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THE ORIGINAL POSITION REVISITED: DUTY AND JUSTIFICATION *

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Abstract: Dworkin claimed that hypothetical agreements are not binding and, thus, that the argument from the Original Position in Rawls' *A Theory of Justice* does not justify or ground the principles of justice. I argue that the Original Position is neither foundational nor in need of a "deep theory", as claims Dworkin; it is only a means of clarification, a sort of "perspicuous representation" of our judgments concerning justice. I also argue that the natural duty of justice works as a *non*-hypothetical justification for why the principles are binding. This because the natural duty of justice does not depend on agreements to hold and, as such, makes *any* principle of justice binding.

Keywords: Rawls. Original position. Justification. Natural duty. Dworkin.

A POSIÇÃO ORIGINAL REVISITADA: DEVER E JUSTIFICAÇÃO

Resumo: Dworkin sustentou que acordos hipotéticos não são obrigatórios e que, deste modo, o argumento da posição original na *Teoria da Justiça* de Rawls não justifica ou fundamenta os princípios da justiça. Argumento que a posição original não é fundacional nem necessita de uma "teoria profunda" (como argumentou Dworkin); ela é apenas um meio de clarificação, uma espécie de "representação perspicua" dos nossos juízos a respeito da justiça. Também argumento que o dever natural da justiça funciona como uma justificação não-hipotética do caráter obrigatório dos princípios. Isso porque o dever natural da justiça não depende de acordos e torna *qualquer* princípio da justiça obrigatório.

Palavras chave: Rawls. Posição original. Justificação. Dever natural. Dworkin.

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INTRODUCTION

Rawls emphasizes that the Original Position (hereafter OP) is “purely hypothetical” (TJ, p. 19). Dworkin, contra Rawls, argued that hypothetical agreements are not binding and, thus, that the choice of the parties in the OP doesn’t provide an argument that makes the principles of justice binding. This implies, in his view, that the OP is not a justification for the principles of justice. The justification can only be successful, argues Dworkin, if we suppose that a “deep theory that assumes natural rights” operates in Rawls’ TJ (Dworkin 1978, p. 177).

In this paper I would first like to argue, contra Dworkin, that the OP is neither foundational nor needs a “deep theory” in which it is grounded; it is only a means of clarification. As such, it does not make the principles metaphysically certain, but only provides us with a sort of “perspicuous representation”¹ that shows what we already take as just and what we have to give priority to as just.² I also argue that what Rawls calls ‘the natural duty of justice’ provides a non-hypothetical justification for the binding character of any principle of justice. This strategy is useful (even though not explicitly used by Rawls himself) because it shows that, in one sense, the duty to follow the principles of justice does not depend on the hypothetical agreement of the OP.

¹ “Perspicuous representation” or “surveyable representation” (*uebersichtliche Darstellung*) is Wittgensteinian jargon (see *PI*, §122). Rawls talks about a “device of representation” and also about a “surveyable idea” (*JF*, p. 81).

² I will suggest a reading of Rawls that is close to the “alternative blueprint” sketched in Laden (2003). According to the alternative blueprint, Rawls’ TJ does not present a metaphysical foundation for the principles of justice; the principles are not the consequences of any *a priori* conception of rationality (Kantian or non-Kantian). Such a reading takes the public space of reasons and the idea of public justification as the most significant characteristic of Rawls’s work. Contrary to Laden, however, who de-emphasizes the role of the OP in Rawls’ TJ, I will emphasize it and point to its non foundational role.

This paper has three sections and some closing remarks. In the first section I present Dworkin's most important argument against Rawls. In the second, I follow and elucidate Rawls' main strategy to answer Dworkin: "the answer [to Dworkin's critique] is given in the various features of the original position as a device of representation" (Rawls 1986, p. 237). In the third section I use my own strategy to answer Dworkin. I argue that since the natural duty of justice does not depend on agreements to hold, and since it makes *any* principle of justice binding, it works as a non-hypothetical justification for why the principles are binding

I. DWORKIN'S CRITIQUES

To show why hypothetical agreements aren't binding, Dworkin gives the example of a card game. Suppose that two people are playing a card game, and they notice that one of the cards is not in the game. One suggests (player A) that the game should be stopped and the cards redistributed with the missing card. The other player (B) refuses to do it because he knows he will win. Player A could argue that player B would have chosen the option of the redistribution of cards if this possibility had been considered in advance. Dworkin claims that the hypothetical agreement, suggested by A, is not an argument for redistributing the cards. Since A and B hadn't agreed before the game, the hypothetical agreement introduced when the problem occurred could not have any coercive value. It seems that one has no obligation to accept an agreement that one has never *explicitly* agreed on previously.

