not be motivated by fear of morally unjustifiable coercion by another. See David Lefkowitz, "The Sources of International Law: Some Philosophical Reflections," in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (New York: Oxford University Press, 2010). Nonetheless, much of the actual consent to international arrangements by weaker states surely involves this motive. For example, many states likely objected to the specific terms of the WTO, yet consented given the serious costs of non-participation. See Richard H. Steinberg, "In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the Gatt/Wto," *International Organization* 56, no. 2 (2002), cited in Buchanan and Keohane, "The Legitimacy of Global Governance Institutions," 414.
5. Buchanan, "The Legitimacy of International Law," 91.
6. For a classic statement of the principle, see H. L. A. Hart, "Are There Any Natural Rights?" *Philosophical Review* 64, no. 2 (1955): 185.
7. See Simmons, *Moral Principles and Political Obligations*, 101-42.
8. George Klosko, *The Principle of Fairness and Political Obligation*, new ed. (Lanham, MD: Rowman & Littlefield 2004), 39.
9. For a general criticism, see A. John Simmons, "Fair Play and Political Obligation: Twenty Years Later," in *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001).
10. A similar point can be made concerning Wellman's innovative "samaritan account," though slightly reframed. On Wellman's account, we owe presumptively beneficial goods to others, as a matter of natural duty. Thus, powerful states might be obligated to support international institutions that are providing these benefits to others. Again, though, international institutions are rarely involved in keeping *citizens* from the state of nature. Christopher Heath Wellman and A. John Simmons, *Is There a Duty to Obey the Law?* (New York: Cambridge University Press, 2005).
11. Klosko, *The Principle of Fairness and Political Obligation*, 63-84.
12. This is partly what motivates Buchanan and Keohane's weakening of the conditions of legitimacy for international governance. International democracy, in any sense, is not forthcoming and may, in any case, be undesirable. However, given the type of governance international institutions actually engage in (e.g., little of it employing coercive enforcement), weaker standards involving alternative and less demanding methods of accountability are appropriate. See Buchanan and Keohane, "The Legitimacy of Global Governance Institutions." However, even this weaker, "complex" standard of legitimacy goes unmet in practice.
13. Klosko, *The Principle of Fairness and Political Obligation*.
14. Though, that is one possibility. See, e.g., Charles R. Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979), 127-76.
15. See, e.g., Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford University Press, 2009), 123-57, Richard W. Miller, *Globalizing Justice: The Ethics of Poverty and Power* (New York: Oxford University Press, 2010).
16. See, e.g., Thomas Pogge, *World Poverty and Human Rights*, 2nd ed. (Malden, MA: Polity Press, 2008); Thomas Pogge, *Politics as Usual: What Lies Behind the Pro-Poor Rhetoric* (Malden, MA: Polity Press, 2010).
17. John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999).
18. See, e.g., Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 195-224.
19. As Kramer insists. See Matthew H. Kramer, "On the Moral Status of the Rule of Law," *Cambridge Law Journal* 63, no. 1 (2004).
20. H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994), 91-99.
21. Samantha Besson, "Theorizing the Sources of International Law," in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (New York: Oxford University Press, 2010).
22. For an extended discussion, see Alan Boyle and Christine Chinkin, *The Making of International Law* (New York: Oxford University Press, 2007), 210-62.
23. *Ibid.*, 263-311.
24. Antonio Cassese, *International Law*, 2nd ed. (New York: Oxford University Press, 2005), 5-6.
25. Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), 33-44. See also N. E. Simmonds, "Law as a Moral Ideal," *University of Toronto Law Journal* 55, no. 1 (2005).
26. Jeremy Waldron, "The Concept and the Rule of Law," *Georgia Law Review* 43, no. 1 (2008).
27. Frederick F. Schauer, *Playing by the Rules* (Oxford: Oxford University Press, 1991), 51.
28. Cassese, *International Law*, 373-74.
29. For familiar reasons having to do with the history of the use and abuse of humanitarian justifications. See Thomas M. Franck, "Humanitarian Intervention," in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (New York: Oxford University Press, 2010).
30. Of course, on certain occasions, non-compliance may be related to establishing more desirable rules of governance. If well-grounded, such considerations may argue in favor of abandoning accepted international practice.
31. Schauer, *Playing by the Rules*, 97.
32. Jeremy Waldron, "The Rule of International Law," *Harvard Journal of Law & Public Policy* 30, no. 1 (2006): 23.

