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Social Contract Theory and Transitional Justice: A Philosophical Approach to a Problem of Global Importance

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SOCIAL CONTRACT THEORY AND TRANSITIONAL JUSTICE:

A PHILOSOPHICAL APPROACH TO A PROBLEM OF GLOBAL IMPORTANCE

by

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Abstract

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Advisor: Charles Mills

In this thesis, I seek to bring together two areas of scholarly work to see how each can inform the other: social contract theory and transitional justice. The social contract, as it exists and as it was theorized about by Rousseau, was born from the world-historic forces that spread capitalism across the globe, stirring up nationalism everywhere it went. In its wake, there was vast inequality and new legal regimes which protected the hoarded wealth of the capitalist class by enshrining the right of private property along with life and liberty. To examine the intricacies of transitional justice and its mechanisms, I primarily study the examples of Rwanda and the former Yugoslavia. From these cases there are many examples of transitional justice mechanisms: two international criminal tribunals, hybrid courts, truth and reconciliation commissions, special war crimes courts, indigenous forms of dispute resolution, lustration, and amnesties. I attempt to answer three questions: Why do people commit genocide? What is the social contract under transitional justice? Is there a third state of nature? To answer these questions I draw upon a diverse body of literature from multiple disciplines. I hope that my approach to these subjects illuminates new ways of thinking about social contract theory and transitional justice.

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Contents

Abbreviations

BiH - Bosnia and Herzegovina

BWCC - Bosnia War Crimes Chambers

ECCC - Extraordinary Chambers in the Courts of Cambodia

EU - European Union

EULEX - European Union Rule of Law Mission in Kosovo

FBiH - Federal Republic of Bosnia, or Federation of Bosnia and Herzegovina

ICC - International Criminal Court

ICTR - International Criminal Tribunal for Rwanda

ICTY - International Criminal Tribunal for the Former Yugoslavia

IPIRs - Important Persons and their Internalized Representations

JNA - Yugoslav People's Army

KLA - Kosovo Liberation Army

MMA - Monitor, Mentor, and Advise

NATO - North Atlantic Treaty Organization

NURC - National Unity and Reconciliation Commission

OHR - Office of the High Representative

OSCE - Organization for Security and Co-operation in Europe

REMCOM - Regional Truth Commission for the Former Yugoslavia

RoR - "Rules of the Road" established by the 1996 Rome Agreement

RPF - Rwandan Patriotic Front

RS - Republicka Srpska

SCSL - Special Court for Sierra Leone

SFRY - Socialist Federal Republic of Yugoslavia

SPRK - Kosovo Special Prosecutor's Office

SRSG - Special representative for the Secretary-General

TRC - Truth and Reconciliation Commissions

UN - United Nations

UNMIK - United Nations Interim Administration Mission in Kosovo

UNSC - United Nations Security Council

Introduction

Before the United Nations and the League of Nations, before the Rome statute and the Hague Conventions of 1899 and 1907, and before the Bolshevik and French revolutions, Immanuel Kant wrote in 1784 that to understand the history of humanity, one must look at it from a point of view which stipulates that the ultimate purpose of the human race is to create a perfect civic constitution. In his "Idea for a Universal History," Kant conjectured that historians ought to conduct their work with these principles in mind: humankind will fully develop its natural capacities through the use of reason, that Nature has willed that humanity will develop its natural capacities by evolving beyond its animal instincts, that the natural antagonisms of human beings will lead them to create universal civic society governed by law, and that through reason, we might be able to discern the 'secret plan' which Nature has for us.

Unfortunately, it is not through reason, at first, that humanity will choose to create a universal civic society. In the end, "after devastations, revolutions, and even complete exhaustion, [nature] brings [humanity] to that which reason could have told them at the beginning and with far less sad experience, to wit, to step from lawless condition of savages into a league of nations."[1] Kant goes on to accurately predict that "the impact of any revolution on all states on [Europe], so closely knit together through commerce, will be so obvious that the other states, driven by their own danger but without any legal basis, will offer themselves as arbiters, and thus they will prepare the way for a distant international government for which there is no precedent in human history."[2] It is from these words that we can understand both the social

[1] Kant, "Idea for a Universal History From a Cosmopolitan Point of View," 18–19.
[2] Ibid., 23.

contract and transitional justice: the movement towards the creation of a perfect civic constitution, driven by violent conflict and through fictionalized legal basis.

In my thesis, I analyze the social contract and transitional justice by the application of philosophical, sociological, and political theories to see how each topic can inform the other. I believe that my research could inform scholars from multiple areas of academic study — philosophers could learn about the real life examples of people writing social contracts and political scientists could see how a universalizing approach to understanding human events could contextualize transitional justice mechanisms. I begin by sketching out the social contract of Jean-Jacques Rousseau. I focus on the emergence from the state of nature and Charles Mills' 'domination contract' in particular. I go on to take up the real life examples of transitional justice in Rwanda and the former Yugoslavia. In the final sections I answer three questions: why do people commit genocide, what is the social contract under transitional justice, and could we conceive of a third state of nature. I use Claudia Card's theory of evil, Charles Tilly's theory of contentious politics, and Elizabeth Anderson's theory of moral progress, among others, to answer these questions.

It may seem out of place to pick the former Yugoslavia and Rwanda as the primary examples of transitional justice to which social contract theory is applied because mainstream academics tend to see contract theory as concerning Western liberal democracies and capitalism. The reason I picked my examples is because they offered good contrasts. In the former Yugoslavia you have a higher level of industrialization whereas Rwanda is mostly resource extraction and agrarian economics. Moreover, Rwanda is a former colony whereas the republics of the former Yugoslavia were never colonized. Additionally, these two cases probably more than anywhere else had a high density of transitional justice mechanisms. Lastly, I was simply

unable to choose a Western capitalist, liberal democracy because there really was no country which consciously deployed transitional justice mechanisms. In the best possible cases of transitions — Spain with Franco and Portugal with Salazar — there was no transitional justice beyond some lustration and impunity, which is by definition the absence of applied justice.[3] It might seem natural that the Nuremberg trials would count as an example, but they concern crimes committed by a fascist government — hardly an example of government with the consent of the governed — and the trials mostly concerned crimes committed outside Germany, against the Allied combatants. It was victor's justice. Perhaps the only applicable example I could find was in Northern Ireland with the Good Friday Agreement, which I briefly discuss at the end.

This being said, I believe that Rousseau's account of a class contract and what Mills describes as the domination contract is something that could be applied the world over, not just Western countries as mainstream contract theorists would have it applied. This is because class divisions have existed and domination has happened throughout history and across the world. Although the conditions which produced the social contract theories of Hobbes, Locke, Rousseau, and Kant may not be present in many of the areas of the world undergoing transitional justice, I believe social contract theory still has import because of Rousseau's account of what really is the social contract.

[3] On Spain's lack of transitional justice, see Escudero, "Road to Impunity." On Portugal's lack of transitional justice, see Raimundo and Pinto, "From Ruptured Transition to Politics of Silence."

1. Social Contract Theory and the Domination Contract

In the following section I present Rousseau's account of the social contract. In particular, I focus on the concept of emergence from the state of nature and the creation of political authority. Additionally, I present what Charles Mills defines as the 'domination contract.' I use their theories as the baseline for discussing the social contract and transitional justice.

At the most basic level, social contract theories have both a descriptive and prescriptive aspect. All social contract theories seek to describe the nature of human beings, how human nature leads individuals to come together to form societies, and the arrangement of political authority that tends to take hold in these societies. The prescriptive aspect details which arrangement best orders society so as to maximize principles such as liberty, equality, and justice. Modern contractarians tend to distinguish a number of contracts within the 'social contract,' such as a political contract and a moral contract, which outlines the moral codes that regulate behavior within our society. Discussions regarding the moral contract tend to focus on the morality of pre-political 'society' under the state of nature, or at least the proto-society before the creation of political authority, and whether or not there are natural laws which prescribe a universal moral code. Some theorists argue that the moral codes of the state of nature constrain the reach of the political contract, whereas others believe that the political contract creates morality as conventional rules.[4]

There is also an epistemological contract, or at least an epistemological aspect to the social contract. The epistemological contract can be thought of as "an idealized consensus about cognitive norms and... about what counts as a correct, objective interpretation of the world, and for agreeing to this view, one is granted full cognitive standing in the polity, the official epistemic

[4] Mills, *The Racial Contract*, 14.

community."[5] The social contract creating the official epistemic community is important when thinking about ingroups and outgroups.

We must also consider that social contract theory is not merely a subject of academic curiosity, it is a cultural and historical object — something used by political actors to guide deliberations and decisions, and even being used to justify policies. Perhaps the very study of the social contract has itself changed the course of human development. Regardless, it is a historical fact that politicians, military commanders, and other leaders have, at a minimum, invoked the idea of the social contract to inspire support for their agendas. Famously, the remains of Rousseau were moved to the Panthéon to lay with Voltaire during the French Revolution.[6]

We should also distinguish between ideal theory and non-ideal theory. Somewhat similar to the distinction between prescriptive and descriptive modes of analysis, ideal theory with regards to the social contract concerns the theorizing about society under ideal conditions. What might a perfect society look like? Non-ideal theory concerns theorizing about society under non-ideal conditions. How could an imperfect society be made to look better? Because this thesis seeks to explore the intersection of social contract theory and transitional justice, I am concerned with non-ideal theory.

Because I am concerned with non-ideal theory, the way that I use the 'state of nature' in this thesis at times departs from the strict interpretation that is commonly used. Additionally, I want to discuss situations where there is not an accepted political authority which guarantees the rights and liberties of individuals and moral norms are universally accepted, but there is a level of sociability which rises above what most philosophers might consider to be the state of nature. So

[5] Ibid., 17-18.
[6] "19 Apotheose de J.J. Rousseau."

by state of nature, I may not always be talking about the strict interpretation, but a somewhat broader understanding that I use to answer questions.

Next, I briefly summarize Rousseau's accounts of the emergence from the state of nature and the establishment of political authority. What is important to understand about Rousseau's theory is that he is offering a conjectural history of human development. He does not attempt to present an actual anthropological account. Instead, the point of this conjectural history is to explicate why people might forfeit their 'natural rights' — rights we hold under the state of nature — and accept political authority. Unlike the account of the social contract by Rousseau that I present, the emergence from the state of nature and acceptance of political authority, in prescriptive theory, is used to justify a political system because people are said to offer the consent of the governed. In reality, most people do not consent to their form of government or the arrangement of social relations. To paraphrase Marx, we make our own history, but not under circumstances of our own choosing.

At first, individuals are alone, out in the world basically by themselves. Next, there is a sort of utopian proto-society as people's natural inclinations lead to compassion and cooperation. As relative levels of inequality rise, jealousy and vainglory overcomes some people, leading to conflict and violence. According to Rousseau, "consuming ambition, the zeal for raising the relative level of his fortune... inspires in all men a wicked tendency to harm one another" and eventually "[t]here arose between the right of the strongest and the right of the first occupant a perpetual conflict that ended only in fights and murders. Emerging society gave way to the most horrible state of war."[7] At this point there is already a good amount of social cooperation and industriousness. This is not quite the state of nature because there is a level of sociability. This

[7] Rousseau, "Discourse on the Origin of Inequality - Part Two," 68.

interim between the state of nature, where humans are thought to be alone in the world, and the state of society under political authority can be considered, or at least I consider, a part of a broad interpretation of the state of nature insofar as the rights of individuals are not secured by a government and moral norms may not be universally understood and respected. It is here that the buds of a future society are planted because of the rise of inequality.

The need for the creation of the state then comes from a mutual desire to secure one's belongings and persons against the attacks of others. Unlike under Hobbes' conception, where the creation of state is rational and reasonable for all members,[8] it is not universally rational, but only rational for the rich, and is a ruse perpetrated on the poor. According to Rousseau:

> Alone against all and unable on account of mutual jealousies to unite with his equals against enemies united by the common hope of plunder, the rich, pressed by necessity, finally conceived the most thought-out project that ever entered the human mind. It was to use in his favor the very strength of those who attacked him, to turn his adversaries into his defenders, to instill in them other maxims, and to give them other institutions... Such was, or should have been, the origin of society and laws, which gave new fetters to the weak and new forces to the rich, irretrievably destroyed natural liberty, established forever the law of property and of inequality, changed adroit usurpation into an irrevocable right, and for the profit of a few ambitious men henceforth subjected the entire human race to labor, servitude and misery. [9]

The reason for Rousseau's view of the emergence from the state of nature is his belief that the current social contract is bad because it is what Charles Mills calls a 'domination contract.'[10] He believes that a good contract could be created, which he details in "On the Social Contract," but this subject is not discussed in this thesis.