So if hypothetical agreements don't bind people to accept them, then the hypothetical OP doesn't seem to add anything to the justification of the two principles of justice in TJ either. Suppose, argues Dworkin, that we try to fix this problem by saying that people would have the *antecedent* interest of accepting the principles as binding in their actual social positions (if one is rich, it seems that it is not in his *actual* interest to accept the principles, but it could be his antecedent interest

because he could end, hypothetically, in a different social position). In the OP, then, people would choose the principles in a conservative way to avoid the worse possible outcome (not taking risks) because they wouldn't know their position in the actual society. The problem, according to Dworkin, is that actual people, who are aware of their advantages (talents, richness, etc), might prefer other principles to take advantage of their talents. The OP fails, then, as a *foundation* for the principles and also as the justification for the legitimacy and *obligation* connected to them.

In what follows, I will try to make clear in which way the OP can be understood as the foundation for the principles of justice and how Rawls could present an “independent argument” (Dworkin 1978, p. 152) without appealing to “an abstract right” or a “deep theory” (Dworkin 1978, p. 181) that shows that it is a duty to follow the principles.

II) JUST PRINCIPLES

Rawls certainly doesn't think that the OP is an unnecessary part of TJ:

There is no way to avoid the complications of the original position, or of some similar construction, if our notions of respect and the natural basis for equality are to be systematically presented (*TJ*, p. 513).³

The goal of the OP is, then, the *systematic presentation* of “our notions of respect and the natural basis for equality”. It is not, as such, the ultimate ground or foundation of abstract principles, but a way to perspicuously present what we already have. Even though it is not completely clear what Rawls mean by “similar construction” comparable

³ The context of this quotation is Rawls' claim that we cannot derive the principles of justice from notions like ‘benevolence’, ‘value of a person’, ‘respect for persons’, etc., because they are controversial and cannot be assumed at the beginning. The principles of justice can be helpful to make such ideas clear.

to the OP, he certainly has in mind some device to be used in the determination of principles of justice.

According to Rawls, the OP is the correct construction to establish the principles of justice because it models two things: (1) “what we regard – here and now – as fair conditions under which the representatives of citizens... are to agree to the fair terms of cooperation whereby the basic structure is to be regulated” and (2) “what we regard – here and now – as acceptable restrictions on the reasons on the basis of which the parties ... may properly put forward certain principles of political justice and reject others” (JF, p.17). If the conditions of the OP construction (model) are in place (1 and 2), then the principles that result from it “would specify the terms of cooperation that *we* regard –*here and now* – as fair and supported by the best reasons”(JF, p. 17; my emphasis). The *here and now* qualification is very important, for it indicates that the “foundations” that Rawls has in mind are not in any sense absolute. This qualification makes even more explicit a point that Rawls had made already in the TJ, when he explained the hypothetical character of the OP:

...we may remind ourselves that the hypothetical character of the original position invites the question: why should we take any interest in it, moral or otherwise? Recall the answer: the conditions embodied in the description of this situation are ones that *we do in fact accept*. (TJ, p. 514; my emphasis).

Rawls assumes in TJ that we want principles to evaluate our institutions and that we are looking for them together in the space of public reasoning, thus, of public justification. The OP should be seen as a “thought-experiment for the purpose of public-and-self-clarification” (JF, 17) in the quest for such principles.⁴ *We* (people interested in clarifying

⁴ The original situation has to express basic ethical constraints on any choice of principles and a way to choose among several conceptions of justice. In this paper, I am mostly concerned with the first role of the OP.

what a just institution is) construct a model in order to clarify what all reasonable human beings can accept as fair principles in which we will base our basic institutions; and “can accept” means to accept according to the best reasons we have at a given point (*here and now*).⁵

But why are the conditions of the OP accepted? Which is the relationship between restrictions of reason and fairness? Rawls’ point is that the model expresses what we regard as just (fair). The non-violation of equality is certainly one of the characteristics that we should expect in just arrangements. This equality, in Rawls’ view, is based on the equality of human beings as moral persons and their presumed capacity to follow their own moral conceptions.⁶ This is our view, here and now, concerning human beings in any liberal society. Thus, the individuals in the OP should be equal in the sense that there is no distinction among them concerning the right for choosing principles.