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## ***Hermeneutic Concepts and Immodest Conceptual Analysis of the Law\****

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Traditional conceptual analysis of the law (CAL) involves testing candidate analyses of law against intuitions. According to CAL, the legal theorist should reject analyses that have counterintuitive implications about whether some object counts as law or whether some feature is a necessary feature of law in favor of analyses that better accord with such intuitions. Because CAL is the predominant methodology in contemporary Anglo-American legal philosophy, examples of this approach are easy to find. For example, Hart's argument against Austin's theory of law and for his own theory can be readily characterized as an instance of CAL.<sup>1</sup>

In keeping with CAL, Hart observed that if John Austin's claim that laws are the commands of the sovereign were correct, then many objects that we would intuitively consider to be law, e.g., certain customs, power-conferring norms, and very old laws, would not be law. Also, Hart noted that if laws were merely the commands of the sovereign, they would need not possess a feature that we intuitively take them to possess—namely, laws claim to be obligatory rather than merely obliging. Further in keeping with CAL, Hart offered his rule-based account of law as an alternative to Austin's in part because it better accords with the foregoing set of intuitions than Austin's.

Recently, Brian Leiter has levied a forceful line of criticism against CAL.<sup>2</sup> This criticism poses a dilemma for CAL's proponents. On the first horn of the dilemma, the proponent of CAL admits that CAL does not necessarily lead to truths about the law, but rather that CAL more modestly leads to truths about our shared understanding of the law. The problem with this horn is that it renders CAL relatively uninteresting. Though it may overstate the case to say that so construed the philosophy of law is glorified lexicography, such a claim is only mildly hyperbolic.<sup>3</sup> If CAL is only modest, it remains to be seen what significant role, if any, it plays in helping us to understand the law itself. On the second horn, the proponent of CAL immodestly claims that CAL leads to truths about the nature of law and not merely to truths about our shared understanding of it. The worry about immodest CAL is that its theoretical ambition outstrips its warrant. Why should we expect intuitions about what counts as law and the features that law must possess to tell us anything about the nature of law itself rather than merely our understanding of it?<sup>4</sup>

In sum, Leiter holds that the proponents of CAL either modestly but relatively uninterestingly make claims about our shared understanding of law, or they immodestly but unwarrantedly make claims about law itself. Here, I defend and explore the implications of a third possibility. Namely, intuition-guided conceptual analysis of law is simultaneously an analysis of our shared understanding of law and of the law itself, for our concept of law constitutes the reality of law. As we shall see, the inspiration for this thesis is Locke's notion of an archetype idea. Thus, I refer to the thesis I defend here as the Lockean approach.<sup>5</sup>

My explication and defense of the Lockean approach proceeds in a number of steps. In part I, I situate the challenge that Leiter poses for CAL in the context of his larger project of naturalizing analytic jurisprudence. In short, Leiter questions the assumption that the extensions of hermeneutic concepts, such as the law, are (unlike natural-kind concepts) fully determined by the concepts' users' understanding of such extensions rather than the results of scientific inquiry. In part II, I refine Leiter's notion of a hermeneutic concept with help from Locke's discussion of archetype ideas, particularly his notion of practice-constituting archetype ideas. In part III, I explain by way of illustrative example why intuition-guided conceptual analysis of hermeneutic concepts (understood as Lockean practice-constituting archetype ideas) is informative not only with respect to the concepts' users' understanding of the concept but also of the bit of social reality that such concepts constitute and are about. In part IV, I distinguish a number of concepts of law and note that only some of these concepts are hermeneutic. I further observe that the non-hermeneutic concepts of law are the traditional core targets of immodest CAL. Specifically, legal theorists seek to explain a general concept of law, yet, as I will argue, the general concept is not hermeneutic (or at least not hermeneutic in the sense that I develop here and for which immodest intuition-guided analysis is appropriate). This presents a puzzle for traditional analytic jurisprudence, for immodest CAL seems justified only with respect to hermeneutic concepts. I conclude part IV with the suggestion that immodest CAL has a legitimate role to play with respect to non-hermeneutic concepts of law insofar as they stand in the right relation to hermeneutic concepts of law.

### 1. Leiter's Naturalistic Challenge

According to Leiter, a hermeneutic concept is "any concept which satisfies two conditions: (i) it plays a hermeneutic role, that is, it figures in how humans make themselves and their practices intelligible to themselves, and (ii) its extension is fixed by this hermeneutic role."<sup>6</sup> Leiter contrasts hermeneutic

concepts with natural-kind concepts. On his view, the key distinction between a hermeneutic concept and a natural-kind concept is that the former's extension is fixed by its hermeneutic role, whereas the latter's extension is "fixed solely by whatever well-confirmed scientific (lawful) generalizations employ the concept."<sup>7</sup>

Leiter's account of a natural-kind concept is one among a number of rival conceptions of this kind of concept. For example, whereas Leiter holds that the extensions of natural-kind concepts are fixed by whatever well-confirmed scientific (lawful) generalizations employ them,<sup>8</sup> other theorists hold (no less controversially) that the extensions of such concepts are fixed by natural orderings or groupings that exist independently of human interests or concerns.<sup>9</sup> Fortunately, we do not need to choose between these two understandings (or some other understanding) of a natural-kind concept to motivate and explain Leiter's naturalistic challenge.