Rousseau is offering a specific type of domination contract. Rather than the social contract being a covenant between and among all members of a society, or even representatives for said

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[8] Rawls, *Lectures on the History of Political Philosophy*, 54-55.
[9] Ibid., 69-70.
[10] Pateman and Mills, *Contract and Domination*, 81.

members, the social contract is really an agreement between the powerful elites to set the terms of how they will rule in society, thereby perpetuating the domination of everyone else. We can think of white supremacy as a contract among whites to define whiteness, against all of the other non-whites in our societies, and in the globe, and then privileging the status of whiteness. We can also think of patriarchy as a contract between and among men to define the terms of masculinity and femininity and the division of labor so as to perpetuate the domination of women. Rousseau's account is that of a class contract. Before the establishment of political authority, people only had a natural right to their property owing to their possession of it. With the emergence from the state of nature, the social contract defines the terms of property ownership, creating private property and securing the wealth of the powerful elites. Instead of allowing for a true democracy, the class contract allows for control of the state by the wealthy few, and later corporations. It is their consent which most politicians elicit, offering only a fig leaf of participation in government to the poor so they do not revolt.

What is most important about Rousseau's theory is that Rousseau's emergence from the state of nature is achieved in stages and allows for cycles. There are four stages in the emergence from the broad interpretation of the state of nature which would unfold over a long period of time. The first stage is that of primitive human beings, which is the strict interpretation of the state of nature and subsequent stages are merely interim stages. In the second stage, we have the beginnings of society with the development of tools, weapons, and language. The third stage is the patriarchal stage, where the only 'political' authority (not truly political) is the father and the polity is the family. The fourth and last stage is the beginnings of inequality, as described earlier, with the creation of the domination contract built on class. The transition from the third stage to the

fourth stage is what I consider to be the emergence from the (broad interpretation of the) state of nature, into a state of society with political authority.

After the development of civil society, we get three more stages of development, or epochs of inequality. In the first epoch, we get the establishment of laws and private property, referred to as the rule of the rich over the poor. In the second epoch, we get the creation of magistrates, referred to as the rule of the powerful over the weak. In the third and final epoch, the transition of legitimate political authority into arbitrary power, which is referred to as the rule of the masters over slaves. Under this arbitrary power, we return to a state of nature as our rights are no longer protected, and everything is up to the capricious whims of despots. All that can happen next is tyranny, social collapse, and/or revolution. So, it must be understood that under Rousseau, there are in fact two states of nature. The state of "nature in its purity, and [the second state of nature] is the fruit of an excess of corruption."[11] Rousseau is the only theorist who offers an account of a second state of nature. This second state of nature is not a traditional, strict interpretation of a state of nature because there are extensive social relations; however, Rousseau argues — and I concur with him — that this second state of nature ought to be considered a state of nature because the rights and liberties of individuals are no longer guaranteed by a political authority and there may not be universally understood and respected moral norms. As Rousseau states, "there is so little difference between these two states, and the governmental contract is so utterly dissolved by despotism, that the despot is master only as long as he is the strongest; and as soon as he can be ousted, he has no cause to protest against violence. The uprising that ends in the strangulation or the dethronement of a sultan is as lawful an act as"[12] his tyrannical decrees of violence. Political authority does exist, but because it is tyrannical, there is no guarantee of rights and because there is tyrannical rule,

[11] Ibid., 79.
[12] Ibid.

agents of the state have little accountability to people and may act against any previously understood and respected moral norms.

What is also important about Rousseau's stages of development and epochs of inequality is that his theory points to, or at least allows for, the existence of multiple social contracts over time, and not just the Social Contract as postulated by Hobbes, himself, Locke, and Kant. As I state from the beginning, Rousseau's account of humanity's emergence from the state of nature is not to be taken literally, and is rather a conjectural history. As I quote in a larger block, Rousseau comments on his account of the stages of development by stating "[s]uch was, or should have been, the origin of society and laws."[13] Looking at the actual history of human development, however, shows that we have had society and political authority for a long time before the Enlightenment, and power was not yet arranged in the fashion described by the likes of Locke, Kant, or Rousseau until modernity. As such, we must conclude that there existed what could be understood as a type of social contract, even if incomplete. In fact, there were quite literal social contracts that existed in feudal society prior to and existing during the Enlightenment.

According to Silvia Federici, there were extensive feudal social contracts which regulated the social relations of European society. These early 'social contracts' which made, " 'privileges' and 'charters' that fixed the burdens and granted" the right for a degree of local self-government, while also allowing for the "*commutation* of labor services with money payments (money rents, money taxes) that placed the feudal relation on a more contractual basis."[14] There are additional corresponding documents that preceded and contributed to social contract theory. Charles Mills points to "papal bulls and other theological pronouncements; European discussions about colonialism, 'discovery,' and international law; pacts, treaties, and legal decisions... which

[13] Ibid., 70.
[14] Federici, *Caliban and the Witch*, 28. Italics were by the author.

collectively can be seen, not just metaphorically, but close to literally, as [the] conceptual, juridical, and normative equivalent"[15] to the signing of a social contract. Millls' presentation focuses on the relation between white European society and the rest of the non-white world, but I believe that the nature of the domination contract entails a degree of application to inter-European affairs. All of this is to say that there were social contracts long before the Social Contract as envisioned by the Enlightenment, and that Rousseau's theory best explains how new social contracts arose. During times of either war, revolution, or tyranny, there is a devolution into the first or second states of nature, as broadly interpreted, from which the eventual resolution of conflict can arise a new social contract. This is not to say that a new contract is always obtained — the forces of counterrevolution or established powers may succeed. It is only with the Enlightenment that we get the Social Contract — the modern social contract.

The transition from feudalism to capitalism necessitated the modern social contract. Starting in the 16th century, going into the 17th century and the Enlightenment, the way that people imagined 'persons' began to shift away from medieval superstition towards a new paradigm involving the Passions and Reason. The body was no longer a plane on which celestial and demonic beings did battle, but the "forces of Reason" and instincts of the body (the Passions) conflicted. In this process, "a change occurs in the metaphorical field, as the philosophical representation of individual psychology borrows images from the body-politics of the state...it is an aspect of that broader process of social reformation, whereby"[16] the bourgeoisie sought to remold the working classes for the growing needs of the emerging capitalist society.

Out of this, we get the emergence of "Mechanical Philosophy," as both a product of the changing times and a deliberate attempt to shape how the times changed. As Federici argues,

[15] Mills, *The Racial Contract*, 20-21.
[16] Federici., 135.

"Mechanical Philosophy contributed to increasing the ruling-class control over the natural world, control over human nature being the first, most indispensable step."[17] Mechanical Philosophy, as an all encompassing way of understanding the world, could only take root once the old ways of conceiving of the world had been destroyed. So, the battle of 'Reason' against the psuedo-sciences and paranormal or dark arts was not purely an academic exercise or theological campaign for the souls of humankind, but a political project — mechanical notions of the body could not take hold as "a model of social behavior without the destruction by the state of a vast range of pre-capitalist beliefs, practices, and social subjects who existence contradicted the regularization of corporeal behavior promised by Mechanical Philosophy."[18] For this reason, paired with Mechanical Philosophy, the Age of Reason came also with the revival of philosophical skepticism. Skepticism was necessary to get rid of the pre-capitalist beliefs and practices, but its application would extend into other areas of philosophy.

If Mechanical Philosophy guided theories of social control, then it's important to understand the schools of Mechanical Philosophy and which one prevailed. The two main models of the body as a machine were the Cartesian model and the Hobbesian model. On the Cartesian view, the individual is capable of developing internal mechanisms of discipline and management. As such, individuals could voluntarily regulate their own conduct, and interact with government based on consent. On the Hobbesian model, people are not capable of self-discipline, and therefore a coercive, absolute state was necessary to produce the incentives necessary to make people behave. This is because there was no Reason independent of the body, and therefore the body could not be trained to act in a different manner than originally intended.

[17] Ibid., 140.
[18] Ibid., 141.

For the Cartesian model, the relationship between the mind and body would mirror the relationship between the state and society. With the mind and the will taking sovereign control over the body, "the counterpart of the mechanization of the body is the development of Reason in its role as judge, inquisitor, manager, administrator. We find here the origins of bourgeois subjectivity as self-management, self-ownership, law, responsibility, with its corollaries of memory and identity."[19] Because individuals are seen as capable of self-managing, the necessity of concentrating power in the state to control people's behavior is lessened; instead, power is decentralized and centered in each person. As such, "[t]he development of self-management... becomes an essential requirement in a capitalist socio-economic system in which self ownership is assumed to be the fundamental social relation."[20] According to Federici, it is this model which wins out over the Hobbesian model. The Cartesian model allows for the democratizing of the methods of social discipline. Under the Hobbesian model, success can only be achieved through the absolute rule of the state. It is not that the former is preferable, but simply that it is practical. Given the focus on socialization, and the similar (albeit not the same) views on dualism,[21] Rousseau's philosophy continues the Cartesian model.

With the failure of the Hobbesian model, and the success of the Cartesian model, it should be clear why the domination contract was able to succeed. The purpose of tricking the poor into 'consenting' to the creation of legitimate political authority, or at least offering people a philosophy that says that government operates with the consent of the governed even if its not actually true, is to democratize social control. Rousseau called the creation of the state the most thought-out project that ever entered the human mind because what was required was convincing people to love their

[19] Ibid. 149.
[20] Ibid.
[21] Westmoreland, "Rousseau's Descartes: The Rejection of Theoretical Philosophy as First Philosophy."

own chains and their own jailers. With the Cartesian model, the modern social contract that took form in Europe, and then spread across the world, was a particular version of a contract. By obscuring the true masters of society (the capitalist class), governments could avoid falling into tyranny, and, therefore, avoid the necessity of a new social contract.

When discussing social contract theory, authors would be remiss not to acknowledge John Rawls, the preeminent contract theorist of the 20th century. In his 1971 magnum opus titled *A Theory of Justice*, Rawls provided a new method of understanding how one could conceive of an ideal, prescriptive social contract. In his words, the aim of his book was to "present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant."[22] According to Rawls, that best method by which we could conceive of the best principles of justice is by deploying a thought experiment whereby we imagine ourselves existing in an original position — not a state of nature, but a sort of state of ethereal existence — behind a veil of ignorance which shields us from knowing our defining features (race, sex, income level, etc.) From here, individuals would have to determine the principles that would order society and from which laws would be derived to constitute an ideal government. According to Rawls, because people do not know who in society they would be, individuals in the original position would seek to maximize the benefits of the people in the minimum position of society so that the worst off are still better off than the worst off in any other formed society. As such, individuals in the original position would come up with two key principles — the liberty principle and equality principle — to order society, and he called the ordering of this society justice as fairness.[23]

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[22] Rawls, *A Theory of Justice*, 11.

[23] Ibid. See chapters 1 and 2. For maximizing the minimum, see section 26.

For Rawls, the social contract is a metaphor for understanding how political power should be constructed and deployed and how social relations should be arranged. The original position, and the removal of the veil of ignorance, reflect the emergence from the state of nature in the state of society. Justice as fairness is seen as the obtaining of the consent of the governed insofar as the two principles are seen as what people would willingly choose for themselves, and all other arrangements of society and government which flow from justice as fairness are likewise endorsed by people because they are entailed by justice as fairness.

Seeking to apply his idea of the original position and the veil of ignorance to international affairs, Rawls wrote *The Law of Peoples* in 1993.[24] Instead of conceiving of international affairs as concerning states, Rawls chose to think of the principles of global justice as laws of peoples because what matters is the relations between people, and that states and governments are only instruments by which people's interests are mediated. As he argues in *A Theory of Justice*, society is "more or less a self-sufficient association of persons who in their relations to one another recognize certain rules of conduct as binding and who for the most part act in accordance with them... [and] a society is a cooperative venture for mutual advantage."[25] As such, it may seem natural to talk about Rawls in a thesis which engages with social contract theory and issues of global justice. I do not seek to apply Rawls' theories in my thesis for a couple of reasons.

Foremost, I do not want to apply Rawls to my thesis because, as I make clear, this thesis is concerned with non-ideal theory, while Rawls' is (mostly) concerned with ideal theory. When talking about transitional justice, one is necessarily talking about non-ideal conditions. It would be of course taken as a given that behind a veil of ignorance people in the original position would condemn genocide and ethnic cleansing. But because they are ignorant of their identities and have

[24] Rawls, *The Law of Peoples*.
[25] Rawls 1971, 4.

never experienced genocide or war themselves, these individuals would be incapable of conceiving of what mechanisms best deal with issues of corrective justice and how to respond to atrocities. The epistemological barrier which Rawls uses to justify justice as fairness renders his theory unable to seriously grapple with transitional justice at an ontological level. It may be possible to adjust his theories to transitional justice but such a project would be a thesis topic unto itself. As such, I do not engage with Rawls in this thesis.