Individuals are equal under their moral capacities, but they are unequal concerning other potentialities. This is a fact about humans’ capacities. How should we deal with them, if our goal is to establish a just society? Rawls restriction is the following: if inequalities are allowed, they cannot be based on unjust reasons. Some inequalities, thus, would be ruled out from the beginning. Inequalities based on natural chance, for instance, cannot be considered just because there is no merit in them, i.e.

⁵ I think that the three points of view (parties in the OP, citizens in a well-ordered society and ourselves – see Rawls 1996, p. 28) are only three different ways to ask ourselves what a just society is. In the process of justification of the theory or principles of justice (the first two views), we think of ourselves, first, abstracting from our biasing tendencies and, second, in idealized publicity conditions that express fully the public domain of the principles. But in both situations we are still “there”. When Rawls says that people are not real in the argument from the OP, he is simply pointing to the fact that real people cannot be *reduced* to the characteristics of the representatives in the OP – they are the product of an abstraction and this abstraction makes it possible that “one can at any time adopt its perspective” (*IJ*, p. 120).

⁶ See (*IJ*, §77) and (*JF*, p.22).

they are not the recompense of any effort. It is important, for Rawls, that *we* don't accept natural chance as the basis of an argument in a dispute in which justice is evaluated. For instance, an argument such as "each one deserves what nature bestows him with, therefore each one has what he deserves to have" is unacceptable. Inequalities that have origin in the contingency of social circumstances cannot be considered just for the same reason. Another clear case of what we consider unjust is the inequality that has its origin in bargains for one's own interest. We certainly don't accept it as a valid reason in any argument. Imagine the following "reasoning": "we should construct the road in place X because my farm is very close to X". This is not a reason at all. In fact, no one would ever argue in this way in the public space of reasons because it would show him obviously wrong. When people want to construct the road in place X because of self-interest, they obviously conceal such goals in a public debate. Thus, the following restrictions (expressed in the veil of ignorance) concerning the basis of arguments in the OP apply:

- i) No natural advantages or advantages by social circumstances are allowed
- ii) One should not tailor the principles to one's own advantage and no particular inclinations or aspirations should affect the principles

But to be sure that the result of the agreement under the conditions we've been discussing is not unjust, it still has to be balanced with our convictions concerning what is just. It can be the case that either the chosen principles or our convictions, or both, are changed in a process of reflection ("reflective equilibrium"). If convictions and principles coincide, the selection of principles is finished.

This equilibrium is stable, but not definitive, for our convictions or the way we take the principles may change over time. Thus, the principles that we agree on are not metaphysical truths given once and for all; and the derivation of the principles through the OP is not

supposed to be a “metaphysically certain” procedure. Rawls takes his principles as the result of a provisory process of choice (a process that *we* should go through when we read the book).

However, the non-foundational, non-metaphysical, character of Rawls’ philosophy may seem to be incompatible with the OP. If further reflection can make us change or adjust the resulting principles, what is the importance of the original agreement and the restrictions under which it takes place? It seems, as Dworkin argues, that we can start by reflecting on principles and convictions and dispense completely with the hypothetical agreement in the OP. Yes, we *can* do what Dworkin suggests. Nevertheless, if we do it, we lack a way to specify initial standards for our choice of principles: something that enables us to rule out of our process of choice bad “reasons” that are not political reasons at all or obviously lead to unjust choices. That is, if we don’t use the OP, we still need to find a way to include the basic restrictions on reasons that we have been discussing in the new construction. We need a device to express the “consensus on reasonable conditions” (*TJ*, p. 509), an initial situation that “combines the requisite clarity with the relevant ethical constraints”. If we want to get rid of the OP, then, we need a new beginning in which the basis for public reasoning is expressed, a shared point of view that allows the quest for the principles. Moreover, we need to find a criterion to rank theories that are not compatible with the principles we choose: we have to show that the result of reflective equilibrium is the best that we have now.