Despite their differences, scientific inquiry plays a key role in the foregoing accounts of natural-kind concepts (and other rival accounts). Whereas for Leiter, scientific inquiry directly fixes the extension of a natural-kind concept, for the more essentialistic natural-kind theorist, scientific inquiry is our best means of epistemic access to an independently existing natural ordering that fixes the extension of a natural-kind concept. The integral role that scientific inquiry plays in these (and most other) conceptions of natural-kind concepts is enough to distinguish natural-kind concepts (broadly construed) from conventional concepts. Conventional concepts are those whose extensions are determined directly by the understandings of their users. A conventional concept's extension just is what its users take it to be. Scientific inquiry neither fixes such an extension nor does it help us discern it. By contrast, natural-kind concepts are those whose extensions are either fixed or discerned by scientific inquiry. To help see this general distinction, compare the paradigmatic natural-kind concept "gold" with an example of a conventional concept, say, "a chess pawn."

On Leiter's account, the extension of "gold" includes all the stuff with the atomic number of 79 because a mature, well-confirmed set of scientific generalizations, chemistry, makes heavy use of this concept with this extension. On the more essentialistic account, "gold" includes all the stuff with the atomic number of 79 because this is the natural grouping that the concept picks out, as we have discovered through scientific inquiry. An important point to note about such concepts is that folk understanding of their extensions may diverge quite radically from their actual extensions. For instance, all users of the concept "gold" might think that pieces of fool's gold are gold. By contrast, "chess pawn" is a conventional concept. Pawns have a particular starting location on the chessboard and may move and attack in certain ways. "Chess pawn" is a conventional concept because its extension is fixed by convention and not by a natural grouping or directly by scientific inquiry. Thus, in this case, discerning the referent of the concept requires learning the requirements of the relevant convention (i.e., the convention among chess players of calling pieces of certain kinds pawns) rather than the results of scientific inquiry.

As we saw above, the first element that Leiter ascribes to hermeneutic concepts is that they play a role in our understanding of ourselves and our practices—hence, the moniker *hermeneutic* concept. The second element is that the extension of hermeneutic concepts is determined by the hermeneutic role they play. The second feature seems to imply that such concepts are conventional. As Ian Farrell helpfully glosses Leiter's notion:

The extension of a hermeneutic concept is therefore determined in relation to what *we* understand the

concept to be, how we employ the concept (or the term by which we refer to the concept) and how we make *sense* of the concept, in order to make better sense of ourselves and our practices.<sup>10</sup>

Though Leiter acknowledges that law satisfies the first element of his conception of a hermeneutic concept—it is about our practices, namely, our legal practices—he questions whether it satisfies the second feature.<sup>11</sup> That is, he queries why we should think that the extension of the concept of law is determined by our understanding of the concept rather than by scientific inquiry.

Leiter's challenge can be summarized as follows:

The concept "law" refers to a practice, a phenomenon in the world, much like "gold" and "time" refer to phenomena in the world. In the cases of "gold" and "time," we take science either as our guide to or as the determinant of the respective concepts' extensions. Why, then, given that "law" similarly refers to an object in the world, shouldn't we take scientific inquiry to play a similar extension-discerning or extension-determining role?

Leiter's project of naturalizing jurisprudence rests on the thesis that the defender of law as a hermeneutic concept cannot meet his challenge; rather, law is a natural-kind concept and, hence, its extension is fixed by scientific inquiry. The obvious response to Leiter's challenge is that the key difference between things like gold and time on the one hand and law on the other is that law is a human creation, whereas gold and time are not. Below, I develop a version of this response; however, I do not offer this response glibly, for care must be taken to explain why the fact that law is a human creation implies that our concept of it is not a natural-kind concept.

The challenge described above relates to the dilemma Leiter poses for proponents of CAL. Recall that CAL is an intuition-guided analysis of the concept of law. As such, CAL takes the intuitions, and, hence, the understanding of the users of the concept "law" as a guide to the analysis of the concept. Leiter's criticism of CAL is that it is either relatively uninteresting or its theoretical ambition outstrips its warrant, for though CAL is informative with respect to our general understanding of the concept of law, it is not obviously informative about the phenomenon of law. Just as the folk's scientifically uninformed understandings of the extensions of "gold," "space," and "time" has radically diverged from the underlying phenomena of gold, space, and time, so too may the folk's scientifically uninformed understanding of the extension of "law" radically diverge from the phenomenon of law that the concept is about. In light of this dilemma, Leiter rejects CAL in favor of looking to the concept of law that social scientists' employ to determine the contours of law qua concept and qua phenomenon in the world.