2. Transitional Justice in Rwanda

Rwanda was colonized by Germany in 1884, lasting until 1916, after which the League of Nations, and later the United Nations (UN), placed it under Belgian Trusteeship until 1962. Although Rwanda had been under a Tutsi monarchy before and during colonial rule, ethnic categories were not rigid; under Belgian rule, though, ethnic membership was codified and exploited. In 1959, a Hutu revolution overthrew the monarchy, driving Tutsi refugees into neighboring countries, and, two years later, Major-General Juvénal Habyarimana seized power in a military coup. President Habyarimana announced, in 1990, that he would allow for multi-party elections; not long after, the Rwandese Patriotic Front (RPF) attacked from Uganda. Combined with government supported propaganda, Tutsis residing in Rwanda were labelled as accomplices of the RPF and many Hutu opposition party members were cast as traitors. After sporadic fighting and broken ceasefires, the "Arusha Accords" was negotiated in 1993 with UN implementation assistance. On April 6th, 1994, the President's plane was shot down, precipitating the genocide.[26]

Less than four months after the RPF declared a unilateral ceasefire, the UN Security Council (UNSC) established the International Criminal Tribunal for Rwanda (ICTR) by resolution 955.[27] Although Rwanda had lobbied for its creation, they voted against the resolution.[28] One strong reason for Rwanda's opposition to the ICTR was that the most stringent sentence for those convicted was only life in prison, and not execution. The logics, competencies, and structure of the tribunal more or less mirrors that of the International Criminal

[26] *The Blue Helmets: A Review of United Nations Peacekeeping*, 341-46.
[27] Ibid., 359-60.
[28] Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, 161.

Tribunal for the Former Yugoslavia (ICTY),[29] except that the ICTR was located in Arusha instead of the Hague, its temporal jurisdiction (January 1st - December 31st 1994) was narrower, and that only violations of Article III of the Geneva Convention and Additional Protocol II applied.[30] Moreover, the ICTR's mandate, unlike the ICTY, states a third purpose for its establishment — national reconciliation — in addition to maintaining peace and redressing violations.[31]

The first trial in the ICTR began in the final days of 1996, a few weeks after the first domestic trials.[32] On September 2nd 1998, Jean-Paul Akayesu was found guilty on seven counts of Crimes against Humanity, one count of Genocide, one count of Direct and Public Incitement to Commit Genocide, and not guilty on six other counts.[33] He was the mayor of Taba commune in Gitaram prefecture. This was the first the conviction by the ICTR and first conviction for Genocide in any international court; two days later, the ICTR found Jean Kambanda, the caretaker prime minister at the beginning of the genocide, guilty one of count of Genocide, Conspiracy to Commit Genocide, Direct and Public Incitement to Commit Genocide, Complicity in Genocide, and two counts of Crimes Against Humanity — the first conviction of a head of government on these violations.[34] Both were sentenced to life imprisonment. The median sentence of the ICTR, as of June 2010, was 33.5 years.[35] As of June 2016, the ICTR has indicted 93 individuals of which 61 were convicted and 14 acquitted.[36]

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[29] Westberg, "Rwanda's Use of Transitional Justice After Genocide: The Gacaca Courts and the ICTR," 6.
[30] Barria and Roper, "How Effective Are International Criminal Tribunals? An Analysis of the ICTY and the ICTR," 354.
[31] Ibid. 357.
[32] Schabas, "Genocide Trials and Gacaca Courts," 881.
[33] Laïty, Aspegren, and Pillay, "The Prosecutor Versus Jean-Paul Akayesu: CASE NO.: ICTR-96-4-T - Judgement."
[34] Laïty, Aspegren, and Pillay, "The Prosecutor Versus Jean Kambanda: CASE NO.: ICTR 97-23-S - Judgement"
[35] Hola, Smeulers, and Bijleveld, "International Sentencing Facts and Figures," 420.
[36] International Justice Resource Center website, https://ijrcenter.org/.

In Rwanda, the volume of arrests overwhelmed the domestic court system, with estimates ranging from 100,000 to 120,000 citizens imprisoned, potentially facing trial.[37] They only presented an economic determinant, as it represented a significant drain on the labor supply. By 2004, only 10,026 cases had been handled.[38] As of 2005 the International Committee of the Red Cross estimated 89,000 accused remained in detention.[39] In 1995, Rwanda convened an international conference to explore different accountability mechanisms for genocide and implemented new legislation the following year in "Organic Law No. 08/96, Organization of Prosecutions for Offenses Constituting Genocide or Crimes against Humanity committed since October 1, 1990."[40] Organic Law No. 08/96 (OL 08/96) created four categories to classify genocide suspects based on the nature and scope of involvement in the genocide, suspects were to be tried in new Specialized Chambers, and new regulations on compensation and reparation procedures were created.[41] The four categories were as follows:

> Category 1:
> a) person whose criminal acts or whose acts of criminal participation place them among the planners, organizers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity :
> b) persons who acted in positions of authority at the national, perfectoral, communal, sector or cell level, or in a political party, the or fostered such crimes;
> c) notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed;
> d) persons who committed acts sexual torture;
> Category 2:
> persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators of accomplices of intentional homicide or of serious assault against the person causing death;
> Category 3:
> persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person;

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[37] Schabas,880, see footnote 3; Westberg, 3.
[38] Westberg, 4.
[39] Schabas, 880, see footnote 4.
[40] Call, *Constructing Justice and Security after War*, 197.
[41] Ibid.

Category 4:
persons who committed offences against property.[42]

Building off of OL 08/96, The Rwandan Transitional National Assembly adopted Organic Law no. 40/2000 (OL 40/00) 'on the Establishment of ''Gacaca Jurisdictions'' and the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed between 1 October 1990 and 31 December 1994.'[43] The gacaca courts, under OL 40/00 assumed jurisdiction over crimes which fell under categories 2-4 of OL OL 08/96, added rape to category 1, and suspects accused of category 1 crimes were still processed under the Specialized Courts. "Gacaca" had existed since pre-colonial times, but was marginalized as colonial authorities imposed Western systems.[44] Under Habyarimana, the gacaca process enjoyed some renewed use, but acquired a reputation as a government tool more than a local level institution. In the immediate aftermath of the genocide, the pre-colonial form of Gacaca returned and "[e]lders and community members once again began to preside over cases and hand out judgments independent of any national or local governmental oversight."[45]

Borrowing from the gacaca process, OL 04/00 sought to modernize and formalize it with five goals in mind: "establish the truth about what happened; accelerate the legal proceedings for those accused of genocide crimes; eradicate the culture of impunity; reconcile Rwandans and reinforce their unity; and use the capacities of Rwandan society to deal with its problems through a justice based on Rwandan custom."[46] In June 2002, 80 pilot gacaca courts were established and

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[42] *Organic Law No. 08/96 On the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990* Aug. 30, 1996 (RWA) CHAPTER II § 2 <http://www.preventgenocide.org/law/domestic/rwanda.htm>.
[43] Schabas, 892, see footnote 52.
[44] Westberg, 2-3.
[45] Call, 204.
[46] Westgate, 4, see footnote 67.

in 2006 the gacaca system began operation nationwide; by April 2009, approximately 12,000 gacaca courts with over 169,000 judges had completed 1.1 million cases.[47]

The efficiency of the gacaca process is not just a result of different court procedures — there is a fundamental difference in the structure and aim of gacaca courts. There are two phases: information gathering and the trial. In the first phase, accusations are made, testimony collected, more accusations and testimony based on earlier information, and finally judges categorize suspects based on alleged offenses. There are three categories: the first category essentially corresponds to the first category from OL 08/97, the second category has three subcategories which essentially corresponds to the other three categories from OL 08/96, and the third category deals with property offenses.[48] In the trial phase, category one offenses are referred to the courts established under OL 08/96 (until 2008 when some were moved to gacaca courts), category two are referred to "sector" level courts, and category three are referred to "cell" level courts. Because of this structure, trials often take place in the village of the accused and deliberations are open to the community members. In the case of category three offenses, parties may even settle the dispute between themselves with judges acting as supervisors and ratifiers of final agreements. Most importantly, both in sentencing guidelines and the material structure of the proceedings themselves, confessions are encouraged.[49] Placing a high value on confessions supports more speedy trials as well as an atmosphere of reconciliation as lower level offenders appeal for re-integration with their former communities.

One last note before moving to the next section. Following an agreement in 1992, a truth commission had been established to investigate and report on atrocities since October 1, 1990

[47] Ibid., 4-5.
[48] Ibid., 4.
[49] Ibid., 5.

and published mid 1993. The report was well received domestically and internationally, but its work was short lived.[50] Importantly, this was a truth commission set up before the Rwandan genocide, and was intended to investigate past atrocities The work of truth and reconciliation lives on, though, in the National Unity and Reconciliation Commission (NURC), which was created in a 1999 law.[51] The work of the Rwandan government through, and in addition to, the NURC has been in some ways laudable. The government has prioritized fighting poverty, furthering socio-economic justice, and leading development projects as necessary for promoting national unity and reconciliation in post-genocide Rwanda. There have also been a number of local associations which promote community integration. It is in these local associations where a lot of the work of what other national truth and reconciliation commissions have done. For instance, associations have 'dialogue-building programs,' encouraging repentance, and programs to "sensitize other Rwandans with whom they live side by side in "the community to tell the truth."[52] Having a decentralized, local process may lead to Rwandans feeling as if they 'own' the process more than if it was a centralized, national level process. The report argues that the work of the local associations have promoted a sense of 'national identity.'

Not everyone looks so positively on the NURC. Janine Clark argues that the reconciliation project's focus on national unity is meant to be created by a negation of ethnic differences, thereby making a false unity wherein people can not be open and honest about the past.[53] The problem with negating ethnic differences, and instead trying to impose a 'Rwandan identity' against the Tutsi and Hutu distinction, is that the argument presupposes an

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[50] Hayner, "Fifteen Truth Commissions--1974 to 1994: A Comparative Study," 630-32.
[51] *Law No. 03/99 Establishing the National Unity and Reconciliation Commission* Mar. 12, 1999 (RWA) <https://www.refworld.org/docid/3ae6b59a18.html>.
[52] Sentama, "Unity and Reconciliation Process in Rwanda."
[53] Clark, "National Unity and Reconciliation in Rwanda: A Flawed Approach?" 137-54.

oversimplified view of the cause(s) of the genocide. It is important to understand that at least part of the cause of the genocide was political differences, not just some old, tribal hatreds that naturally lead to violence. Rwanda was transitioning into a multi-party democracy. Political divisions that cut across ethnic lines would be papered over in a world where national unification rested on the view that the opposite of unity is defined solely as ethnic division. This being said, the author's article is based on theoretical analyses of the NURC's themes and programs, and not on any empirical data.[54]

The last transitional justice mechanism used in response to Rwanda is universal jurisdiction. Universal jurisdiction refers to domestic criminal prosecutions for acts that are illegal under international law, and took place outside the borders of the prosecuting state. In 2001, a Belgian court convicted two nuns for their participation in the killings of Rwandans who sought refuge in their convent.[55] The principle which guides universal jurisdiction is "the notion that certain crimes are so harmful to international interests that states are entitled — and even obliged — to bring proceedings against the perpetrator, regardless of the location of the crime or the nationality of the perpetrator or the victim."[56] Universal jurisdiction is currently guided by what are called "The Princeton Principles of Universal Jurisdiction," based on deliberations by the Princeton Project at Princeton University in 2001. The 14 Principles outline everything from qualifying international crimes to basics of jurisprudence to guide prosecutions to matters of international relations which would limit the scope of applicability. It is worth noting that universal jurisdiction, albeit not known by the terminology at the time, is probably the oldest use

[54] Ibid., 138.
[55] Rettig, "The Sovu Trials: The Impact of Genocide Justice on One Community," 201.
[56] Robinson M., "Preface," 16.

of the discussed mechanisms. The most common crime prosecuted has been piracy, and later slavery. War crimes and crimes against humanity are relatively new additions.[57]

Although there have been a few more cases since the first prosecutions of the nuns in Belgium, they were contained to prosecuting suspects who already resided in the host countries and did not represent a "prosecute or extradite" form of combating impunity elsewhere.[58] The "prosecute or extradite" principle of international law, and not just universal jurisdiction, holds that if an accused criminal is within a state's border, that said state has the obligation to either prosecute the accused or to extradite him or her to a country willing to pursue a prosecution. Examples of crimes that generally fall under the purview of "prosecute or extradite" principle which do not apply to universal jurisdiction are terrorism and international drug trafficking. This being said, there is significant overlap between the two ideas.[59]

[57] Macedo, "The Princeton Principles on Universal Jurisdiction," 20–25.
[58] Leonard, "The Evolving Nature of Universal Jurisdiction in Rwanda."
[59] Damrosch, "Comment: Connecting the Threads in the Fabric of International Law," 93.

3. Transitional Justice in the former Yugoslavia

The Socialist Federal Republic of Yugoslavia (SFRY) consisted of six republics: Bosnia and Herzegovina (BiH), Croatia, Serbia, Slovenia, Macedonia, and Montenegro. After reforms to the constitution in 1974, two autonomous regions within Serbia, Vojvodina and Kosovo, were given more power at the federal level. Because internal boundaries rarely coincided with demographic distribution and a weak central government, economic crises throughout the 1980s stirred inter-ethnic tension and nationalist unrest. By 1991, Croatia and Slovenia each declared independence, followed by a successful referendum in Macedonia, and a vote for independence in BiH.