If the OP fulfills those requirements, however, why should we even try a new method? Apparently, the only reason to do it would be that the OP doesn’t give us the required standards or the best reasons in support of the principles we choose. Suppose, however, we find better initial standards for choosing the principles. In this case, Rawls could argue, we can incorporate them to the OP. If we find better reasons for the principles (reasons independent from the OP), we can be even more confident about the OP and the principles. We have, in this case, better

reasons to believe that the principles chosen through the OP are the right ones. Thus, it doesn't seem to be advantageous giving up the OP.

The OP is, then, not a metaphysical device to give a foundation for the principles of justice, but, as Rawls says, “a way to keep track of our assumptions” and “a surveyable idea” (*JF*, p. 80) that enables us to see what our assumptions imply.⁷ It is true, then, that “the argument

⁷ I've been insisting that Rawls' philosophy is not a metaphysics of justice (for a “metaphysical” reading of Rawls see, for instance, Sandel (1988)). It is rather to be seen as an elucidation of the concepts that we already have, here and now. This may be seen as a kind of Wittgensteinian reading of Rawls. Rawls, in fact, uses Wittgensteinian jargon: the OP “brings out the combined force of our assumptions by uniting them into one surveyable idea” (*JF*, p. 81) – compare with (*PI*, §122), where Wittgenstein says that a “surveyable representation” has fundamental significance for him). Rawls also talks about a “a familiar family of conceptions” (*JF*, p. 83) –compare with (*PI*, §67). Rawls knew Wittgenstein's philosophy quite well, as his assessment of the significance of Burt Dreben's teaching and works shows (Rawls 2001b). The use of Wittgensteinian jargon does not make Rawls a follower of Wittgenstein of any kind, of course. However, it indicates his worries concerning the presentation of Justice-as-Fairness. His goal seems to be freeing his presentation from strong metaphysical claims concerning the nature of justice and the justification or foundation of the principles through the OP. The clearest sign of this tendency is to be seen in his insistence that Justice as Fairness is a political conception and not a comprehensive doctrine. Rawls has a practical aim with his theory (and not “metaphysical or epistemological”, as e says), namely, offering the basis for “willing political agreement between citizens” (Rawls 1985, p. 230). This is something that traditional metaphysics cannot do: “Philosophy as the search for truth about an independent metaphysical and moral order cannot, I believe, provide a workable and shared basis for a political conception of justice in a democratic society” (Rawls 1985, p. 230). This critical assessment of metaphysical foundationalism may have been accentuated after TJ. However, it is clearly stated there as well: “Some philosophers have thought that ethical first principles should be independent of all contingent assumptions, that they should take for granted no truths except those of logic and others that follow from these by analysis of concepts. Moral conceptions should hold for all possible worlds. Now this view makes

from the original position is merely a handy way of organizing the assumptions at the basis of our judgments about justice” (Laden 2003, p. 379). However, it is important to emphasize that the organizing of our assumptions is far from being trivial and it is the most important step in Rawls political philosophy. This is because the organization of our assumptions concerning justice has to fulfill the role of an explanation, i.e., it has to show how the organizing ideas capture our basic views. Thus, even if we find a device that is independent from the set-up of the OP and guarantees the choice of principles among different theories, the expression of our “consensus on reasonable conditions” (*TJ*, p. 509) by means of a device like the OP seems to be a central step in the presentation of a conception of justice. It works as a map of our concepts through which we can find our way in the public space of reasons.

III. DUTY AND OBLIGATION

How can the OP justify the duty of applying the principles of justice? How can we justify that each person should do his/her own part to establish and further the principles of justice? These are, of course, questions concerning the application of the principles of justice to

moral philosophy the study of the ethics of creation: an examination of the reflections an omnipotent deity might entertain in determining which is the best of all possible worlds”. (*TJ*, p. 137). A similar point is made elsewhere in *TJ*: “There is no set of conditions or first principles that can be plausibly claimed to be necessary or definitive of morality and thereby especially suited to carry the burden of justification” (*TJ*, p. 506). I do not want to deny, of course, that there are significant differences between *TJ* and Rawls’ later writings. An obvious and fundamental difference is the discovery of the “fact of oppression” (Rawls 1996, p. 37), i.e. the fact that *any* comprehensive doctrine (including even Justice-as-Fairness taken as such), over time, survives only by means of oppression. This is, I take it, the main reason for why Rawls looks at new ways of stability for political liberalism and calls Justice-as-Fairness a “political conception”. About this topic see Dreben (2003).