## 2. Locke and Hermeneutic Concepts

Ian Farrell, who offers a defense of modest CAL, characterizes the conceptual analysis of law in the following terms:

If we must use an analogy from criminal investigation, modest conceptual analysis would be better compared to image enhancement whereby an out-of-focus photograph of the perpetrator is enhanced to the extent that the subject's face can be recognized.<sup>12</sup>

Leiter, commenting on the foregoing passage, states:

[B]ut we need to be careful to construe it modestly for strictly speaking, what we recognize is not the subject's actual face, but rather the contours of the face as portrayed in the photograph: it is the photograph, not

the person, that comes into focus. Modest conceptual analysis illuminates our concepts—our talk, as it were—not the referent we might have intended to understand.<sup>13</sup>

From these passages, it is apparent that Leiter is of the view that the concept of law is merely *about* the phenomenon of law. Moreover, on Leiter's view, though CAL is directly informative with respect to the concept's users' understanding of law, it is not necessarily informative with respect to the phenomenon of law that the concept is about. Thus, Leiter emphasizes that there may be a gap between the portrayal of law in the photograph and the referent of the photograph, the phenomenon of law. However, Leiter's view of the potential gap between the concept of law and the underlying phenomenon it is about rests on a failure to appreciate fully the ways in which a concept may (as I argue below law does) "figure[] in how humans make themselves and their practices intelligible to themselves."

As we have seen above, one way that a concept may figure in how humans make themselves and their practices intelligible is that it may be about persons and their practices. A second way is that in addition to being about a phenomenon, say, a legal practice, a concept may constitute the relevant phenomenon. Below, with the assistance of Locke's notion of an archetype idea, I develop the notion of a practice-constituting concept.

### *Archetype and Ectype Ideas*

As James Tully puts it:

[Archetype] ideas are 'not intended to be the Copies of anything, nor referred to the existence of any thing, as to their Originals'. (4.4.5) An archetype idea 'is not designed to represent any thing but itself. It contains in it precisely all that the Mind intends it should.' (2.31.14) Thus ectype ideas copy their natural archetypes whereas archetype ideas are their own archetypes.<sup>14</sup>

Locke's idea is that some concepts (or in Locke's terminology, ideas) seek to copy substances, whereas many other concepts do not, but rather seek objects in the world that conform to them. Locke's illustrative examples of archetype and ectype ideas are, respectively, jealousy and adultery on the one hand and gold on the other (3.36.44-47).<sup>15</sup>

Locke asks us to imagine that Adam, upon noticing that Lamech seemed troubled, invented the concepts of adultery and jealousy to discuss Lamech's trouble with Eve. To put things a bit anachronistically, Locke's idea is that the extension of jealousy is fully determined by Adam's understanding of the concept; Adam seeks objects in the world, i.e., an emotion and a kind of action, respectively, that conform to his understanding of jealousy and adultery. By contrast, Adam fashions his idea of gold to conform to an independently existing reality, the substance gold. To put Locke's point anachronistically but in a way that makes contact with the foregoing discussion of conventional and natural-kind concepts, the extension of Adam's concept "gold" is determined by whatever the substance gold actually is, whereas the extension of Adam's concepts of "jealousy" and "adultery" is determined fully by Adam's ideas of them, respectively.

It should be clear at this point that I have described above Locke's take on the distinction between conventional concepts (archetype ideas) and natural-kinds (ectype ideas). For present purposes, Locke's further distinction between different kinds of archetype ideas, i.e., conventional concepts, is of special interest.

### *Practice-Constituting Archetype Ideas*

One kind of archetype idea is illustrated in the example above. A person or, as Locke acknowledges is more often the case, a

language community constructs an idea, such as jealousy or adultery, and seeks instances that conform to it in the world. A second kind of archetype intrinsically guides its users' activities. In this case, persons fashion the world in accordance with the archetype. To cite Tully again, for Lockean archetype ideas are "the ideas man has of the things he makes: products, actions, institutional practices, social relations and so on."<sup>16</sup>

Of immediate interest is the latter entries on Tully's list, social relations, which for Locke includes social roles, such as fatherhood, citizenship, and being a general (3.28.2-3). These archetype ideas are intersubjectively shared and constituted. They are the ideas of the relevant community as a whole. Moreover, these ideas do not merely guide the community's use of terms (e.g., guide them in what they should refer to as gold, a father, a citizen, etc.), but they also guide its members' activity. Take Locke's example of a citizen. According to the archetype of citizen, that someone conforms to this archetype requires not only that we refer to her as a citizen, it also requires that we treat her as having the rights and responsibilities of a citizen. Moreover, though Locke does not quite put it this way, his idea must be that the guidance such ideas supply is *intrinsic* rather than indirect.