What distinguished the conflict in BiH and Croatia was the difference in military capacities. Under the SFRY, the Yugoslav People's Army (JNA) was composed of members of every ethnic group, although disproportionately made up of Serbs. Each republic also had its own military units, as well as local units of varying levels, which resembled reserves/national guards and irregular militias which could be activated by the central government if needed. When the wars broke out, these different units divided and coalesced along ethnic lines and members of larger units, such as the JNA, appropriated weapons and *materiel* for each ethnic groups' use. In BiH, Bosnian Croats and Bosnian Serbs relied on their "big brother" republics for support; Bosnian Muslims, however, had no such protector.[60] When Slovenia and Croatia declared independence, Slovenians and Croats in the JNA deserted and joined their respective armies, effectively cementing Serb dominance of the JNA. Moreover, the UNSC enacted an arms embargo in late 1991 and, despite a UN General Assembly resolution calling for an embargo exemption for BiH which failed in the Security Council, cemented the disparity between Bosnian

[60] Power, *A Problem from Hell: America and the Age of Genocide*, 247–49.

Muslims and their Serbian counterparts.[61] The conflict formally ended with the Dayton agreement on December 14 1995.[62]

The disparity was even greater in Kosovo. In 1989, Slobodan Milosevic, then president of the Socialist Republic of Serbia, forced through a constitutional amendment which stripped Kosovo's autonomy, allowing for the centralization of security forces in Belgrade.[63] One year later, the regional assembly unilaterally declared independence and was subsequently disbanded by Serbian government.[64] After the Dayton agreement affirmed Serbia's territorial integrity, lacking any formal institutions, embittered Kosovar Albanians joined the Kosovo Liberation Army (KLA) and enjoyed some support from Albanian émigrés; in 1998, the KLA began to attack Serbian officials and was met with a disproportionate response by Serbian forces. After Milosevic rejected a US-European proposal to restore Kosovo autonomy in February 1999 and launched an ethnic cleansing operation, NATO began a 78 day bombing campaign which resulted in an agreement to a peacekeeping mission.[65] The United Nations Interim Administration Mission in Kosovo (UNMIK) was established the following day, on June 10, 1999 by UNSC resolution 1244.[66]

The ICTY was created on May 25, 1993 by UNSC resolution 827 and was inaugurated on November 17, 1993 at the Peace Palace in the Hague.[67] Although Dragan Nikolic, a commander of Bosnian Serb detention camp, faced the first indictment of the ICTY, on

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[61] Ibid., 263; *The Blue Helmets,* 497.
[62] *The Blue Helmets,* 560.
[63] Power, 445.
[64] Fichtelberg, *Hybrid Tribunals: A Comparative Examination*, 25.
[65] Power, 447-59.
[66] Fichtelberg, 26.
[67] *The Blue Helmets,* 506-7.

November 7, 1994,[68] it would not be until May 7, 1996 that an indictee, Dusan (aka Dusko) Tadic, a Bosnian Serb politician and former paramilitary, faced trial — almost three years after the ICTY's creation.[69] As of August 2019, proceedings for 158 of the 161 accused have concluded with 90 sentenced, 18 acquitted, and the other 50 referred to national courts or concluded for other reasons.[70] The median sentence handed down in the ICTY as of June 2010 was 15 years.[71]

As part of the Dayton agreement, BiH was divided into two regional entities, the Federal Republic of Bosnia (or Federation of Bosnia and Herzegovina, but hereinafter FBiH) and Republicka Srpska (RS), with a third polity, Brčko District, created in 2000.[72] Below the regional level, the local governments are constituted as follows: The FBiH has 10 cantons and municipalities within each, the RS has municipalities and five district courts, and the Brčko District has a Basic Court.[73] The procedures for prosecution at the domestic levels for BiH as well as Croatia and Serbia were determined by the 1996 Rome Agreement under "Rules of the Road" (RoR) so as to avoid any accusations of bias. The ICTY reviewed and approved all domestic prosecutions against alleged war criminals.[74]

The Dayton agreement also established a tripartite presidency represented by one Croat, one Serb, and one Bosniak and established the Office of the High Representative (OHR) which was later endowed with special powers that allowed for a high degree of executive control. The

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[68] Goldstone, "The Prosecutor of the Tribunal Against Dragan Nikolic Also Known as 'Jenki' Nikolic: CASE NO. IT-94-2-I - Indictment."
[69] Bass, *Stay the Hand of Vengeance - The Politics of War Crimes Tribunals*, 206.
[70] "Key Figures of the Cases." An example of conclusion for other reasons would be that the accused died before proceedings concluded.
[71] Hola, 420.
[72] Fichtelberg, 108. There's some discrepancy over the name of the regional entity that isn't the Republicka Srpska, so I will stick with the FBiH designation.
[73] Ivanišević, "The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court," 5 and note 18, 5.
[74] Fichtelberg, 69.

OHR, in partnership with the ICTY, established the Bosnia War Crimes Chambers (BWCC) in 2005 and installed it within the State Court (national) system that had been established three years prior.[75] There are two other criminal courts at the State Court level, one of which handles economic crimes and the other general crimes, and the BWCC is comprised of five three-person panels and one five-person appellate panel. Moreover, the State Prosecutor's office was expanded with the addition of the Special Department for War Crimes.[76] The BWCC and the State Prosecutor's office were to be staffed by a mix of international and Bosnian jurists, for which the ratio would change over time. The purpose of the Prosecutor's office and its expansion was to ensure that cases proceeded impartially and competently, build local judicial capacities through the cooperative arrangement, instantiate local trust in institutions, and help justice be done in a speedier manner.

The creation of the BWCC and the Special Department was precipitated by a winding down of the RoR and the review authority of local prosecutions passed from the ICTY's Office of the Prosecutor to the national level. Moreover, as the ICTY sought to complete their work within a timeline provided by the UNSC, cases were transferred to the national level under Rule 11 *bis*.[77] Given the variety and scope of responsibilities, the Special Department had a monumental task at hand: they needed to initiate prosecutions, process ICTY transfers, review new local prosecutions, and transfer prosecutions to local courts. In 2008, the Bosnian Ministry of Justice developed a "National War Crimes Strategy" to streamline this process and communicate their plan to receive responsibilities.[78] According to a 2011 study by the OSCE, between 2005 and September 2010, the BWCC has tried 166 cases, with 52 of the 68 completed

[75] Ibid., 4-5.
[76] Fichtelberg, 108.
[77] Ivanišević, 6.
[78] Fichtelberg, 109.

cases resulting in convictions.[79] Nonetheless, there are still a number of cases to be heard at both the national and local level.

Although the conditions of the judiciary in BiH were quite bad, it could not compare to that of Kosovo. Because of actions taken under Milosevic as mentioned earlier, the entire security and legal apparatus relied on Serbian forces. After the signing of the Rambouillet agreement, the peacekeeping mission was established two-fold: operational control fell to NATO, which established the Kosovo Force for military presence, and civilian administration was led by a special representative for the Secretary-General (SRSG) and through UNMIK.[80] In 2000, UNMIK issued Regulation 2000/64 which created "Regulation 64 Panels," which were judicial panels made up of two international judges and one Kosovo judge. Moreover, the SRSG had the ultimate authority to replace any local jurist (i.e. judge, prosecutor, etc.) with international personnel, which could be requested through a petition by another jurist but was also *ex proprio motu*.[81] Moreover, the SRSG could strike down any law passed by the Kosovo Assembly per the Constitutional Framework promulgated on May 15, 2001.[82] This arrangement lasted until 2008, when Kosovo declared independence from Serbia, and much of the overarching mission mandates passed to the European Union Rule of Law Mission in Kosovo (EULEX).[83]

EULEX was created "to 'Monitor, Mentor, and Advise' or MMA all institutions related to the rule of law while retaining executive powers to adjudicate certain categories of serious and

[79] Ibid., 109, see note 21.
[80] Call, 273-74.
[81] Fichtelberg, 104 Latin for "of one's own accord," meaning a petition by another jurist was not necessary for the replacement of a local jurist with international personnel.
[82] Call, 285.
[83] Fichtelberg, 106.

complex crimes."[84] EULEX operates within the framework of UNSC Resolution 1244, the same resolution which established UNMIK, meaning they initially shared competencies and functions. Pursuant to its institution and capacity building mandate, EULEX worked with the Kosovo Assembly to pass "Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo, which gave EULEX judges the authority to hear cases in Kosovo courts under the authority of the Assembly of EULEX judges."[85] The law also integrated EULEX participation with the "Kosovo Special Prosecutor's Office (SPRK) in a complex web of organizational relations."[86]

Unfortunately, due to a number of pre-existing organizational deficiencies as well as unclear policy directions, EULEX's use of executive functions bled into the administration of its MMA duties, hampering capacity building goals and reminding locals of the UNMIK's legacy.[87] Recognizing this problem, in 2012 "an agreement was signed between the Kosovo Justice Minister, the EU Special Representative, and the head of EULEX under the Compact on Joint Rule of Law Objectives that defines EULEX priorities for the 2012-2014 mandate."[88] Under the Compact, no formal authorities or powers would change; however, EULEX committed to changing the implementation of their MMA duties, with a focus on informal mentoring, separating the personnel who advise and monitor from those whom enact executive functions, and a greater commitment to devolving competencies to local panels and judges. In assessing the success of the EULEX mission to adjudicate war crimes cases, it's important to understand the situation which was inherited from UNMIK as well as the fact that many of the perpetrators

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[84] Welski, "Hybrid Court System in Kosovo: Has EULEX Proven to Be the Device to Strengthen the Independence and Effectiveness of the Judiciary?" 15.
[85] Fichtelberg, 107.
[86] Ibid., see note 20.
[87] Welski, 15.
[88] Ibid., 17.

would have left Kosovo in 1999. As it stands, there are currently 100 EULEX/Kosovo war crimes investigations, five ongoing trials, 15 adjudicated cases, and 13 arrest warrants for Serbian defendants outside of Kosovo.[89]

The last policy frequently deployed in periods of transition is lustration. Lustration refers to the removal of public officials from the bureaucracy, and the prohibition of individuals from serving in future government positions. In BiH, significant vetting of the police force was necessary for the post-Dayton Accords periods, as many police officers were deployed as soldiers during the former Yugoslav wars. Additionally, judges and prosecutors required vetting, as the weak judiciary required trustworthy jurists while UNMIK and EULEX was underway. From 1999 to 2002, 24,000 police officers were vetted and approximately 1,000 judges and prosecutors were vetted from 2002 to 2004.[90] Lustration can be an important policy tool in limiting the influence of previous regimes when mass prosecutions may be politically infeasible.

[89] Borchardt, "EULEX and War Crimes."
[90] Finci, "Lustration and Vetting Process in Bosnia and Herzegovina," 217.

4. A Dialogue Between Social Contract Theory and Transitional Justice

In the following section, I apply social contract theory to issues of transitional justice, combined with other sociological, political, and philosophical theories. I use these theories to answer three questions: Why do people commit genocide? What is the social contract under transitional justice? What should the international community do to help countries under transitional justice?

Before addressing these questions, it is first important to look at what has already been said about the combined subject. In looking through the literature, I could not find that much discussion of both subjects. Most references to social contract theory and transitional justice briefly mention the social contract, and invite the reader to imagine transitional justice as being a moment of creating a new social contract, and then quickly moves on from that point. For instance, in a three year strategic plan, the International Center for Transitional Justice mentions the social contract once, invoking the metaphor to talk about new constitutions.[91] In a journal article about indigenous rights and relations in New Zealand, the author similarly references the social contract to talk about a treaty between Maori tribes and the British settlers as a reimagined social contract which founded the eventual New Zealand state.[92] I could only find two sources that tried to talk extensively about what the social contract is and how that could inform transitional justice.

In a book on the transitions from communism to liberal democracy in Eastern Europe, Noel Calhoun discusses what she identifies as the 'five key tools' of the ideology of liberal democracy:

1. Social contract metaphor structures the way that politicians think about the past and the responsibility of a new regime for a past regime's unjust acts.
2. The rule of law forbids the exercise of force without legal authority
3. The ideology of democracy ascribes great value to inclusive participation.
4. Openness is a significant value. (Freedom of speech, press, assembly, etc.)

[91] Tolbert, "Pursuing Justice in Changing Times," 12.
[92] Winter, "Towards a Unified Theory of Transitional Justice," 230.