individuals (and not, say, to the basic structure of society). Individuals have obligations and duties. According to Rawls, the obligation to apply the principles is given in the form of the “principle of fairness”: “a person is under the *obligation* to do his part as specified by the rules of an institution whenever he has voluntarily accepted the benefits of the scheme or has taken advantage of the opportunities it offers to advance his interests...” (*TJ*, p. 301; my emphasis). Since an obligation arises from voluntary acts such as promises and agreements and are “owned to definite individuals” (*TJ* p. 97), and since we are looking for what makes the principles of justice binding, we can skip an analysis of obligation and turn our attention to duties here.

There are two different kinds of questions concerning duties in *TJ*: which duties are chosen as duties of citizens in the OP and why are people bound to follow those duties. The most important duty for our purposes is the natural duty of justice, namely, that we should do our share in just institutions and help establishing them when they do not exist (*TJ*, pp. 293-4).

The duty of justice, as seen above, is chosen in the OP as part of the duties of individuals. But why should representatives in the OP choose the duty of justice among other candidates? According to Rawls, the duty of justice is ranked as better than the principle of utility because the latter would be incompatible with the principles of justice already chosen for the basic structure. This because it is not always compatible to ask of individuals that they, at the same time, both maximize the average satisfaction and promote the principles of justice. Moreover, the duty of justice is more adequate to promote and to secure the stability of just institutions because it blocks selfish tendencies (the tendency to reduce doing one’s share).⁸

⁸ See (*TJ* §51; §76).

However, here we seem to reach the point in which we have a double hypothetical agreement: the hypothetical choice of the principles and the hypothetical choice of the duty of justice. This does not give a satisfactory answer to Dworkin, it seems, for why should two hypothetical agreements bind more than one?

To answer that worry, one has to make clear that even though the duty of justice is chosen in the OP, it does not follow that it is binding *only* because it is chosen. The duty of justice, according to Rawls, is a natural duty. One important characteristic of natural duties is that we don't need to choose them in order for them to be binding. They don't depend on voluntary acts and, thus, on any kind of agreement. It is not the case that we cannot choose them due to lack of capacities or due to our natural limitations. The point is that we simply don't choose to agree on them in order to be bound by them - we expect of each other respect of what we take to be obvious duties.⁹

In order to make clear why natural duties are not a matter of agreement, I go over three examples. Suppose someone comes to your house, kills your dog and purports to justify his cruelty by saying that he never promised not to be cruel. We would not accept such an answer as a reason. It would simply strike us as nonsensical and we would probably think that the person is insane. The duty of not causing unnecessary suffering does not depend on any previous agreement. As a second example, suppose someone (A) is drowning, while someone else (B) watches it. After a while, a third person asks B why he hadn't helped A when he could have done so. If B answered, "I've never promised to save this person", we would certainly have good reasons to think that B didn't really understand our question. We don't need to agree on the duty of helping people in danger when our help doesn't imply excessive risk to us. The third example is the natural duty of justice. Suppose two individuals A and B go to a wood and harvest mushrooms together. In

⁹ See (TJ, §19) for examples of natural duties.

the end of the day, the individual A makes the division of the harvest. Suppose that A gives 10% of the mushrooms to B. If B says that A is unjust, it wouldn't make sense for A to reply: "I've never promised or chosen to be just". This because to be just is not something that we need to decide that we want. It is a natural duty and it does not depend on any agreement to hold. To suppose that we need such an agreement is to misunderstand our practices and considered judgments concerning promises and just action. Here one could say that it is part of our practices concerning justice and duty the fact that we don't have to promise to be just in order to commit ourselves to just practices and be held responsible for them. One could also say that these characteristics of natural duties are part of the 'grammar' of 'duty' and 'justice'.

Now, since duties aren't chosen, their application doesn't depend on any previous *condition* that we stipulate to regulate them. In this sense, they are unconditional (*TJ*, p. 99). (The unconditionality doesn't need to be considered mysterious as long as we think of the examples above as giving us a *clue* as to why there is no justification in regard to duties.) Thus, because natural duties don't depend on conditions that we agree upon in order to be duties and, thus, they don't depend on any voluntary act to be put into practice, they are also not dependent on what is decided through the OP. Therefore, the duty of justice is not, in this sense, dependent on the hypothetical agreement of the OP.

