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REPLY TO TALBOTT, ACKERLY, KELLY, AND RISSE

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I am very fortunate to have such astute and fair-minded commentators. Their remarks are so rich and deserving of extended replies that I am sure I will not be able to do justice to them here. I will reply to each in turn, making connections among their discussions where relevant. Before doing so, I will provide a brief overview of *The Heart of Human Rights* for those who have not read it, in order to make the commentators' remarks more understandable.

What is distinctive about my book is its focus on the moral evaluation of the system of international human rights law, where the system is understood to include not only legal norms, but also institutions. I make the moral evaluation of the system of international legal rights the focus of my inquiry, because I think that it is the heart or core of modern human rights practice. International human rights law serves as an authoritative *lingua franca* for addressing many, though not all, issues of global justice and, increasingly, for assessing the legitimacy of states. Because this body of law is widely regarded as not only authoritative, but also authoritative in part by virtue of embodying widely accepted moral values, various agents can appeal to its norms to mobilize moral motivations without having first to engage in the process of building consensus on a comprehensive moral view. The international legal human rights system enables a discourse that is practically effective for pursuing moral aims, in part because it takes the most fundamental moral issues off the table, at least provisionally. This is not peculiar to international human rights law; it is characteristic of law generally that it is an institutionalized kind of practical reasoning that allows moral values to be taken into account without requiring foundational moral agreement or allowing unconstrained contestation of moral values.

I emphasize that the moral and political reach of international legal human rights (ILHRs) exceeds their legal power. For example, states are often called to account for noncompliance with ILHR norms, regardless of whether they have ratified the relevant treaties. It is hard to see how ILHR could have this power unless it was widely viewed as morally authoritative.

Strangely, philosophers have not focused critical attention on the ILHR system even when, as Charles Beitz does, they emphasize the importance of understanding the practice of human rights. Even more strangely, most philosophers do not even distinguish between moral human rights and legal human rights, instead using the fatally ambiguous phrase 'human rights' without making it clear just what they are talking about. Further, as I argue in the book, some philosophers, when pressed to make the distinction, assume a very simple relationship between moral and legal human rights: They assume – rather than argue – that legal human rights, when they are justified (that is, when they are properly included in international human rights law) correspond to moral human rights of the same scope or content and also assume (again, without argument) that a legal human right cannot be justified unless it can be shown that it corresponds in this way to some moral human right or is a more concrete specification of such a right or is instrumentally valuable for realizing a moral human right. I call this the 'Mirroring View', and I argue that it is false. I show that international legal human rights are valuable instruments for furthering various moral aims or values, only one of which is the realization of corresponding moral rights. I also argue that international legal human rights articulate, express, and help to give practical effect to a conception of equal status.

Although much of the critical response to the book thus far has been limited to either agreeing or disagreeing with my critique of the Mirroring View, I would like to emphasize that virtually everything else of importance in the book is independent of whether that critique succeeds. One of my most fundamental theses is that the best justification of the ILHR system portrays it as performing two major functions: ensuring that states affirm and protect the equal basic status of all those under their jurisdiction and ensuring that all under their jurisdiction have access to the conditions for living a decent or minimally good human life. This thesis is compatible with the

Mirroring View, and with its rejection. In the end, I remain agnostic as to whether the best justification of a system of ILHR that performs these two functions will include premises asserting the existence of a relatively short list of moral human rights or can succeed while relying only on premises asserting moral duties or affirming certain basic moral values. Further, I identify several distinct justifications *for having a system of ILHRs* that are also neutral on the question of whether the Mirroring View is correct or not. Finally, my account of the legitimacy of the institutions of the ILHR system proceeds independently of my critique of the Mirroring View, as does my discussion of the limitations of the existing ILHR system and my stance on conflicting claims of legal supremacy between domestic legal systems and the ILHR system.

I. PROFESSOR TALBOTT'S COMMENTS

Professor Talbott raises some fundamental issues of substance and methodology. Before proceeding to those, permit me one remark that may at first appear a bit picky, but which in fact is important for understanding what is distinctive about my book. Recall my earlier complaint that many philosophers use the phrase 'human rights' without making it clear whether they are talking about moral human rights or legal human rights. Talbott persists in this unfortunate practice and in doing so misrepresents my view on the first page of his comments when he says that I distinguish 'two approaches to human rights', one moral, the other practical. Not at all. I distinguish two senses of the phrase 'human rights' – a moral sense and a legal sense – and then go on to focus on the moral evaluation of the system of international legal human rights, arguing that it is a mistake to assume, as so many philosophers do, that international legal human rights (when they are justified) simply mirror pre-existing moral human rights. By 'moral human rights' I mean rights ascribed to all human beings by virtue of their humanity. By 'legal human rights' I mean the legal rights included in the ILHR system. I also acknowledge that sometimes the phrase 'human rights' is used in the practice to refer to items that (supposedly) ought to be included in the ILHR system.