To help see the distinction between indirect and intrinsic conceptual guidance, consider the sense in which the idea (presumably, for Locke, an archetype idea) "great white shark" guides its users' activity. Namely, in general it is a good idea to stay away from things that fall under this idea. Thus, we might say that in a sense, the "great white shark" provides guidance. However, this guidance is contingent, depending on how we stand in relation to the great white shark (e.g., we are or are not protected from the shark, we fear or do not fear death or mutilation, and so on). By contrast, the guidance the idea citizen provides is intrinsic; to be a citizen is intrinsically to be someone who ought to act in certain ways (e.g., she must vote and defend her country) and who ought to be treated in certain ways (e.g., she must be allowed to vote). Thus, this second kind of archetype idea guides a community in its use of terms and provides an intrinsic guide to its members' actions.

#### *Hermeneutic Concepts Refined*

I submit that we should understand hermeneutic concepts in terms of Locke's second kind of archetype idea: all hermeneutic concepts are Lockean practice-constituting concepts. As such, hermeneutic concepts comprise two kinds of contents. Like all concepts, they have semantic content that distinguishes the extension of the concept. However, they also have deontic content. The deontic content provides the intrinsic guidance described above. For example, the deontic content of the concept "citizen" includes the requirements that persons falling under the concept act and be treated in certain ways.

Deontic content, I submit, is an integral part of hermeneutic concepts, for one does not fully understand such a concept if one does not grasp its deontic content. This is not to say that one must accept the deontic content to understand the concept; rather, one must only grasp that the core users of the concept accept the deontic content. That is, full understanding of such a concept entails understanding that it plays a role in guiding the actions of its core users. For example, an agent does not fully understand the concept "citizen" if he only grasps that citizens are persons that meet certain conditions of citizenship, such as being born in the relevant territory; he must also grasp that persons that meet such conditions are also accorded an array of privileges and responsibilities.<sup>17</sup>

In sum, we should refine Leiter's initial characterization of hermeneutic concepts. First, hermeneutic concepts are not only about objects; they also constitute those objects and guide human practices. As such, a hermeneutic concept comprises

not only semantic content that picks out the object that the concept is about, but deontic content as well that guides the concept's users in the construction of the object and its associated practice. Second, the extension of a hermeneutic concept is determined by the concept's users' understanding of it, for the construction of the object and the relevant practice is guided by the users' understanding of the extension of the concept and their understanding of the concept's deontic requirements.

### **3. Wolverines**

In this section, I argue that intuition-guided conceptual analysis is an appropriate methodology for the analysis of hermeneutic concepts. This argument proceeds by way of an illustrative example borrowed from Leiter. Leiter distinguishes between wolverines and Wolverines to illustrate his notion of a hermeneutic concept.<sup>18</sup> Whereas Wolverines are persons associated with the University of Michigan, wolverines are a particular species of animal. Leiter's point is that Wolverine is a hermeneutic concept, whereas wolverine is a natural kind.

In light of our refinement of the notion of a hermeneutic concept, we can further characterize the concept of "Wolverine." Like all hermeneutic concepts, "Wolverine" comprises both semantic and deontic content. The semantic content of the concept guides its users use of the term "Wolverine," and the deontic content of the concept guides their actions, largely in the form of christening Wolverines and authorizing and requiring various forms of behavior among Wolverines and those that associate with them (e.g., authorizing them to wear certain insignia, sit in certain sections of sporting events, requiring them to display loyalty in various ways, etc.).

The first lesson we can draw from the Wolverine example is that the intuitions of a hermeneutic concept's users are key to the concept's analysis. The understandings of the users of a hermeneutic concept determine the concept's features, and their intuitions tell us what these understandings are. Thus, any analysis that enumerates the various features of a hermeneutic concept must consult the intuitions of the concept's users.

A second lesson is that conceptual analysis of hermeneutic concepts is immodest. As we have seen, practice-constituting hermeneutic concepts intrinsically guide the actions and interactions of the relevant community's members. Thus, unlike natural-kind concepts, the ultimate object of interest for the analyst of practice-constituting hermeneutic concepts is not some underlying reality that the concepts merely represent. Rather, the ultimate object of interest is the social reality, certain objects and companion social practices that the concept constitutes and maintains.<sup>19</sup> Moreover, these objects and practices are created in accordance with the concept's users' understanding of the concept. Hence, learning about the phenomenon of interest, e.g., Wolverines and the practice of treating certain persons as Wolverines, requires learning about the concept's users' understanding of the concept "Wolverine."