I will elucidate this point further by means of the restatement of Dworkin's objection and the indication that it is based on a misunderstanding. Suppose that Dworkin emphasizes his point in the following way: But why is the duty to foster the principles of justice a *duty*? It may seem that if we apply our "clue" to duties in this case, it doesn't work. Suppose that someone is not fostering the principles of justice and we ask him why. If he says that he had never promised that he would do it, he may seem to be right (as the player in Dworkin's example). It *seems* that we cannot take him to be talking nonsense or as merely giving a bad excuse, as was the case in the three examples above.

He may be wrong, but he seems to have a rational (or even reasonable) justification for his point. It may seem, then, that the only counterargument that Rawls could use would be the binding hypothetical character of the agreement in the OP.

The reasoning (*incorrect* reasoning) in the paragraph above is, however, the product of confusing the duty of justice with the duty of the principles of justice.¹⁰ The principles of justice are *not* natural duties. Thus, the question of why they are duties is misconceived. However, the natural duty of justice requires that an individual promotes justice – *whatever* justice is taken to be. Even though the parties in the OP choose which are the duties to be followed, they do not choose *that* they are duties. The principles of justice and the duty of justice are obviously compatible, but one doesn't follow from the other (even though the principles are chosen for the basic structure and the duty of justice chosen as a duty for the individuals). The natural duty to further justice would still be a duty if the principles chosen in the OP were not the two principles of justice suggested in Rawls' OP.

If this interpretation is correct, Rawls' answer to Dworkin could be the following. The duty of justice is a duty independently of what we consider to be the just principles to regulate our institutions. But if the principles of justice are the best expression of what we, here and now, in our considered judgments take as just, then we are bound by the *natural* duty to further those principles. The principles are binding only in so far as it is binding to be a just citizen (one who furthers just institutions).

I still need to address a worry that one may have concerning the idea of natural duty. One may think that it is something similar to a natural right in the contractualist framework. In this case, it would give the foundational basis for TJ as a natural right in the contractualist tradition. This is, in one sense, correct: there is, obviously, a symmetry between the OP and the social contract and, thus, between the state of

¹⁰ This confusion is not rare among Rawls' readers. See, for instance, Klosko (2004) pp. 809-11.

nature and the shared ideas inside our political tradition that Rawls wants to unify and organize in the OP. However, it is incorrect to say that it gives, say, the metaphysical foundation (or “deep theory”, as Dworkin claims) for the OP. The natural duty to foster principles of justice is part of our considered judgments, which are within our political tradition in the same way that the reasons behind the idea of the veil of ignorance are. The considered judgments that we share in our tradition, here and now, are with what the TJ really begins. There is, therefore, no reason to avoid this basic intuition (shared conviction) when pressed to give reasons for why the principles are binding. Giving the natural duty as a reason to why principles of justice are binding is, then, simply stepping back to a shared conviction here and now. In this way, we have reached the point where explanations come to an end and Rawls’ elucidation begins. This may seem circular. Circularity of this kind, however, is the least worry in an elucidatory enterprise that has the character of a public justification (*JF*, §9). Clarity is what we strive for, and not foundations.

IV. CLOSING REMARKS

If what has been said in this paper is correct, the role of the OP is that of providing an expression of our basic views concerning justice in order to support the choice of principles through public reasoning. The OP, thus, secures that our choice of principles is in harmony with our basic judgments concerning matters of justice. It doesn’t, however, (“metaphysically”) guarantee the choice. There are no such guarantees. We have to rely on our reflection and on the public justification of the principles in the public space of reasons. This point is decisive in both the examples of natural duties and the reasons for the veil of ignorance. Always when Rawls goes “deeper” in the justification of organizing ideas, he finds hard rock in our considered judgments and practices.

The OP isn't, then, the ultimate foundation for why the principles of justice are binding. The principles of justice are binding because to promote justice is a natural duty (and this is not the product of a choice) *and* because they are the best expression of just principles for institutions. The OP has only a role to play in the justification of the second half of this claim.

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