Contrary to Talbott, I do *not* say that the key 'to understanding human rights [note the ambiguity] is to understand the role they play

in…the practice…' (p. 1), if by 'human rights' one means moral human rights, understood as rights that we have by virtue of our humanity. I go out of my way to say that there is a concept of human rights – the traditional natural rights concept – that can be fully explicated without any reference to the practice. This moral concept of human rights does not presuppose the existence of a system of states; the concept of legal human rights, as it is understood in the practice, does. It makes no sense to ask whether human rights are moral or political (or moral or practical), without specifying whether the phrase refers to moral or legal human rights (or items that should be legal human rights).

Fortunately, this failure to heed my plea for clarity does not affect most of the remainder of what Talbott has to say. He offers two main criticisms. The first is that I have not established that the best construal of the ILHR system portrays it as having not just a welfare function (ensuring that all have access to the conditions for a minimally good or decent life), but also a status egalitarian function (ensuring that all are accorded equal basic moral status). Talbott makes the correct claim that legal protections that prohibit status distinctions contribute significantly to an individual's welfare (something I do not deny in the book). However, he goes on to make a much stronger claim: that, in the absence of the *full* range of equal status protections required by ILHRs, individuals will not have secure access to the conditions for a minimally good or decent human life. In other words, his second claim is that the only reliable way to achieve the welfare function is to enact the exceptionally robust equal status protections we find in the current ILHR system.

He rightly observes that from a historical perspective, providing protections of equal status have contributed significantly to welfare, but that is not the point, because it does nothing to refute my central claim, namely, that there can be and in fact have been legal systems that succeeded from the standpoint of fulfilling the welfare function (providing all with a minimally good or decent life) without including the full range of equal status protections included in the ILHR system. It is obviously possible to have sufficient protections against the grosser forms of discrimination to enable all to have access to the conditions for a decent or minimally good life without providing the complete suite of equal status protections found in

existing international law. In other words, if we assume that the sole function of the system is to ensure basic welfare, then some of the equal status protections look superfluous and for that reason unjustified.

In the book I give three examples to support my claim that unless we acknowledge that the protection of equal basic status is a primary function of the ILHR system, we cannot account for the extremely robust protections of equal status it includes. The first is the case of Switzerland, which until the 1960s denied equal political rights to women, but which appears to have provided the conditions for women and all other citizens to live a minimally good or decent life, in spite of this injustice. The second is that case of a highly paid woman executive who receives somewhat less pay than men doing the same work. It would be false to say that she lacks access to the conditions for a minimally good or decent life (or that her 'basic needs', to use David Miller's phrase, are unmet). The third example draws on Dr. King's 'Letter from a Birmingham Jail', in which he says that stammers when he tries to explain to his 8-year-old daughter why she is prohibited from going to an amusement park. I think it is wildly implausible to say that Dr. King thought that being prohibited from going to the park (or sitting at the front of the bus) deprived his daughter of the opportunity for a minimally good life or resulted in failure of her 'basic needs' to be satisfied – indeed even to suggest this would be to exhibit a demeaning attitude toward the ability of the victims of discrimination to lead good lives in spite of the injustices they suffer. His point, rather, is that such treatment was wrong because it signaled that blacks are of an inferior status. In brief, if we refuse to recognize protection of equal basic status as a fundamental goal of the system, on a par with the welfare function, we must say that the system includes what might be called surplus status protections – protections that go beyond those needed to realize the welfare function, and which are therefore unjustifiable if we take the securing of basic welfare to be the only function of the system. My view is that the existing ILHR system makes the best moral sense if we recognize that it includes a status egalitarian function, not just a welfare function. I also suggest, though not to argue in detail, that it is *appropriate* for the system to include the status egalitarian function, because the public acknowledgment and

protection of equal status of every individual is a fundamental moral value.

Talbott's second chief criticism is that my view is insufficiently consequentialist: Instead of the dual function view that includes a welfare function and a status egalitarian function, I should not only have said that there is only the former (as his first criticism alleges), but also should have then considered the possibility that the best interpretation of the welfare function is that it is grounded, not in a Sufficientarian theory of justice (as the notion of securing the conditions for a minimally good life for all suggests), but in some form of Prioritarianism. Here, Talbott puts his finger on a significant limitation of the book. I do not attempt to resolve fundamental disputes among Sufficientarians, Prioritarians, and Utilitarians regarding distributive justice. Although my view on the international legal human rights system rules out some accounts of distributive justice, it is compatible with several distinct accounts. Instead, I attempt to provide a justification for the ILHR system that goes deep enough to be illuminating – and in particular to demonstrate the inadequacy of the widely held view that the only function of the system is to secure basic welfare – without resolving the more fundamental issues concerning distributive justice that Talbott raises. Given the deep disagreement and theoretical uncertainty about distributive justice that now exists, I think this is a virtue of my view. Further, proceeding in this way leaves open the possibility that the correct theory of justice might be one which, if taken seriously, might require significant revisions in the ILHR system.