5. Many people throughout the world express their desire to live under a liberal democratic regime because it holds out the promise of justice.[93]

For Calhoun, the social contract represents an 'invented tradition' by liberalism, an anachronism for our current society. Social contract theory has contributed three things to liberal democratic theory. First, it contributes the rule of law, which provides predictability, consistency and impartiality of judgments. Second, it contributes a legitimate source of law by way of the consent of the governed. Third, it contributes a "surprising model for radical, yet peaceful, political change."[94] Calhoun derives her vision of the social contract from a Hobbesian model, explicitly invoking and citing the Leviathan, but I believe she fails to grapple with the implications of his entire work, specifically that people are incapable of change and that they act according to natural laws.

Calhoun goes on to argue that social contract theory divides time into three phases or eras: the past, the devising of the social contract, and the post-contractual society. In this way, there is an organizing of our thoughts about the present society and what constitutes the 'past' before the contract. In the past, there is no reason to assess 'crimes' committed under the state of nature. Because violence is unavoidable, any normative assessment is irrelevant. Standards of society do not bear on the state of nature. In the second phase, the procedures involved in the devising of the social contract "inveighs against holding individuals responsible for unjust acts committed during the state of nature. People may not be excluded from the social contract on the basis of their past offenses."[95] The social contract then established the rule of law, which promises equal protection under the law, as well as predictability, because punishments for crimes are already known. For

[93] Calhoun, *Dilemmas of Justice in Eastern Europe's Democratic Transitions*, 29-30. Text does not numerate the sentences nor are the quotes consecutive, but each line is a quote. Parenthetical is my own.
[94] Ibid., 31.
[95] Ibid., 32.

this reason, there should be no retroactive prosecution. Lastly, in the post-contractual society, Calhoun believes that the social contract should be forward-looking. The erasure of the past is necessary for order. It is clear that the author does not seriously consider the social contract theory of Hobbes, as well as providing no mention or citation of Rousseau. I believe that her analysis would have been better served if she considered his contract theory. Lastly, Calhoun analyzes the nation-state as a single, cogent actor instead of understanding that there are ruling classes, and class conflict which can drive the policy choices of governments.

The best interpretation and application of the social contract to a subject related to transitional justice, although not precisely regarding it, comes from the Norwegian Peacebuilding Resource Centre. It is important to note that this concept note is concerned with peacebuilding generally, and not transitional justice specifically. Mezzera, et. al. begin by acknowledging the contributions of Rousseau to the concept of the social contract. Unlike in this thesis, they focus on the normative features of the social contract, or what a social contract ought to look like, as well as the descriptive features. From Rousseau, they identify two politico-philosophical lineages: "[f]or the liberal-individualistic lineage, a social contract should serve to maintain property rights and public order. For the human rights and equity lineage, social justice is the goal."[96] Although it is true that both lineages have motivated political decisions, in the liberal-individualistic lineage it seems easier to find the domination contract, inasmuch as the focus of the contract is on property rights and public order.

In the democratic, industrialized parts of the world, the authors state that there is a political equilibrium which balances the interests of different groups within society, which is to be contrasted with 'conflict-afflicted' countries. In these countries, the equilibrium includes more

[96] Mezzera, Sogge, and Lister, "Engaged Societies, Responsive States: The Social Contract in Situations of Conflict and Fragility," 8.

than just the state — political elites, non-state actors, and informal institutions share the responsibilities and revenues that normally would flow entirely through the state. Such equilibriums fail to deliver universal standards of governance and are considered unstable.

The authors then present a comprehensive definition of a social contract, as developed by a team commissioned by the Organisation for Economic Co-operation and Development. The social contract is "a process for bargaining, articulating and mediating society's expectations of the state"[97] with 5 key features:

1. *expectations* that a given society has of a given state
2. *state capacity* to provide services, including security, and to secure revenue from its population and territory to provide these services (in part a function of economic resources)
3. *élite will* to direct state resources and capacity to fulfil social expectations
4. the existence of *political processes* through which the bargain between state and society is struck, reinforced and institutionalised
5. *legitimacy* plays a complex additional role in shaping expectations and facilitating political process.[98]

Important to the features and definition of the social contract is that everything is seen as in flux. The social contract is a process; it is the bargaining, articulating, and mediating of society's expectations over how state capacities will be used through political processes directed by elite will, and in exchange for a conferral of legitimacy upon the state by the members of society.

The authors go on to distinguish between a social contract and a social covenant. A social covenant is a horizontal agreement between groups across various demographic differences within a political community to cooperate together and with the state. In the context of preparing a document to inform peacekeeping policies, this makes sense; peacekeeping missions sometimes deal with quite literal covenants, written down and signed, which are a part of some accords, peace treaties, or even a constitution. The social covenant may also be interpreted broadly, and

[97] Ibid., 9.
[98] Ibid. Italitics found in text. Each numbered line is a contiguous quote.

philosophically. According to the definition that the authors use, a social covenant can be seen as creating the society whereas the social contract creates the state. The social covenant is seen as determining the fundamental principles and values that undergird society. On this interpretation, I would compare the author's distinction to that of Mills' distinction between the moral social contract and the political social contract.

The other concept which the authors relate to the social contract is social cohesion, which "refers to the reduction of disparities, inequalities, and social exclusion within or between societal groups, as well as the strengthening of social relations, interactions, and trust. Such disparities often coincide with political divisions and forms of organied [sic] violence, sometimes driven by long–standing grievances and collective humiliation."[99] Social cohesion and social contracts are interrelated. Poor social cohesion can be repaired by renegotiating the social contract. Likewise, poor social cohesion undermines the stability of the existing social contract.

Given this discussion by the authors, it is clear that there can be meaningful dialogue with political scientific research related to transitional justice and social contract theory. This being said, there was little engagement with the philosophical aspects of the social contract and what defines them. The most positive aspects of the authors' contribution is that they recognize that the state is not one cogent actor but, rather, influenced by elites and other social groups pushing and pulling policy decisions, and that the social contract is as much a process as it is a thing at a particular moment in time.

[99] Ibid., 11.

5. Why Do People Commit Genocide?

In conducting my research for this thesis, in discussions with non-academics, a frequent question I would get is "why do people commit genocide?" There are of course racially tinged, or orientalizing, explanations for some genocides. For example, the conflict in the former Yugoslavia was merely the result of "primordial hatreds and ancient grievances," according to neoconservative thinkers.[100] Foreign policy experts like Robert Kaplan, whose writings influenced Bill Clinton's foreign policy, set aside the secular, political interests of factions in war and instead portrayed the violence in the Balkans as a result of tribal and religious conflict that went back centuries. This is, obviously, an unscientific view of the subject. Ethnic divisions do play a part in conflict, but it is better understood as a modifier to the conflict. Ethnic, racial, and religious groupings lead to sorting among participants in conflicts. If, as Carl von Clausewitz is correct in saying that "[w]ar is not merely a political act, but also a real political instrument, a continuation of political commerce, a carrying out of the same by other means"[101] then perhaps we might say that genocide is a continuation of contentious politics by other means.

Charles Tilly extensively developed theories in contentious politics, which he defined as "discontinuous, public, collective claim-making in which one of the parties is the government."[102] When politics become contentious, there is a higher chance of 'collective violence,' episodic social interactions characterized by the inflicting of damage, towards both people and objects, and some level of coordination. During periods of contentious politics, coordination is usually preceded by 'boundary activation,' the "shift in social interactions such that they increasingly (a) organize around a single us-them boundary and (b) differentiate between within-boundary and cross-

[100] Atanasoski, *Humanitarian Violence*, 59. Atanasoski is referring to comments by Robert Kaplan.
[101] von Clausewitz, *On War*, 119.
[102] Tilly, *The Politics of Collective Violence*, 9.

boundary interactions."[103] Social inequality — often a source of contentious politics — is generated by exploitation and opportunity hoarding, the securing of a valuable resource by and for a categorically bounded network. Boundary activation is often in response to threats, whether perceived or real, to hoarded opportunities and resources, with the boundaries mapping onto the bounded network. The distribution and arrangement of opportunities and exploitation influence the propensity for one type of boundary to be activated over others. So, even in a deeply misogynistic society, there might be little solidarity between women of different ethnic groups if socio-economic arrangements are determined by ethnicity.

In the course of boundary activation, the heightening of contention leads to greater attempts to coordinate collective action. Organizations, as well as individual organizers, seek to build power by incorporating previously inactive members of their group, resulting in brokerage, the "linking of two or more previously unconnected social sites by a unit that mediates their relations with one another and/or with yet other sites."[104] Brokerage is a type of relational mechanism, a social mechanism which alters the connections between and among people. Relational mechanisms, along with dispositional and environmental mechanisms, combine and reproduce to trigger social change. Social processes are sequences of mechanisms which replicate in patterns, often leading to similar outcomes. Four processes, or groups of mechanisms, common to contentious politics are mobilization, political identity formation, coalition formation, and polarization. Tilly defines polarization as the

> widening of political and social space between claimants in a contentious episode and the gravitation of previously uncommitted or moderate actors towards one, the other, or both extremes. When it occurs, polarization is an important accompaniment to contentious episodes because it vacates the moderate center, impedes the recomposition of previous

[103] Ibid., 21.
[104] Tilly and Tarrow, "Contentious Politics and Social Movements," 447.

> coalitions, produces new channels for future ones, fills even the most pragmatic of policy issues with ideological content.[105]

These processes also interact with and reproduce each other. Mobilization and coalition formation often leads to an opposing coalition formation, and then polarization. What is significant about a cycle of coalition formation and counter-coalition formation is for the linking of unrelated issues.

Imagine group A, group B, group ~A, and group ~B, with each letter pair groups holding opposing positions. Groups A and B are more powerful than groups ~A and ~B, so groups ~A and ~B decide to form a coalition to fight against both groups A and B. Before the formation of the first coalition, neither group A or B had any contact; however, faced with emboldened opponents, a counter-coalition would beneficial for both. Subsequent iterations would add groups C and ~C, D and ~D, etc. leading to polarization. This account of coalition formation and counter-formation is simplistic, and provides a rational explanation for a social phenomena which may lack any reasoned approach on the part of the actual decision makers. Once there is significant enough polarization, the social practice of forming a coalition with the enemy of your enemy can detach from initial utilitarian considerations and become instinctual, reactionary position-taking. When an adversary is prone to automatic disagreement, a savvy group can bait their opponent into taking unsavory positions or alliances which they would never have accepted under restrained deliberations. Of course, not every coalition formation and mobilization leads to a counter-formation, even in a polarized society; moreover, not every counter-coalition will have the same level of coordination or resource pooling. Even in the baiting example, the forced alliance may be in name only.

From examining contentious politics we can see processes that may precipitate genocide. This is not to say that it is always the case. In most instance of contentious politics, there is no

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[105] Ibid., 449.

where near the level of violence that would approach that of a genocide or ethnic cleansing. Nor have all cases of genocide historically been precipitated by contentious politics. I believe, however, that in most cases there have been, such as in Rwanda and in the former Yugoslavia.

In both scenarios, prior to the outbreak of genocidal violence, there were transitions towards a more liberal, democratic society. In Rwanda, President Habyarimana had announced in 1990 a transition towards a multi-party democracy. This was followed by an invasion of the RPF, leading to a three year civil war that ended in 1993. With the Arusha Accords in place, there were to be general elections for the national government with participation from multiple parties. The election never happened because of the death of Hayarimana and the outbreak of the Rwandan genocide. In the former Yugoslavia, the federal Yugoslav government moved towards ending one party rule, but tensions between the Serbian and Croats and Slovenian Socialist Republics led to secessions by the latter, and the yet to be recognized break-up of the Socialist Federal Republic. The breakout of war led Croats and Slovenians in what is today the BiH to join arms with their comrades from the Socialist Republics of Croatia and Slovenia respectively. The Bosnian Muslims lacked a "brother republic" to defend them against Serbians, so they were subjected to ethnic cleansing. Later the Kosovars faced ethnic cleansing for similar reasons as the Bosnian Muslims. Why did the move towards, and potential for, political liberalization end up leading to genocidal violence, and why did the violence mostly fall along ethnic lines?

In both situations, the move towards liberalization brought the potential (and in all probability would have, had events unfolded differently) relative decline in the position of the ruling ethnic group. There would not have been an inversion in power relations, where they became the ruled over, but just a decline in power. In Rwanda, the stepping down of President Habyarimana, a Hutu that implemented policies which benefited Hutus, and multiparty elections

would have brought some Tutsis into government as well as moderate Hutus that wanted equal treatment for both groups. In the former Yugoslavia, the Serb dominated Socialist Federal Republic would have lost a substantial territorial loss with the secession of Croatia and Slovenia, and Bosnian Serbs would not have been in the majority in a seceded BiH. Serbs in the remaining republics still would have remained in power — in fact, with the departure of the other Socialist Republics, their relative power within the remaining state would have increased! — but Serbian power over the region would have waned. Facing such possibilities, Serbs and Hutus would have had fewer opportunities and resources to hoard. With this threat, boundaries were activated, where the boundaries were determined by the ethinc identity of the bounded network. This activation led to mobilization, and cross-class coalitions. In the absence of strong civic institutions and the rule of law, polarization accelerated unabadated into genocide. The only opposition to be found was in the counter-coalitions and mobilization by Croats and Slovenians, and by the already armed and mobilized Tutsi forces in the RPF.