Note that theorists interested in the concept of Wolverine could analyze the concept in two main ways. First, they might catalogue the various conditions some object must meet to be a Wolverine (the semantic content), and they might catalogue the various forms of privileges and requirements that accrue to someone meeting these conditions (the deontic content of the concept). Second, theorists might group Wolverines with other objects, such as Longhorns, Buckeyes, Wildcats, or Mustangs, that they take to be similar to Wolverines in important respects. Accordingly, they might coin a name for this group of objects, e.g., collegiate mascots. In this same vein, they might distinguish the mascots from other objects that are similar in some respects but that they take to differ crucially from the mascots, e.g., religious totem-animals.

#### 4. The Law

The term “law” applies to a number of different concepts. One such concept refers to particular kinds of norms. The speed limit is a law; the requirement that I not put my elbows on the table during dinner is not a law. In turn, there are at least two different concepts of law that refer to legal norms. The first is a particular concept. There are many particular concepts of law qua concepts of legal norms. For example, the particular concept of the law of the United States picks out one set of norms (e.g., the enactments of the U.S. legislature, U.S. court decisions, and the rulings and regulations of various American administrative bodies) and the particular concept of the law of the United Kingdom picks out another set of norms (e.g., the enactments of Parliament and so on). The general concept of law qua legal norm subsumes all norms picked out by the particular concepts of law. For example, the enactments of the British and American legislatures are both laws in this general sense, whereas the rules of Major League Soccer in the United States and the Premier League in the United Kingdom are not. Yet another concept associated with the term “law” refers to legal systems. Here, too, we can distinguish between the particular and the general: concepts of particular legal systems and the concept of the class of all legal systems. The latter concept is the favored target of contemporary analytic jurisprudence. To wit, in the *Concept of Law*, Hart develops a general concept of a legal system that demarcates a certain kind of normative system, the modern municipal legal system.<sup>20</sup>

Note that the particular concepts of law qua legal norm differ significantly from the other concepts of law enumerated above—the general concept of law qua legal norm and the general and particular concepts of a legal system. The particular concepts of law qua legal norms are not merely about legal norms; they are also constitutive of them. For example, the concept of French law guides French legal officials’ determinations of what norms are French legal norms, e.g., those norms promulgated by the French Parliament, French courts, and French administrative bodies. Moreover, this concept intrinsically guides such officials’ deontic attitudes and corresponding actions; the officials feel bound to treat such norms as standards that they and their fellow citizens must follow and they accordingly enforce conformity with the standards. By contrast, the users of the general concept of law employ this concept to distinguish the laws of various communities from other norms, such as rules of sports clubs or etiquette, but not as intrinsic guides to their action. For example, for the French legal official, that some norm counts as an instance of French law directly implies that she must act in certain ways, whereas for this same official, that some norm, say a Mexican law, counts as an instance of the general concept of law need not similarly guide her actions and deontic attitudes. Likewise, the particular and general concepts of a legal system merely guide the use of the term “law” as it applies to particular legal systems, say the French legal system, and the class of legal systems generally, but do not directly imply certain actions and deontic attitudes. In sum, whereas particular concepts of law qua legal norms, e.g., the concept of French, American, or Canadian law, are hermeneutic concepts, i.e., practice-constituting concepts, the other target concepts of analytic jurisprudence are not. This difference has implications for the warrant of employing intuitions in the analysis of these respective concepts.

Above, I explicated the warrant of immodest intuition-guided conceptual analysis with respect to hermeneutic concepts. This warrant extends to this form of analysis with respect to particular concepts of law, such as French law, American law, and so on because and insofar as these concepts

are hermeneutic. The basic idea as applied to the particular concepts of law is as follows: the users of particular concepts of law qua legal norms, such as the concept of French law, have certain intuitions about the relevant concept’s extension. These intuitions reflect the concept’s users’ understanding of the concept’s extension, and this understanding guides the relevant community’s activity (e.g., the community of French legal officials). In turn, this conceptually guided activity constructs the concept’s object (e.g., French legal norms). That is, French laws exist and have causal effect in the world only insofar as the French legal officials act on their convergent understanding of what French laws are and their deontic requirements. In sum, the intuition-guided analysis of a particular concept of law is informative with respect to the relevant set of particular legal norms and the legal practice associated with them because these intuitions reflect the concept that guides the construction of such legal norms and practice.