The word 'might' here is important. Talbott seems to assume – quite mistakenly – that the best presentation of the ILHR system will characterize it as having the function of realizing the correct principles of justice. This is not the case, however. It may be that, when we consider the fact that we are looking for an ILHR system that is feasible and effective, we ought to conclude that it should aim lower than the achievement of full justice. It might turn out, for example, that even if, as Talbott thinks, some version of Prioritarianism or even Utilitarianism is the best theory, nonetheless the best *feasible and reasonably effective* ILHR system, for the foreseeable future, may be one that is designed to satisfy a less demanding welfare standard, such as ensuring that all have access to the conditions for a mini-

mally good or decent life. A more demanding standard might not be palatable to enough states to make such a system effective; they might either refuse to ratify human rights treaties designed to satisfy such a standard or ratify, but egregiously fail to follow through on their obligations. The ILHR system may cover part of the terrain of justice, but in order to do that effectively it may have to include a welfare function that is more modest than what full justice requires.

II. PROFESSOR ACKERLY'S COMMENTS

My responses to Professor Ackerly's comments will be shorter because we are largely in agreement. In fact, I shall suggest that we are even more in agreement than she thinks.

First, let me say that I agree with her that many people believe that the modern human rights practice has a strong moral justification without agreeing on what the justification is or on whether there is one uniquely correct justification. And I also agree that it was wise of the founders of the ILHR system to seek agreement on norms without first trying to secure agreement on their grounds.

The apparent sources of our disagreement are as follows. First, Ackerly thinks that I am wrong in thinking that the ILHR system needs a moral justification. Second, she thinks that it is a mistake or at least misleading to characterize ILHRs as entitlements rather than as rights that are enjoyed in community. Third, she thinks that there is no problem of ILHR inflation. Fourth, she thinks that it is clear that contemporary human rights practice does strive to establish a global equal basic status for all individuals, whereas I say that the practice clearly embodies a society-relative notion of equal status and then go on to raise the question of whether it could incorporate a commitment to global equal status without having to undergo significant revisions.

Although at times Ackerly seems to assert the very bold claim (1) that the ILHR system needs no moral justification, she also sometimes suggests that she is advancing two other, quite distinct claims: (2) that the effectiveness and benefits of the system do not require the existence of a satisfactory justification; and (3) that the effectiveness and benefits of the system do not require that there be one justification that is widely or universally accepted. I have no quarrel

with claims (2) and (3). I do think, however, that claim (1) is false and that Ackerly has not given us reason to think it is true.

The ILHR system requires a moral justification, because power is wielded through it and the exercise of power always requires a justification. Moreover, the ILHR system and the practice of human rights anchored on it are works in progress. To know how we ought to proceed in the making and interpretation of human rights law and in the various other activities that comprise the practice, we need to be able to address tensions and conflicts in the practice and in the legal doctrine that is its core and we need to set priorities. It is hard to see how we can reasonably do that without having a pretty clear idea of what the moral point of the enterprise is – and without having a defensible account of why the power that is wielded through the system ought to be wielded in this way rather than another, for these purposes rather than for others.

Further, it is not the case that there is universal agreement that the ILHR system is optimal or even legitimate. The Chinese government's official position is that international legal human rights norms are improper limitations on sovereignty and that it is a violation of sovereignty for any state even to criticize another for failure to fulfill its human rights treaty obligations. In addition, many governments and apparently many individuals reject some of the most basic elements of the system, in particular, prohibitions of discrimination on grounds of gender and religion. Finally, the practice has friendly critics as well: some who are deeply committed to the practice nonetheless find aspects of it defective. In order to make the case that there are defects and to formulate principled strategies for addressing them, one needs to address the question of justification. To make plausible replies to these and other challenges to the system, it is necessary to have a consistent, principled account of why there ought to be a system of this sort. Such an account may well be compatible with there being more than one moral foundation for the system.

I suspect that Ackerly's second complaint is not a matter of substantive disagreement, but rather merely a matter of emphasis. I do claim that international legal human rights, as legal rights, are entitlements and in doing so I follow standard usage of the term 'entitlement' in the legal and philosophical literature. Ackerly says

that instead of thinking of these rights as entitlements of individuals, we should recognize that they are enjoyed in common. This seems to me to be a false dichotomy: Individual entitlements can be enjoyed in common, if many individuals who associate with one another all are accorded their rights and if their possession of these rights plays an important role in their communal life. In fact, as Ackerly acknowledges, I explicitly say that for many ILHRs, including rights to freedom of expression, freedom of religion, and political participation, their value to the individual usually depends on others having them. In the case of the right to freedom of religion, the value of the individual's entitlement usually stems from the fact that the individual is part of a religious community and seeks to exercise her right with others as part of that community. To say that these legal rights are individual entitlements is only to say that, as a matter of legal fact, they are ascribed to individuals in their own right and that the individuals have legal standing in the sense of being subjects who can make legally recognized claims on others.