Given these facts, it still may appear difficult to imagine that ordinary people would be motivated to commit acts of genocide over what is fundamentally a question of unequal resource distribution. Would you really be willing to kill innocent civilians for a better paying job, or a slightly bigger home? Many of the participants in the conflict may not have actually benefited from the uneven distribution of resources prior to the conflict. Certainly the risk of dying would make participation in a campaign of ethnic cleansing imprudent. If it is difficult to imagine still why most seemingly moral people would participate in a genocide, I ask the reader to consider what Mark Twain wrote, and to think about some comparisons to other policies. Twain wrote:

> There were two “Reigns of Terror,” if we would but remember it and consider it; the one wrought murder in hot passion, the other in heartless cold blood; the one lasted mere months, the other had lasted a thousand years; the one inflicted death upon ten thousand persons, the other upon a hundred millions; but our shudders are all for the “horrors” of the

> minor Terror, the momentary Terror, so to speak; whereas, what is the horror of swift death by the axe, compared with lifelong death from hunger, cold, insult, cruelty, and heart-break? What is swift death by lightning compared with death by slow fire at the stake? A city cemetery could contain the coffins filled by that brief Terror which we have all been so diligently taught to shiver at and mourn over; but all France could hardly contain the coffins filled by that older and real Terror—that unspeakably bitter and awful Terror which none of us has been taught to see in its vastness or pity as it deserves.[106]

I am not attempting to normatively compare between genocides, or to differentiate state policies. Instead, we should consider that although there are genocides of 'hot passion,' people of seeming normal moral compunction may not notice the long, slow genocide done in 'heartless cold blood.' Take for example the Israeli occupation of Palestine.

With Israel and Palestine, there was a quick, hot passionate moment of Terror — the Nakba, or the "miraculous clearing of the land" from the Zionist perspective.[107] Ever since the Nakba, parts or all of Palestinian territory (including both what the international community recoqnizes as the territory in Gaza and the West Bank, and the Israel, which proponents of Palestinian liberation also consider Palestinian land) have been occupied by the Israeli state, and to this day there is significant strictures on all of Palestinain life.[108] From control of who is allowed into and out of Gaza and West Bank, to prohibitions on Palestinian fishing along their own coasts, to control over the electrical and water supplies for the territories, the Israeli government exercises significant authority over what is ostensibly Palestinian governed bodies, with no democratic recourse. The Israeli policy towards legitimizing illegal settlements by Israeli settlers is nothing short of a slow paced ethnic cleansing of Palestinian land. Paired with rampant killings of civilians, polluted water supplies, denial of healthcare, the Israeli government is also slowly killing the Palestinian people, making living conditions literally unlivable in the hopes that more Palestinians would leave, and

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[106] Twain*, A Connecticut Yankee in King Arthur's Court,* 70-71.
[107] Finkelstein, Blacklisted Academic Norman Finkelstein on Gaza, "The World's Largest Concentration Camp."
[108] See Chomsky and Pappé, *On Palestine*.

Palestniain refugees would give up hope on returning. The question is, how can ostensibly moral people support, or even perpetrate these crimes?[109]

I invite the reader to consider lastly the era of Jim Crow. Again, I do not want the reader to believe that I am drawing any normative comparisons. Everything discussed is bad and wrong, and I am not here to order all of the harms of the world from most bad to least bad. I only invite the reader to to consider these various cases to help get insight into how people get to a position where they are willing to commit genocide. I need not belabor the horrors of the Jim Crow era. I bring up the subject for only two reasons: 1. to show that millions of seemingly good, upstanding people would support and participate in a system that wreaked a slow, heartless terror on millions of their fellow citizens, much as Twain describes and 2. there is a difference between structural inequalities and oppression, and a slow ethnic cleansing. The difference is the social contract.

African-Americans were, and are, a party to the social contract categorized as subhumans, or second class citizens. This can be contrasted with the indigenous populations, who were collectively subjected to multiple genocides at the hands of white America (as there were many tribal nations that were wiped out), who are not considered a party to the American social contract. The same may be said of Palestine. Some Israelis in fact try to argue essentially this point, that because some of the past governments have sought a two-state solution that the Israeli government does not have to be responsive to the demands of Palestinians living in Palestine (which ignores the separate treatment for Israelis and Palestinians living in Israel). This is a misguided argument because, as stated above, Israel controls, at a minimum, the borders, immigration policy, and trade policy of the Palestinian territories, which makes it ruling the polity. Regardless, the mindset of the Israelis who do not actively oppose the occupation of Palestine is that Palestinians are not a

[109] "Israel: Apparent War Crimes in Gaza."

party to their social contract, and therefore ought not enjoy its protections. This is why there has not only been a proliferation of extrajudicial killings of Palestinians by the Israeli Defense Forces,[110] but senior politicians have in fact encouraged soldiers to commit these killings.[111] From this, it should be easier to see why people are willing to commit genocide: they do not see their victims as a party to their social contract, and are therefore in the state of nature, devoid of social-political obligations. To look more into the psychology of perpetrators, I turn to Claudia Card and a theory of evil.

According to Claudia Card's atrocity theory, evil(s) can be understood as "foreseeable intolerable harms produced by culpable wrongdoing."[112] On Card's theory, evil is defined by both the perspective of the victim (the harm felt) and the perpetrator (the wrongdoing committed). Additionally, the wrongdoing includes inaction, insofar as the harm is foreseeable and the actors are culpable for the inaction. So, the British (lack of) response to the Irish famine(s) could be considered evil insofar as mass starvation was foreseeable and the government had a responsibility to the Irish people to provide for their welfare. Card's theory of evil goes beyond mass harms to include domestic abuse, or what she terms "terrorism in the home" to contrast with rape as a weapon of war.[113] What is important to this thesis is her approach to the psychological question of why people do evil.

Card begins her discussion of the psychological reasons behind evil with Kant's theory of radical evil. It's worth noting that Kant has a similar account of the social contract to Rousseau, in some ways. Most notable (in my opinion) is his view on the unsociable sociability of human beings, which is similar to Rousseau's account of *amour-propre* and *amour de soi*. In fact, they

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[110] "Israel/OPT: Pattern of Unlawful Killings Reveals Shocking Disregard for Human Life."
[111] "Israel/Palestine: Some Officials Backing 'Shoot-to-Kill.'"
[112] Card, *The Atrocity Paradigm*, 3.
[113] Ibid., 139.

are so similar that Rawls referred to Kant as "the best interpreter of Rousseau."[114] Returning to evil, according to Kant, there is a two step process to our actions and motivations. First, one adopts a supreme principle to abide by, such as the Categorical Imperative, and then one acts in the real world according to what said supreme principle legislates. The 'good will' is the motivation that people have to act according to what duty prescribes, and acting on the good will is what makes an act a moral act. Evil, for Kant, has three gradients, or stages. In the first stage, people are weak, inasmuch as they adopt the correct supreme principle but they sometimes fail to act according to its legislation, giving in to self-interest or other inclinations. In the second stage, people have mixed motives, and act both from the good will and self-interest. In the third stage, radical evil takes hold and people have subverted the moral principle, which ought to be the supreme principle, to the principle of self-interest, or prudence. To reiterate, Kant's analysis is at the level of motivation, not action. So in four situations, four people could each separately act according to the good will, to weakness, to mixed motives, and to radical evil, and all perform the same act. What defines radical evil is that the motivation is prudence, not a sense of duty.

What distinguishes the good and evil is that a moral supreme principle legislates actions whereas the principle of prudence does not. Evil is not simply posed as doing the not-moral thing. As such, Kant's theory denies the existence of (fundamentally) evil desires, interests, or immoral principles. He denies that people have essentially diabolical inclinations; however, he does acknowledge that there are 'diabolical vices.' Kant argues that these vices "do not really issue from nature as their root but are rather inclinations, in the face of the anxious endeavor of others to attain a hateful superiority over us to procure it for ourselves over them for the sake of security as

[114] Rawls, *Lectures*, 200.

preventive measure."[115] So these vices "at first appears to be an evil inclination is at bottom a response from fear based on our felt need for the goods of protection and security. [Kant] insists that evil lies only in our choices to accord too much importance to our inclinations, not in the inclinations themselves."[116] The problem with Kant's view of radical evil and the good will is that if one acts neither according to duty nor to prudence, there appears to be no answer.

To answer 'Kant's mystery,' as Card refers to the third possible motivation, she turns to theories of normative self-conception. Herein lies a distillation of Kant's views that he himself only partially made. According to Kant, we could assess the morality of our actions and motivations by imagining an impartial rational spectator with perfect knowledge (i.e. God) and whether such a spectator would judge us as having acted morally. The perfect scenario for Kant's ethics is that we act only according to our duty and that we are happy in our conduct. The only entity capable of giving us true happiness is God, and God seeks to reward those who act morally. As such, "[t]he moral worth of an action in Kant's ethics, conferred by the motive of duty, makes one worthy of being rewarded with happiness by an omnipotent, omniscient, and perfectly just rational spectator. Actual reward is not the goal. (That goal would make the behavior prudent.) The goal is to be *worthy* — worthy of a reward that would symbolize the esteem of its bestower."[117] So if the moral worthiness of actions derives from the esteem of God, we can understand a third motivation as an inclination for the esteem of others (who are not God). The desire for the esteem of others is not itself the motivation of prudence (or self-interest), but a desire to fulfill one's self-conception. To elucidate this third motivation, Card first draws on Christine Korsgaard's theory of self-conception as a source of normativity.

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[115] Kant, *Religion and Rational Theology,* 75. From Kant's *Religion within the Boundaries of Mere Reason*, which is published in *Religion and Rational Theology*. Academy edition citation 6:27. Found in Card, 84.
[116] Card, 84.
[117] Ibid., 86. Parentheticals and italics in the text.

According to Korsgaard, normativity can be sourced from one's self conception, or 'practical identity.' A 'practical identity' is "a description under which you value yourself, a description under which you find your life to be worth living and your actions to be worth undertaking."[118] So, our practical identities may have a host of constituent, contingent principles or inclinations, which may or may not be self-consciously recognized. A desire to act according to our self-conception can then be added to the principle of prudence as a principle to which morality may be subverted as a supreme principle. Evil can then be expanded to include the subverting of morality to one of these contingent principles. As such, "what is given priority over morality need not be prudence but could be the good of some specific group, such as one's racial or ethnic group or one's gender. One could be as willing to give up one's own individual interests, or even to die, to promote that good as others are willing to do for the sake of moral ideals."[119] Here we can see where nationalism may take hold. The desire to further the interests of one's nation (and not merely defend legitimate interests, as what might be considered self-defense, and therefore be morally permissible or even obligated), may be seen as neither stemming from a sense of morality nor prudence, but stemming instead from our self-conceptions, and a desire to live according to the precepts which we believe to define our practical identity.

Korsgaard's theory can also help explain why people behave in different moral ways to members of one's own group and non-members. Robert J. Lifton, in an account of Nazi doctors, posits a the concept of 'doubling.' With doubling, people create a 'second self' so that they can perpetrate behaviors which would be inconsistent with one's ostensible values.[120] The question then is that are people doing good acts (in a utilitarian sense) and acting truly according to moral

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[118] Korsgaard, *Sources of Normativity*, 101. Found in Card, 87.
[119] Card, 88.
[120] Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide*. Found in Card, 89.

principles (the good will) in only some cases, and doing bad acts (in a utilitarian sense) for bad reasons, or are the good acts and bad acts done for the same reason — membership in a shared group and non-membership. Korsgaard's analysis may offer an answer. According to Card:

> [k]indness and respect are not morally good if they are based not on the humanity of their recipients but on the recipients' membership in a more limited group. Yet behavior shares features with moral behavior that distinguish it from mere prudence: racist behavior can include self-sacrifice, for example. If the source of normativity is the conception of oneself as a member of a superior group who is free to treat outsiders in hostile ways, the resulting norms are neither moral nor prudential.[121]

The resulting norms do not have a clear category in ethical theories, but are known as racist, sexist, etc. To build on Korsgaard's theories, Card turns to Lorna Smith Benjamin and IPIRs.

Benjamin theory of IPIRs, Important Persons and their Internalized Representations, comes from an extension of attachment theory. John Bowlby defines attachment behavior as "any form of behaviour that results in a person attaining or retaining proximity to some other differentiated and preferred individual, who is usually conceived as stronger and/or wiser" and that such behavior in adults tends to be "especially evident when a person is distressed, ill, or afraid."[122] Benjamin argues that attachment to an important other person can explain otherwise irrational behavior. The internationalization of these important other persons, in Benjamin's system, "can take the form of imitation (of the person's treatment of others, such as oneself), recapitulation (of one's early responses to the person), or introjection (treating oneself as the person used to treat one)."[123] According to Bowlby, children will often retain representations of important persons, such as caregivers, and use their relationships as models for evaluate their behavior towards others. Benjamin's hypothesis is that there is a similar relationship with adults and models of behavior based on important persons, which she designates as the IPIRs. The IPIR approach takes us into

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[121] Card, 89.
[122] Bowlby, *The Making and Breaking of Affectional Bonds*, 129. Found in Card, 90.
[123] Card, 90. Parentheticals found in text.

the minds of people to understand the behavior from the agent's perspective, and to see if their behavior can be understood as a pattern of responses or reenactments of the behavior of IPIRs.