The foregoing warrant does not extend in an obvious way to immodest CAL with respect to the other target concepts of analytic jurisprudence, for, as we have seen, these other concepts are not hermeneutic. Thus, analytic jurisprudence faces a puzzle. It would seem that immodest CAL is warranted only with respect to hermeneutic concepts; however, it is common practice within analytic jurisprudence to employ CAL in the analysis of concepts of law that are not hermeneutic. To wit, as noted above, Hart employs immodest CAL in his analysis of a modern municipal legal system; hence, he employs immodest CAL with respect to the general non-hermeneutic concept of law rather than the particular hermeneutic concept of law qua legal norm. On what basis is this methodological practice justified with respect to these non-hermeneutic concepts of law? I cannot fully answer this question here. However, I can sketch the outlines of an answer. In short, immodest CAL is warranted with respect to non-hermeneutic concepts of law insofar as they stand in the right kind of relationship to hermeneutic concepts of law, such as the concept of French law, American law, and so on. I conclude with a few words about this relationship.

Though the concept of a particular legal system is not a hermeneutic concept, if Hart is right, particular legal systems bear an important relationship to particular hermeneutic concepts. Namely, particular legal systems are, in large part, institutional embodiments of particular concepts of law qua legal norms. To see this, consider Hart’s account of a legal system. On his view, a key element of a legal system is a system of secondary rules that specify what counts as the legal norms in a particular community, how to change such legal norms, and who is in charge of making determinations with respect to the content of such laws. Moreover, Hart holds that these secondary rules exist only insofar as certain important sets of actors, legal officials, accept them and act on them. Another way of putting Hart’s view is that the legal system and its constitutive secondary rules exist only insofar as the relevant community of officials possesses and acts on a particular concept of law qua legal norm. If this is an accurate characterization of the relationship between legal systems and particular concepts of law qua legal norms, then we can explain why the intuitions of the participants in such a system are informative with respect to the legal system. In short, the idea is that we should expect the intuitions of the users of the particular concept of law qua legal norm to be informative with respect to the structure of its associated legal system, for this institution applies and develops the particular concept of law, and it is partly constituted by the activity of those who employ that particular concept.

The intuition-guided analysis of the general concepts of a legal system and law qua legal norms is also warranted by

virtue of these concepts' close relationship to the hermeneutic concept of law qua legal norm. However, this warrant is subject to an important qualification. To see this qualification, we must distinguish between particular intuitions and general intuitions. Particular intuitions are intuitions about the extensions of particular concepts of law, e.g., the concept of French law and its associated legal system. General intuitions are intuitions about the extension of general concepts of law, the general concept of law qua legal norm, and the general concept of legal systems. These concepts respectively demarcate the general class of norms that count as legal norms and the class of normative systems that count as legal systems. Above, we have seen that intuitions about a concept that guide the construction of a particular set of legal norms and a particular legal system (e.g., French legal officials' intuitions about the extension of the concept of French law) are informative with respect to the nature of those particular legal norms and that particular legal system. However, it is hard to see why intuitions about what kinds of normative systems generally should count as legal systems or what kinds of norms generally should count as legal norms are similarly informative, for unlike the particular concepts of law these general concepts do not guide the creation of the concept's object.

Nonetheless, particular intuitions may still have an important role to play in the construction of general concepts. On this view, the starting point for the analysis of the general concepts of law begins with the particular concepts and our intuitions about those particular concepts. We might then generalize across a number of such particular concepts that strike us as similar in important respects and develop a general concept of law that brings to the fore these similarities. For example, we should begin with intuition-guided analyses of French law, American law, Mexican law, international law, and so on, and then decide whether, in light of the similarities and dissimilarities between these various concepts, to group them under a general concept of law qua legal norm. A similar relationship holds between the intuition-guided analysis of particular legal systems and the general concept of a legal system. Understood in this way, the general concepts of law and legal system are theoretical constructions that reflect the theorists' choices about the features of these various sets of norms and systems that should be brought to the fore.

In conclusion, though I have argued that Leiter's naturalistic challenge against immodest CAL can be met, all does not remain as it was. As we have seen, the response I propose requires a clarification of the proper order of inquiry in analytic jurisprudence. In my view, the proper starting point of such inquiry is with particular legal systems and sets of legal norms and our intuitions about those, for I have only established that our intuition-guided analyses of these particular systems and sets of norms is warranted. With these analyses in place, the theorist may then proceed with the construction of general concepts of law that she takes to illuminate important features of the particular concepts. By contrast, it would be a mistake to look for guidance in the construction of our general theories of law from intuitions about the general concepts of law and legal systems, for there seems to be no warrant for taking such intuitions to be informative with respect to anything other than the concepts' users' pretheoretical sense of what generally counts as a legal system or a legal norm.

#### Endnotes

1. See H.L.A. Hart, *The Concept of Law*, 2nd ed. (New York: Oxford University Press, 1997).
2. See the "Methodology Problem in Jurisprudence," particularly part III and "Postscript to Part II: Science and Methodology in Legal Theory," both in Brian Leiter, *Naturalizing Jurisprudence* (New York: Oxford University Press, 2007).