If I am not mistaken, what really bothers Ackerly about characterizing ILHRs as individual entitlements is that she believes that this implies an inappropriate passivity, because she assumes that an individual entitlement is something whose realization depends solely on the actions of some external authority, for example the state, or, to put it more bluntly, that entitlements are things one is handed by others. This view about entitlements is characteristic of the American right, but it is not prominent in the philosophical or legal literature on rights as entitlements. Ackerly rejects the notion of passivity because she believes, and rightly so, that individuals and non-state groups play an active and crucial role in realizing ILHRs. I agree entirely. My point is that as legal rights, ILHRs are individual entitlements with correlative duties and the duties (as a legal matter) fall chiefly on states. This is fully compatible with recognizing that whether states fulfill these duties often depends upon the efforts of individuals and non-state groups, upon their success in pressuring states to live up to their legal obligations. There is nothing in the common philosophical or legal understanding of a legal (or moral) entitlement that assumes that it is to be realized through the actions of others, without action by the right-holders.

Ackerly's third point of disagreement concerns human rights inflation. She thinks this is a pseudo-problem; I do not. Ackerly thinks that what others regard as cases of over-expansive interpretation of ILHR norms or dubious multiplication of norms are perfectly appropriate efforts to clarify rights and specify them in particular contexts or as applied to particular groups of individuals. I would be more cautious: In some cases, what might at first appear to be rights inflation is appropriate specification of initially abstract rights-norms, but we cannot assume that this is always the case.

Those who think it is obvious that there is rampant inflation typically point to the proliferation of human rights treaties. It is true that while the founders of the system thought there would be only one treaty, there are now several dozen. But that does not prove that there is rights inflation. For one thing, some new treaties include valuable specifications of rights stated in previous treaties that make them more effective for particular groups (this is true for the Women's Convention and the Convention on the Rights of Migrants and Their Families, for example). In addition, although some treaties largely repeat rights found in earlier treaties, they nonetheless play a valuable political role by making prior obligations more salient and by establishing better mechanisms for monitoring compliance (as is true of the Convention Against Torture).

Yet there are still legitimate concerns about rights inflation. The process by which new conventions are formulated is messy: highly political and very undisciplined, even unprincipled. As with all attempts to formulate new legal rights, there is a risk of that the result will be either too expansive or too lean. There is no more reason to assume that the creation of new international legal human rights is any less fallible than the creation of new legal rights in a domestic system. In fact, it can be argued that the more developed constitutional democracies have much better institutional and cultural resources for avoiding rights-inflation than does the UN-based system for creating new human rights treaties, including judicial review and mechanisms of democratic accountability for legislators. Further, many legal scholars argue that some of the interpretations of human rights advanced in the European Court of Human Rights – which is an element of the most developed legal human rights system in the world – are over-expansive. That there should be over-expansive

interpretation is not surprising, given how relatively young the European Human Rights system is and given that the Court's jurisprudence is still rapidly evolving. In brief, both the UN-Based system and the European system create venues in which there are highly political and relatively undisciplined processes for creating and interpreting human rights, and in doing so they create a risk of rights inflation. Indeed, given the power of international human rights law, one would expect that some would attempt to use it to achieve goals – sometimes morally worthy goals – that are not properly represented in terms of rights.

In the book, I suggest several practical strategies for reducing the risk of ILHR inflation, including a proposal that new treaties should distinguish clearly between statements as to what the rights are and statements of administrative directives and guidelines for how to realize the rights effectively. Ackerly dismisses this proposal, saying that what I say are more accurately described as administrative directives or guidelines rather than as rights norms are all important elements of an effective human rights practice. Again, we have a false dichotomy. Of course, I agree that proper administrative directives and guidelines can make a valuable contribution to the realization of rights, but it is nonetheless important to see them for what they are. Administrative directives and guidelines can and should change depending upon circumstances, while the rights remain the same. Distinguishing clearly between rights and administrative directives and guidelines can be important, and important for reducing the risk of rights inflation.

The last source of disagreement is my discussion of the distinction between societal and global conceptions of equal basic status. I note that at present, the basic idea of the ILHR system is to set out obligations in international law, ascribed to states, as to how they are to treat those under their jurisdiction. As noted earlier, I also say that one of the main functions of the ascriptions of such legal obligations is to help affirm and protect equal basic status. Given the nature of the existing system – that it chiefly ascribes obligations to states as to how they are to treat those under their jurisdiction – it is natural to understand the various status- equality protections included in human rights treaties as designed to ensure the equal status of all individuals subject to the jurisdiction of a particular state, not to

ensure some kind of global equal status. In other words, given the basic idea of the system, equal status chiefly means equality of status among those within the same state.