Card believes that this approach to understanding behavior and motivations can have implications for theories of moral change, as we understand that norms and values are implicit in the behavior patterns of IPIRs we seek to imitate, recapitulate, or introject. If the IPIRs that individuals are attached to are cruel, then it stands to reason that said individuals will tend to act cruelly, if they act unreflexively and do not have a strong good will. Even if they do self-reflect to some extent, this will still hold because said individuals will not only have behavior patterns based on their cruel IPIRs, but they will seek the admiration and esteem of someone who is cruel. The path towards moral change, according to the theory of IPIRs, is to either deliberately act in a behavior different from that of the cruel IPIRs or to lessen one's attachment to cruel IPIRs. In this way, our initial inclinations may be cruel and we may be said to not be in control of behavior inasmuch as our IPIRs were determined by our caregivers and their behavior, but people are morally culpable insofar as they fail to reflect on the morality of their IPIRs and choose not to adjust themselves if their IPIRs are immoral.

Concluding, Card states that "[e]ver since Thomas Hobbes set the tone, modern Western philosophers have expended much energy either advocating egoism or else defending morality against it... Affiliation is what has been presumed to require explanation, not self-interest. In attachment theory, the presumption seems to be the reverse... Attachment precedes self-interest, even any sense of self."[124] With Korsgaard's and Benjamin's theories, Card presents an updated theory of Kant's radical evil. By subverting morality to principles which derive from practical identities, that are themselves informed by our IPIRs, people may act in a radically evil way

[124] Ibid., 92-93.

without having subverted morality to prudence. Kant specifies that we have an imperfect duty to ourselves to self-improve because we self-improvement means that we as moral agents are more likely to fight evil temptations, and to adhere to the good will, towards which we have a perfect duty. Even if people fall to weakness or mixed motivations, where the principles derive from our practical identity instead of morality, people could greater perfect themselves by ensuring that the IPIRs from which self-conceptions derive are morally righteous IPIRs.

In evaluating Card's theories of evil and the psychological motivations to do evil, we can see a compatibility with the ideas of Rousseau (and Descartes) as presented in the first section, on the social contract. Rousseau believes that humans are born good, and society corrupts them. Kant believes that people are capable of acting from the good will, and that diabolical vices are not from nature, but from social competition and the scarcity of goods. Additionally, the principles of self-management and self-improvement are evident in Kant's belief in perfectibility and that people are capable of changing their IPIRs, thereby further proving the Cartesian model over the Hobbesian model of human nature.

Furthermore, we can see in the diabolical vices and IPIRs why people commit genocide. The desire for hateful superiority over others, the anxiety of social competition, and the fear of loss of goods and security lead people to act against what morality prescribes. Contentious politics creates the environments where diabolical vices can find root. When conflict does arise, the IPIRs that people subconsciously look to are less likely to have mercy and compassion as their guiding principles, but instead cruelty and malice. In conflict, people valorize those who are willing to do violence for the sake of their group. Self-defense is of course recognized as a legitimate motivation for violence, but the problem is that groups will extend their believed defense interests beyond what is recognized as actual self-defense. The social group in a position of power may often

perceive threats to their privileged position as threats to their fundamental interests instead of threats to a system which creates positions of privilege. This is because victimhood (or at least a sense of victimhood) has nothing to do with one's initial position in society.

According to Daniel Bar-Tal, et. al., "[a] sense of collective victimhood is unrelated to the strength and power of the collectives involved in intractable conflict. Collectives that are strong and powerful militarily, politically and economically still perceive themselves as victims or potential victims in the conflict. The self-assigned status as the victim does not necessarily indicate weakness."[125] This is what happened with America in the Vietnam War, Israelis in the Israeli-Palestinian conflict, the Turks in their conflict with the Kurds, and more. Victimhood is important for after conflicts, as well. According to Peskin:

> being designated as a victim is a source of political strength for governments. Victim status can confer global recognition of a nation's suffering and legitimacy to the government in power. This in turn may lead to increased aid and support for the new regime... For governments, the writing of this narrative plays a key role in maintaining their domestic and international legitimacy and in turn solidifying their grip on power.[126]

So we can see the importance of the perceived status of victimhood in not just legitimating the use of power, but in holding the power as well. So in answering the question, why would someone commit genocide, we can start from the question, "what would most people be willing to do or support if they believed that their social group was a victim, regardless of whether or not they actually were victims?" The answer to this question for many people is unrestrained violence, especially when the perceived victimizer is no longer, or never was, seen as a party to the social group of one's social group.

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[125] Bar-Tal, et. al., "A Sense of Self-Perceived Collective Victimhood in Intractable Conflicts," 241.
[126] Peskin, 15.

6. The Social Contract Under Transitional Justice

Before we can understand the social contract under transitional justice, it is first important to answer the question, when did transitional justice begin? The field of transitional justice as a field of legal scholarship began in the 1990s.[127] The aftermath of WWII is generally considered the source of the first transitional justice mechanisms — the war criminals tribunals in Nuremberg and Tokyo. The prosecution of Nazi and Imperial Japanese officials is certainly one of the most famous, although Bass identifies earlier possible claimaints to the title. Bass points to ultimately botched war crimes trials in Constantinople, in 1919, to prosecute Turkish officials for crimes against the Armenians and the trials in Leipzig, two years later, against the German high command for war crimes against Allied troops.[128] Going back even further, there were trials of a sort that may have served as some inspiration for the post-WWI forces — the exiling of Napoleon to St. Helena in 1815. Done absent any legal pretensions, the act was the first of its kind. Victor's justice had always existed, and in another universe Napoleon may have gotten the gallows (or the guillotine), but the forces of the Seventh Coalition decided to punish Bonaparte and his accomplices for the 'crime' of aggression. Realistically, the arresting and exiling of these figures was done to both satisfy France's former enemies, but also to better secure the Bourbon restoration. Herein we can see the kernel of transitional justice which I believe is key to understanding its social contract: securing the legitimacy and existence of the ruling regime.

I argue that we could go back even further to find examples of transitional justice. Perhaps the first is the trial and execution of King Charles I of England. With the Grand Remonstrance, a list of grievances drawn up by Parliament and presented to Charles before the English Civil War,

[127] Bell, "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'NonField,'" 7.
[128] Bass, for Leipzig, 58-105, for Constantinople, 106-46.

the trials for treason at the tribunal established by the Parliament and the New Model Army, and the performance of the punishment for the guilty verdict (death), we have both a justice mechanism during a period of transition from a less liberal government (King Charles I ruling by fiat, having dissolved Parliament) to a more liberal government (although illiberal by today's standard). It may have been victor's justice, but it cannot be said that Charles failed to provide ample reasons for retribution.[129] Additionally, after the Stuart Restoration in 1660, King Charles II faced the question of what to do to those who had executed his father. Believing that forgiveness would better fit the political environment, Charles II offered a general pardon for all who conspired against Charles I.[130]

I also consider the trial and execution of King Louis XVI of France as a transitional justice mechanism. Compared to the trial of Charles I, the list of charges against Louis XVI were much more numerous and expansive, to include actions taken by Louis to suppress the beginnings of the revolution. What is interesting is how often deputies of the Convention referenced Rousseau during their deliberations over what to do with Louis XVI. Of all philosophers, Rousseau is brought up 47 times, more than all other thinkers or scholars combined.[131] Although the terror that followed may have been terrible, it is unarguable that the revolution which overthrew King Louis XVI led to a more a liberal government. If regicide seems hardly to qualify as transitional justice, then the aftermath of the victory of Haitian forces in their revolution may seem a better fit.

After having secured the island and promulgated a new constitution, the second only in the world, President Dessalines ordered, in February of 1804, trials for those accused of participating

[129] Holmes, "The Trial and Execution of Charles I."
[130] Harrington, "Transitional Justice Theory and Reconciling Civil War Division in English Society, circa 1660–1670," 70.
[131] Reilly, "Interviewing the Opinions: Principle, Practicality, and Politics in the Trial of Louis XVI," 35.

in massacres committed by General Leclerc and General Rochambeau.[132] Additionally, Dessalines, "convened a commission to investigate atrocities committed by the French. Mostly this was focused on specific acts committed during the recent occupation by Leclerc and Rochambeau, but it was also interested in compiling a general list of crimes, going back into the days of the old slave regime."[133] According to Mike Duncan, the purpose of the commission was not to aid in the prosecutions of the accused participants in these massacres, but rather to establish the collective guilt of the white French population as a whole. The pretext, then, of the commission and the trials was to justify the killing of most of the remaining white French in Haiti. President Dessalines personally supervised many of the killings, in tours of cities throughout Haiti. Only some white widows and children were spared, along with Polish soldiers who had gone AWOL instead of fighting the Haitians, and Germans who had been given permission to live in Haiti prior to the massacres.[134] In Haiti, although the revolutionaries traded a new Republic for a self-proclaimed President turned Emperor, it seems inarguable that ending slavery meant that the transition was towards a more liberal society.

What all of these examples have in common is that they are examples of transitional justice, of a sort, that took place around the time of the creation of the social contract as a concept. Hobbes' *Leviathan* was written at the same time as the English Civil War and was published only two years after the execution of Charles. Rousseau was alive for the events that preceded the French Revolution — he was even invited to help write the constitution for Corsica after their revolution against the Republic of Genoa.[135] Kant lived through the French Revolution and wrote about it as well. So we should understand that the relationship between the social contract and periods of

[132] Dubois, *Avengers of the New World*, 300.
[133] Duncan, *Death to the French*.
[134] Popkin, *A Concise History of the Haitian Revolution*, 137.
[135] Hill, "Enlightened 'Savages': Rousseau's Social Contract and the 'Brave People' of Corsica."

transition is that the social contract must be viewed through the emergence from the state of nature during a transitional period. The periods of transition in today's age should not be seen as separate from the past times in European and American history, but as analogous. The only difference between the two periods is the timing of the arrival of capitalism and nationalism. I believe that these forces are what propel the social change leading to a new social contract — the Social Contract.

If the social contract of (current) transitional justice is no different from the social contract of the past revolutionary times, then we can understand the aims of current transitional justice mechanisms as playing an analogous role to the trials and commissions of the past. The purpose of transitional justice is the securing and entrenching of power by and for the ruling class. As Rousseau argues, the purpose of the emergence from the state of nature (in the broad sense) into the state of society by the creation of the social contract is to preserve the unequal distribution of resources and power. Transitional justice mechanisms are used to preserve the power of the ruling class in a number of ways. To be clear, there are few situations where transitional justice mechanisms are deployed to hold the current ruling class accountable, but rather the former ruling class by the new ruling class. Where the ruling class has not changed during transitions, amnesties are the order of the day.

In the case of international tribunals, there is the straightforward argument in favor of them for the ruling class in a country that trials can be used to quite literally get rid of the opposition. This was the case in the former Yugoslav countries. In what is today Serbia (but at the time was known as the Federal Republic of Yugoslavia), the arrest of Slobodan Milošević only happened after he and his party lost an election. The new president wanted to get rid of a powerful political opponent, as well as end international sanctions and later join the EU, so his government permitted

the arrest and transfer of Milošević to the ICTY. [136] Similar circumstances played out in Croatia with former President Franjo Tuđman, as well. Paul Kagame, current President of Rwanda, faced different circumstances than in the Balkan countries. The RPF's rule was much more secure after the end of the Rwandan genocide. Peace had not been negotiated, like with the Dayton Agreement in the former Yugoslavia, but had been obtained through blood and sacrifice. As such, there was less of a need to get rid of any opposition politicians who had been complicit in the killings. This is, for one reason, why the ICTR was in Arusha and not The Hague, like the ICTY. It's also why the scope of the ICTR's temporal jurisdiction only covers the Rwandan genocide, and does not extend earlier to include crimes committed in 1990-1993, which may have implicated the RPF. Kagame had a stronger hand to play in negotiations with the international community. International trials had another important aspect, which is why Rwanda ultimately complied with ICTR requests: the benefits of the status of victimhood.

As I discuss in the previous section, the status of victimhood is very important for the obtaining and maintenance of power. Trials allow for the promulgation of victimhood status, and international trials do this on the international stage. Moreover, the recognition of victimhood at the international stage can be used in domestic politics. Because the ICTR was limited to prosecuting crimes that had only happened in 1994, Kagame has been able to create a narrative about the causes of the genocide, and thereby minimize the culpability of the RPF. In doing so, he is trying to reconstruct the collective memory of the events, and thereby strengthening the power of the RPF, the ruling party in Rwanda.[137] It is for this reason that people such as Janine Clark, as I discuss in the second section, is critical of the NURC and the unity process.