3. Leiter suggests that modest CAL is no more than glorified lexicography in "The Methodology Problem," 177. Though Leiter moderates his rhetoric in his response to Ian Farrell's defense of modest CAL, his basic criticism of immodest and modest CAL seems to remain. See Ian Farrell, "H.L.A. Hart and the Methodology of Jurisprudence," *Texas Law Review* 84 (2006): 983-1011, especially part IV, and Leiter's response in *Naturalizing Jurisprudence*, 196-77.
4. Leiter makes this point about immodest CAL by analogy to conceptual analysis of knowledge.

Gettier shed no light on the *nature* of knowledge, *per se*, though he shed considerable light on the epistemic intuitions common among people of a certain class in certain societies. But why should *those* intuitions be of any interest?

*Ibid.*, 178. See also Frank Jackson's discussion of the distinction between immodest conceptual analysis (which seeks to be informative about the concept's object) and modest conceptual analysis (which seeks only to analyze a group's concept of an object). Frank Jackson, *From Metaphysics to Ethics: A Defence of Conceptual Analysis* (Oxford: Clarendon Press, 1998).

5. I would like to thank Arthur Sullivan for introducing me to Quassim Cassim, "Rationalism, Empiricism, and the A Priori," in *New Essays on the A Priori*, ed. Paul Boghossian and Christopher Peacocke (Oxford: Oxford University Press, 2000). I made my first acquaintance with Lockean archetypes in Cassim's piece. For further discussion of Lockean archetypes, see James Tully, *A Discourse on Property* (Cambridge: Cambridge University, 1980), ch. 1 and John Yolton, *Locke and the Compass of Human Understanding* (Cambridge: Cambridge University Press, 1970), 138-59. Locke's discussions of archetypes can be found throughout his *An Essay Concerning Human Understanding*, ed. P.H. Nidditch (Oxford: Clarendon Press, 1975). I cite to the Essay in the body of this paper in book, chapter, and section format.
6. Leiter, *Naturalizing Jurisprudence*, 173.
7. *Ibid.*, 172-73.
8. In formulating his conception of a natural-kind concept in this way, Leiter is taking his cue from Robert Cummins. Cummins states:

We can give up on intuitions about the nature of space and time and ask instead what sort of beasts space and time must be if current physical theory is to be true and explanatory. We can give up on intuitions about our representational content and ask instead what representations must be if current cognitive theory is to be true and explanatory.

See Leiter, "The Methodology Problem," 179, citing Robert Cummins, "Reflections on Reflective Equilibrium," in *Rethinking Intuition*, ed. M. DePaul & W. Ramsey (Lanham, MD: Rowman & Littlefield, 1998), 116.

9. For a discussion of a variety of conceptions of natural kinds, see Alexander Bird and Emma Tobin, "Natural Kinds," *The Stanford Encyclopedia of Philosophy* (Summer 2010 Edition), ed. Edward N. Zalta. <http://plato.stanford.edu/archives/sum2010/entries/natural-kinds/>. Below, I discuss Locke's version of an essentialist account of natural kinds.
10. Farrell, 1002.
11. See Leiter, *Naturalizing Jurisprudence*, 173 n. 77.

"[M]any concepts play hermeneutic roles, but their extensions are not deemed to be fixed by those roles. Some other kind of theoretical considerations must explain why the hermeneutic role is paramount in the case of "law" but not, e.g., "wolverine." And what those theoretical considerations are, and how they are to be weighed, is a complex question, that is rarely discussed explicitly in legal philosophy."

Moreover, Leiter suggests the possibility that we fix our concept of law by looking to the concept employed by

political scientists. His key concern about this approach is that the lawful generalizations that employ a concept of law are not very robust. *Ibid.*, 187-92.

12. Farrell, 1001.
13. Leiter, *Naturalizing Jurisprudence*, 197.
14. See Tully, 12.
15. See *ibid.*, 12-16 for a discussion of Locke's distinction between ectype and archetype ideas.
16. *Ibid.*, 22.
17. Many concepts have deontic content, including but not limited to concepts of thick moral terms, such as cowardice and cruelty; social roles, such as doctor, father, and judge; and roles in games, such as pitcher and chess pawn. One does not fully understand any of these concepts unless one grasps (irrespective of whether one accepts) their deontic content.
18. *Ibid.*, 173.
19. Cf. John Searle, *The Construction of Social Reality* (New York: Simon & Schuster, 1995). Though Searle's account of social reality is much more developed than Locke's, it is continuous with Locke's in many respects.
20. Hart, *The Concept of Law*, 2-6.