There is one sense, of course, in which the ILHR system aims at articulating and affirming equal status for all individuals globally: it sets out a system of rights that are ascribed to all and thereby confers legal standing to all individuals, under international law. However, the system, as it is presently configured, does not include obligations which, if fulfilled, actually achieve all that one would want if one took seriously the notion of global equal basic status. For example, there is nothing in the system that directly addresses the fact that different individuals, depending upon which society they happen to be born in, have radically different prospects of occupying influential roles in the structures of global governance. In other words, there is nothing like a global analogue of the principle that important offices and rules in the basic structure of a state are to be accessible to all who are equally qualified. Even if an individual enjoys equal status *vis a vis* other members of her own state, the fact that her state is poor and relatively powerless will usually mean that she does not enjoy the same opportunities for successful participation in the global economy, or for attaining positions of influence in the global governance structure. In other words, the tremendous disparities in wealth and power among states impose significant limitations on the ability of existing human rights law to achieve a genuinely global equal status.

In the book, I go on to suggest that to the extent that the best reconstruction of the ILHR system presents it as grounded on the equal basic value of all individuals, it seems arbitrary, as a matter of principle, to limit its concern to achieving equal status within states, rather than globally. But I also note that taking the idea of global basic status seriously would require significant conceptual and institutional revisions in the system.

It seems to me that Ackerly does not effectively engage my position on this issue. I have no doubt that many who are active in the practice of human rights are committed to some notion of global equal status that goes beyond merely ascribing the same rights to all (as the current system does), within the limitations of the basic idea that states have obligations chiefly only toward those under their

jurisdiction. But that is compatible with my observation that the system is not presently well-equipped to articulate and implement a conception of global equal status.

One of the more difficult conceptual issues concerns the relationship between global equal basic status and equality of opportunity. We would need to know what forms of equality of opportunity, ranging over which domains of human activity, a plausible conception of global equal opportunity would have to include. I think it is fair to say that the notion of equality of opportunity is one of the most contested and murky in contemporary political philosophy. If anything, the difficulties and disagreements only multiply when we ascend from the domestic to the global application of the concept of equal opportunity.

Quite apart from the fact that we lack a theory of global equal basic status, there is the question of feasibility. Is it likely to be the case that a system of international law that was designed to fix obligations on states regarding those under their jurisdiction will be able to achieve the successful implementation of a standard of global equal basic status? Is it not more likely that significant revisions of the system will be needed? And the answer to the latter question is affirmative, how likely it is that the needed revisions will be made, given the current distribution of power among states and the relatively weak resources of international institutions? I believe that my conclusion in the book stands: to the extent that the ILHR system is grounded in the idea of legal obligations of states owed to those under their jurisdiction, it is not well equipped to deal with disparities of power and wealth among states and hence inadequate for establishing global basic equal status.

III. PROFESSOR KELLY'S COMMENTS

Professor Kelly's valuable remarks concentrate on the account of institutional legitimacy advanced in my book. She agrees with it as far as it goes, but thinks it does not go far enough. More specifically, she thinks that I failed to recognize the implications of my views about international legal human rights for the legitimacy of the state, when they are taken together with my insistence that institutional legitimacy should be understood ecologically. To say that institutional legitimacy is ecological means that the legitimacy of one

institution may sometimes depend upon its relationships to other institutions. More specifically, institutions can be reciprocally legitimating: one institution can contribute to the legitimacy of another and vice versa.

After an accurate exposition of my understanding of institutional legitimacy, Kelly makes two claims: (1) '[T]he function of human rights should figure more prominently into [Buchanan's]…claims about institutional legitimacy'; and (2) 'Buchanan's claim that meta-coordination [consensus on which institutions are worthy of our support] is needed for ''achieving important benefits and avoiding serious costs'' is under-described. [Kelly continues] We need a better sense of the kinds of institutional benefits that warrant collective endorsement and those that would not qualify as a basis for conferring the special status that legitimate institutions possess, if we are to grasp what it means for institutions to achieve normative versus merely sociological legitimacy status'.

The two claims, I take it, are related as follows: The second claim states that my characterization of the considerations that count toward an institution being worthy of the kind of support or endorsement associated with legitimacy is too meager, and the first claim suggests that it can be fleshed out by appealing to human rights (presumably legal human rights).

I am not sure how much real disagreement there is here. In the book, I distinguish between a general concept of legitimacy that applies to a wide range of institutions, on the one hand, and more specific, and contentful conceptions that apply to particular kinds of institutions, including the state, on the other. If Kelly's proposal is that some degree of satisfaction of human rights norms (whether legal or moral) is necessary for the legitimacy of all institutions, if they are to be legitimate, then I agree: Among the general criteria for institutional legitimacy I list is the requirement of minimal moral acceptability, understood as non-violation of basic human rights norms. If Kelly's point is that all institutions, to be legitimate, must do more than satisfy that requirement – that they must positively promote human rights – then I disagree. For example, many institutions, both domestic and international are not designed to promote human rights (legal or moral) and to require them to do so would be inappropriate. Surely some institutional division of labor is

appropriate but not all institutions should be human rights institutions.

Perhaps Kelly's main concern is with the state and its legitimacy. Again, I'm not sure whether we are in disagreement. I do hold that states (unlike many other institutions), must not only abstain from human rights violations, but also promote and protect human rights if they are to be legitimate. I have argued for this explicitly in a number of papers and in my book *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*. However, perhaps I was not sufficiently clear about this in *The Heart of Human Rights*, where my main concern was with the legitimacy of those international institutions that play an important role in the system of international legal human rights. However, in the latter book I do say that international human rights institutions contribute to the legitimacy of states that participate in the ILHR system by making them more reliable in realizing the ILHRs of all those under those jurisdiction, and I also say that by contributing to the legitimacy of states in this way, these international institutions also help to establish their own legitimacy.

Kelly says that 'Legitimacy judgments require more nuanced counterfactual judgments and Buchanan's general concept of legitimacy does little to guide us here'. My initial response to this complaint was simply that one should not expect a general concept of legitimacy – one that applies to a wide range of institutions, not just states – to say much about the specifics of the moral standards whose satisfaction is relevant to legitimacy assessments. However, on reflection I suspect that Kelly's complaint that I have not done enough to fill out the normative in normative legitimacy may be due to an unclarity in my exposition in *The Heart of Human Rights*. What I did not make clear enough, perhaps, is that the concept of legitimacy – in the normative sense – has distinctive value because it characterizes what might be called moral reason-based support for institutions. The idea is that we need institutions, but that they cannot perform the functions that make them valuable unless we support them, unless we confer a certain special status on them, and respond to them with a certain kind of respect. For those to whom the institution addresses its directives, the proper response will be at least to regard those directives as content-independent reasons for

acting; for others, the appropriate response may be merely to refrain from interfering with the institution's activities and to treat its agents with respect. The point is that if, in order to have functioning institutions, we had to depend either upon people supporting them solely due to the threat that they will be coerced or penalized if they don't or if support depended solely on a perfect congruence between the institution's demands, and the interests of every individual over whom they attempt to exercise power, we would be in trouble. To rely solely on the threat of coercion or penalty, we would have to confer unacceptable amounts of power on institutions. To think that the needed support can be achieved by a perfect congruence of institutional demands and individual interests is to overlook not only the fact that different individuals have conflicting interests, but also that part of what makes institutions valuable is that they enable us to achieve collective goods whose provision requires the constraint of the pursuit of individual interests. What is needed, over and above whatever incentives for support the threat of coercion and the realization of interests can provide, is shared moral reason-based support.

The point, however, is that the character of the relevant moral reasons will vary across different kinds of institutions. I agree with Kelly that in the case of the state, human rights considerations loom large: to be legitimate, states must not only refrain from rights violations (as all institutions must); they must also effectively promote and protect rights. But for other kinds of institutions, human rights considerations will not be important, beyond the requirement of non-violation. I hope that by clarifying the distinction between support for institutions based on the threat of coercion or self-interest and moral reason-based support, I will have done something to clarify what I mean by legitimacy in the normative sense. Having done that, I think it would be incorrect for Kelly to say that my general concept of institutional legitimacy is too thin because it does not pay sufficient attention to human rights. If, in addition to including the minimal moral acceptability requirement understood as refraining from serious human rights violations, it required that all legitimate institutions promote and protect human rights, it would not be general enough to encompass not only the state but also other institutions whose proper business is quite different from that of the state.

IV. PROFESSOR RISSE'S COMMENTS

I cannot hope to do respond adequately to all of Professor Risse's thoughtful comments, but I will focus instead on what I take to be his three main points. First, he contends that my refutation of the 'Mirroring View' does not establish the correctness of my own view. Second, he thinks that the Scanlonian view of rights he endorses, when employed in the development to the concept of human rights as membership rights in the global order, provides a better account than mine. Third, he argues that the idea that human rights are membership rights in the global order provides better resources for responding to Chinese intellectuals who are skeptical of or hostile towards human rights. I will take up each of these points in turn.

As Risse, notes, I do not think that showing the incorrectness of the Mirroring View establishes the correctness of my view. 'View' here is unsatisfyingly vague. My point in the book is that in order to tackle the problem of morally evaluating the system of international legal human rights, one must abandon the Mirroring View. My focus in the book, as Risse notes, is on evaluating the system of international human rights, because I think that system is central to contemporary human rights practice. The point is that I first have to clear the ground for my task by showing why the Mirroring View is a hindrance to achieving it. Whether I achieve that task successfully depends on whether I illuminate the international legal system, and in particular whether I make progress on morally evaluating it. I think it is clear that I have succeeded in both respects, but I am a bit surprised that Risse would have thought that I believed, or would suggest that debunking the Mirroring View established the correctness of my own view.

There is, of course, a stronger sense of 'success in establishing my view': One can ask whether there is some *other* way of investigating the moral status of the international legal system that would provide more illumination and better resources for morally evaluating it. Risse thinks there is another way. He thinks that an approach that builds on Scanlon's understanding of rights and conceives of human rights as rights of membership in the global order would do a better job on both counts. However, as he himself admits, this is only speculation, because he has not applied his view to the international legal system. The proof is in the pudding. I have a pudding; Risse has

an idea for a recipe for a pudding. It is hard to compare existing puddings with a hypothetical pudding for which the recipe is not yet available. I hope that Risse will make his pudding and that I will be impartial in evaluating its quality.

Risse may well be right that the kind of view he recommends, *if developed and applied to the moral evaluation of the international legal human rights system* would be superior to the view set out in *The Heart of Human Rights*. I would judge my book to be a success if it stimulated (or provoked) good philosophers into developing alternative frameworks for evaluating the international legal human rights system. In the meantime, I remain respectfully agnostic as to whether the kind of approach Risse endorses, or some other approach, would prove superior to my own efforts.

On Risse's view, it is uncontroversial to say, for starters, that human rights are moral rights (which may or may not take legal form) that all people have independently of their being recognized by cultural practices or law. Conceiving of them as rights of membership in the global order accords with this intuition. So far, there is no disagreement, if, trivially, by 'human right', one means moral human rights. Recall that I hold that there is one well-established, perfectly legitimate use of the phrase 'human rights' that accords with that intuition: We often think of human rights, as moral rights in that way, as moral rights we all have whether or not they are recognized by cultural practices, institutions, and law. In the book, I say that this is one way to gloss the common assertion that human rights – that is moral human rights – are rights we have simply by virtue of our humanity. That is, the phrase 'simply by virtue of our humanity' can be understood, not as a claim about rights being entailed by some metaphysical claim about the human essence, but rather more humbly as an assertion that there are moral rights we all have that are not dependent on cultural, institutional, or legal recognition. So far, then, Risse and I are in agreement. I do dissent, however, from what Risse apparently assumes, namely, that there is a univocal sense of the phrase 'human rights', such that it makes sense to say that when we talk of moral human rights and international legal human rights we are talking about the same thing.

What about Risse's claim that human rights are best understood as rights of membership in the global order? There are two quite

different ways to understand this claim: (1) as an assertion about the best way to understand moral human rights or (2) as an assertion about how to understand legal human rights in the international legal human rights system. In the book, I note that there are at least two legitimate conceptions that could be referred to by the phrase 'human rights': we could mean moral rights of the sort that have been discussed in the natural rights tradition, or we could mean international legal human rights (or perhaps also items that we believe should be included among the international legal human rights).

I take it that Risse is assuming – not arguing – that the notion of rights of membership in the global order – is the best way of conceiving of both human rights as moral rights and international legal human rights. This may be the case, but I am unable to see how anything Risse has said shows that it is. I will not comment on whether the idea of global membership rights is a fruitful way of recasting our understanding of human rights as moral rights – whether it is an advance over traditional, natural rights understandings. As I emphasized in the book, I think that theorizing moral human rights is a legitimate and important philosophical enterprise, but that it is not my enterprise in the book. I think it is unfair to suggest, as Risse does, that the fact that my account of international legal rights does not answer all philosophical questions about moral human rights is a strike against my theory.

Instead of trying to determine whether the notion of global membership rights is the best way to understand moral human rights, I will only voice some skepticism about whether the idea of membership in the global order is the best way to understand international legal human rights. To see whether it is, I will contrast it with how I see international legal human rights.

With considerable simplification, I will say that on my view international legal human rights are as international lawyers generally understand them: legal rights, established through international law that impose obligations on states as to how they are to treat those under their jurisdiction. Given that this is the character of international legal human rights as they are now, I take it that Risse is committed to this assertion: The best justification for having a system of international law that imposes obligations on states as to

how they are to treat those under their jurisdiction is that doing so is the best way of realizing membership rights in the global order for all people. (The alternative would be for him to say that international human rights law is radically ill-conceived – a view I doubt he would embrace).

I'm not sure how to evaluate the claim that the best justification for having a system of international legal rights that impose obligations on states as to how they treat those under their jurisdiction is that this helps realize global order membership rights. My sense is that we have a much clearer notion of how states ought to treat those under their jurisdiction than we do of what membership in the global order should look like. But even if I am wrong about that, there is another reason why one might think that the notion that international legal human rights law is quite properly primarily concerned with specifying the duties of states toward those under their jurisdiction rather than with specifying the terms of membership in the global order: international human rights law, like international law in general, depends heavily on the consent or at least the cooperation of states, and the most powerful states have a weighty interest in *not* acknowledging equal rights of membership in the global order. To do so would reduce their power significantly. So even if 'ideally' there should be a body of international law that could properly be called human rights law and that would specify global membership rights, it does not follow that the idea of global membership rights is the best way for understanding existing international human rights law as it is now and will likely be for the foreseeable future. And even if an ideal system of international human rights law would specify rights of membership in the global order, it might do this in part through imposing duties on states as to how they are to treat those under their jurisdiction. If that is so, and if for now, it is not feasible for international human rights law to establish global membership rights directly, rather than indirectly and partially by establishing membership rights in states, then my book may still have the value I think it has. Nonetheless, in the end, the proof is in the pudding, as I noted earlier: To show that my 'best face' reconstruction of the international legal system ought to be rejected in favor of one that utilizes the idea that international legal human rights are best conceived as rights of membership in the

global order, someone will have to articulate that view to a comparable degree of specificity.

I turn now to Risse's interesting remarks about China. He holds that the idea of international legal human rights being the 'legal form' of global membership rights is better equipped to respond to skepticism or outright hostility toward human rights voiced by some Chinese intellectuals. Following the lead of Joseph Chan and others, Risse suggests that an effective response would draw on the Confucian tradition. He says that the idea that human rights are rights of global membership may resonate with the Confucian idea of 'all beneath heaven' and to that extent help, persuade anti-human rights Chinese intellectuals. The problem is that the connection between the global order and 'all beneath heaven' is so tenuous that we should not conclude that this is the only or even the most Chinese intellectual-friendly way of trying to tap into the Confucian tradition. Why not say that the idea of norms that apply to 'all beneath heaven' could also be understood as norms specifying how all states are to treat those under their jurisdiction? Presumably the notion of 'all beneath heaven' is supposed to convey some sort of universality. But being subject to the authority of a state satisfies that condition just as well as being subject to a global order.

Further, while every state (unless it is a failed state) has some control over how it treats those under its jurisdiction, most states have little or no control over the global order. That fact is of great significance for what counts as a plausible reconstruction of international human rights law, because international law generally, including human rights law, is made and for the most part, applied, and enforced by states, not by institutions of the global order. The idea that international human rights law specifies rights of global membership may be a plausible claim within one rather extreme version of ideal theory, but it is not clear that it is very helpful for understanding or morally evaluating existing and foreseeable international human rights law, at least if that evaluation must take the actual institutional resources available for the making and enforcement of international human rights law into account.

There is another, more painfully obvious reason to doubt that the idea that human rights are rights of membership in the global order will win over Chinese intellectuals who are hostile to the modern

human rights enterprise. The core of Chinese opposition to the modern human rights movement, including its international legal manifestation, is allegiance to an extremely strong notion of state sovereignty. In simplest terms, this is the view that it is nobody else's business how the state treats its own people. But presumably, any notion of global membership rights would have to involve significant restrictions on how states may treat those under their jurisdiction and hence would involve restrictions on sovereignty understood in this extreme way. I fail to see how pointing out that there is a global order would do anything whatsoever to convince someone who held a virtually absolute notion of sovereignty that it should be abandoned in order to recognize global membership rights. A Chinese intellectual who endorsed the Chinese government's extreme views on sovereignty might recognize the influence that the global order has on all of us, as individuals and as organized political communities, but still say that it is up to states to determine what rights their citizens have, and that it is a violation of sovereignty for other states or international organizations to hold a state accountable for infringements of supposed global membership rights. Indeed, she might well conclude that proper recognition of sovereignty implies serious limitations on the development of a global order. Here it is worth noting that the Chinese government seems more intent on carving out a sphere of influence in which it will set the rules, than on helping to develop a global order.

V. CONCLUSION

I hope that my responses to these thoughtful comments have both clarified my views and acknowledged the limitations of the project pursued in *The Heart of Human Rights*. I tried to make it clear in the book that I was not pretending to offer a comprehensive theory of the legal norms and institutions that are, in my view, at the heart of modern human rights practice. Instead, my goal was to entice good philosophers into treating the international legal human rights system as worthy of serious theorizing. My second goal was to make a promising beginning on the task of morally evaluating the international legal human rights system. The comments by Professors

Talbott, Ackerly, Kelly, and Risse assure me that I have succeeded in the first goal and that others will have much to contribute than I to the more successful pursuit of the second.

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