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[136] Peskin, 61-91.
[137] Kelley, "Maintaining Power by Manipulating Memory in Rwanda."

Truth and reconciliation commissions can function in a similar way to trials, in the construction of collective memories. In some instances, truth commissions are used to address grassroots demands without actually permitting fuller accounts of culpability by limiting the permitted scope of analysis.[138] This is often achieved by focusing on particular facts and events and removing the context or normative judgments about those facts. Audrey R. Chapman and Patrick Ball refer to these as 'micro-truths' and 'macro-truths,' where the latter is far more important for framing a narrative for a population.[139] The good news is that if a new government is representative and responsive to its population, then the transitional justice mechanism is in a way a positive development, as it reinforces the power of a responsive government.

Another transitional justice mechanism that is used to preserve the power of the ruling class is lustration. In this case, there is some dispute over the ruling class, with the newer contender being ascendent. Lustration can achieve, among other things, "the reorganization and revitalization of the state's administrative organs; the imposition of economic and social penalties on the old regime's functionaries; and the overall circulation of elites, which provides employment opportunities for the new regimes supporters."[140] Here we can clearly see the prizes of being a member of the ruling class' cohort. As I discuss in the previous section, there is resource and opportunity hoarding, as government jobs can be highly sought after.

Lastly, amnesties may be necessary for a new government to maintain power while it is still weak, and the previous ruling elites still retain a good amount of power. Here, the transitional justice mechanism is chosen as a necessity, if it can be said to be a choice. Some, such as Calhoun, argue that amnesty may not be a mere necessary evil, but vital for the creation of a new social

[138] Mazzei, "Finding Shame in Truth: The Importance of Public Engagement in Truth Commissions."
[139] Chapman and Ball, 1.
[140] Calhoun, 39-40.

contract. Calhoun argues "[t]he promise of future obedience is sufficient atonement for all the past crimes. The injustices of the past can have no practical or moral relevance under the social contract."[141] Leniency towards strongmen is necessary to achieve full participation in the process of contracting a new society. Calhoun goes so far as to argue that illiberal or anti-democratic parties ought not be excluded, as "[a]ll views are welcome in a democracy,"[142] although she does give exceptions, such as the exclusion of Nazis in Germany.

What, then, is the social contract under transitional justice? It is the same social contract as the contract of Haiti, the United States, and France, which is to say a contract of inequality and domination. The only difference is the existence of a scholarly enterprise to study and legitimize certain social practices. The more interesting subject is how the modern social contract differs from previous social contract. As I argue in section 1, new social contracts come from the emergence from the broad state of nature, and they may come from the state of nature of war and anarchy or the state of nature under tyrannical governments which do not respect civil and political rights. Previous social contracts were limited in their reach. They were between the sovereign and the nobility, and then contracts between nobles and their serfs, or later subjects. There were no citizens, only rulers and the ruled. As Benno Teschke argues, international relations can be understood through the lens of social property relations.[143] Monarchs had a social property relation with their realm. They owned the land, and the subjects simply inhabited the land. The feudal social contract was defined by such terms. The modern social contract is different inasmuch as relationship is framed by a social property relationship of the nation and the state. The nation — the people — own the land. The state is then created to arbitrate disputes within the nation. From

[141] Ibid., 32.
[142] Ibid., 42.
[143] Teschke, The *Myth of 1648*.

this we can see why genocides happen. One group of people imagines themselves as a nation, for which there is some plot of land which they own. If there are people on that land that are not a part of the nation, then they are not a party to their social contract, and can justifiably (in the minds of some) be removed from the land. Transitional justice, if it is achieving anything related to the social contract, is to integrate groups into one nation.

7. A Third State of Nature

Lastly, I believe that there may be what we could think of as a third state of nature. As I discuss in section 1, Rousseau believes that there are two states of nature. There is a state of nature in "its purity, and [the second state of nature] is the fruit of an excess of corruption."[144] In these two states of nature, people's rights are unprotected and the rule of the strongest dominates. In the original state of nature it is because political authority has not been established, and in the second state of nature it is because the government is tyrannical and people's rights are subject to the whims of individuals. From both there is a violent break to enter, or return to, a new state of society through a new social contract. I believe that we can imagine a third state of nature, but one far less violent than the second state of nature, and the emergence from it is far better. This third state of nature is not a state of nature in the traditional sense, or even perhaps on the broadest of interpretations. It is probably best understood as a simulacrum of the state of nature. There is still established political authority and a high level of sociability, but governments may not be secure when faced with sustained civil disobedience marshalled by social movements. As such, a third state of nature is brought about by social movements engaged in civil disobedience and other forms of contentious politics so as to achieve radical changes in society, which we can imagine as living under a new social contract. To understand how this works, we need to understand how social movements are able to achieve moral progress.

Turning to Elizabeth Anderson, she expands on Tilly's theories of social movements and contentious politics to address moral progress. She begins with John Dewey's theory of moral pragmatism.[145] According to Dewey, the interdependence of human beings — the necessity of

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[144] Rousseau, 79.

[145] Anderson, "Social Movements, Experiments in Living, and Moral Progress: Case Studies from Britain's Abolition of Slavery." 1-28.

assistance, coordination, and cooperation among people — requires the institution of rules of conduct to regulate and order human activity. The creation and dissemination of social conventions, traditions, norms, etc. provides for a level of predictability beyond that which ad hoc agreements could offer. Norms are accepted and reproduced so long as they effectively structure its relevant group.[146]

What makes moral norms distinct from social norms generally is that: a. moral norms purport to carry the force of authoritative command b. conformity may be exacted from members of the community c. authority of moral commands does not depend on any immediate or direct good and d. shared moral expectations are colored by shared emotional dispositions. Compliance with moral norms is expected regardless of what others do; if people believed that it was acceptable to ignore obligations generated by some norm when it is ignored by others, such a norm could not be understood as a moral norm. When two or more moral claims come into conflict, and the precedent or applicability of particular moral norms is disputed, people appeal to higher order moral principles to adjudicate between said interpersonal claims.[147]

The application of higher order moral principles, as a social practice, is reflective, and the structure of values and norms is subject to change. The impetus for change can arise from a few situations: a. uncertainty over how accepted moral principles apply to particular conflicts b. the application of a principle may produce new undesirable outcomes, or the previously undesirable outcomes could be newly discovered and/or c. people may "challenge the legitimacy of a customary norm or principle, by drawing attention to objectionable features of its operation and failures in its purported justification."[148] Under any of these circumstances, moral norms or

[146] Ibid., 3.
[147] Ibid., 3-4.
[148] Ibid., 5.

principles may require revision, or even replacement. On the pragmatist account, the failure of a norm/principle to properly regulate and order social activity provides the reason for modifying or abandoning said norm/principle. Rules, of any kind, exist so that the collective compliance yields benefits for everyone above that which could be obtained absent those rules. The intended outcome may or may not be known by the participating members — uncritical acquiescence may often suffice. When, though, there is a disagreement or uncertainty about the efficacy or legitimacy of a norm/principle, people are forced to consciously reflect on what the desired outcome actually is, and whether it actually is desirable. Moral reflection is only rendered necessary when the normal, habitual application of moral norms fails in one of the aforementioned ways.

Moral reflection over norms and principles is not an isolated, individual activity. Since norms and principles exist only insofar as members of groups reproduce and abide by them, changing them requires collective action. When it comes to moral norms in particular, social movements play an important role in achieving moral progress through the bias correction of the powerful. By bias, Anderson does not (exclusively) mean partial preferences or selfishness; rather, the bias which social movements correct is an epistemological bias. Powerful elites, just like everyone, view the world through their own limited perspective. We could understand this as constituting part of the epistemological contract. The perspective of the powerful is limited in two ways that are inherent to their social standing: arrogance and ignorance. The powerful are arrogant when they perceive criticisms from below as merely vicious, or covetous. The powerful are ignorant because their social standing does not place them in the material conditions of those below them, and, therefore, cannot understand their interests. To overcome the epistemological problem, social movements must: a. inform the powerful of the interests and needs of the oppressed b. express what is needed to respect these interests as claims to change their conduct and to subject

them to moral criticism and c. display their moral worthiness so as to seize the claim of moral authority.[149]

The epistemological problem is not one that can be addressed by argumentation, alone. For one, mere moral arguments are divorced from social practice, thus necessitating no practical deliberation. Any conclusions arrived at in discussion, or principles enumerated, are taken as hypotheticals and do not need to be acted upon by those a party to the discussion. After all, how often do people find themselves confronted with a lever, trolley car tracks, and hogtied hostages? Moreover, "practically realized moral norms are entrenched in largely unreflective habits which are sustained by shared expectations of people's duties and entitlements."[150] It is not inconsistent to suppose an individual who changes their mind in a moral argument over some issue, and to then, later, revert back to their previously held belief. It requires no self-deception, intellectual dishonesty, or bad faith engagement. In order to make meaningful, sustainable moral progress, arguments need to be paired with action, particularly through contentious politics, so that practical reasoning is engaged with as well as moral reasoning.

Furthermore, we might think of pairing arguments with action as a form of contracting or consenting (or withholding consent) with the government. The epistemological problem can be understood through the lens of the epistemological contract, as the contract defines who is a party to the social contract and their prescribed roles. The disjunction in society over what should be universally recognized moral norms, then, requires a new consensus over cognitive norms. Social action, or what Mezzera, et. al. refer to as bargaining, articulating, and mediating with the state, is required to form the conesus that the epistemological contract requires.

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[149] Ibid., 8.
[150] Ibid., 9.

Social movements engage with people's moral and practical reasoning by producing an epistemic break in the minds of the ruling class and its supporters. By epistemic break, I mean a precipitous shift in belief caused by an action or event that forced significant reflection. Social movements produce the conditions necessary for epistemic breaks by openly defying social norms. Protests, sit-ins, mass demonstrations, etc. disrupt people's sense of normalcy. People are then forced to think about the impetus for public disruption, which then induces practical reasoning about why the current norms have failed and possible alternative norms. When confronted with 'effective contention,' practical deliberation over alternatives is triggered in three ways. First, as public opposition to norm compliance grows, popular support for such norms will decline. Second, dwindling support for a norm may undermine its ability to adjudicate interpersonal conflicts, i.e. the reason for its existence. Third, stubborn adherence to a contested norm can impose a moral cost upon the powerful, and undermine its moral authority.[151]

The legitimacy of the ruling class is contingent upon the source of its authority. Under divine right, a ruler must appear pious. Under absolutism, a ruler must demonstrate lineage. Under democracy (or, more specifically, a democratic republic), the state must be seen as representative of the citizens. In a democracy, the state, by creating and enforcing laws, makes its members subject to the same coercively imposed rules that no one can alter by acting on her own and imposing such terms in the name of said members. Idealized, each citizen is both ruler of and ruled by her fellow citizens. Such is the basis of the modern social contract and the idea of the consent of the governed. The moral authority of the powerful elites derives from their ability to claim that society, under their rule, is governed justly; in a democratic society, justice is measured by whether its laws are ones which ideal citizens would choose for themselves. If a society's legal institutions

[151] Ibid., 10.

produce unpopular, harmful outcomes, then its laws are no longer acceptable, or just. Social movements convey dissatisfaction with the status quo.

Returning to Tilly's argument that social movements offer displays of worthiness, unity, numbers, and commitment, Anderson outlines the necessity of these components for achieving moral progress. All four components constitute conditions for collective self-presentation. As summarized by Tilly:

> *Worthiness*: sober demeanor; neat clothing; presence of clergy, dignitaries, and mothers with children.
> *Unity*: matching badges, headbands, banners, or costumes; marching in ranks; singing and chanting.
> *Numbers*: headcounts, filling streets. signatures on petitions, messages from constituents,
> *Commitment*: braving bad weather; visible participation by the old and handicapped; resistance to repression; ostentatious sacrifice, subscription, and/or benefaction.[152]

Anderson argues that these four features are necessary for social movements to address the moral biases of powerful elites. By displaying worthiness and commitment, social movements dispel the arrogant bias that activists are selfish or vicious. Unity compels a level of internal agreement necessary for attracting others to a movement. Numbers convey the scale of popular support for a movement's platform, as well as undermine perceived support for existing social norms.[153]

With the biases of the powerful addressed, the moral arguments of social movements have a real opportunity for consideration and uptake. One approach to understanding how displays are able to create epistemic breaks is affect control theory. According to affect control theory, people's understanding of the world around them is regulated, in part, by their affective reaction to objects and events around them. The topography of social life, and everything in it, is imbued with an affective meaning. Affective meaning is the content of a symbolic attachment, an object that is associated with affect and the definition of content is collectively shared by members within a

[152] Tilly, *Regimes and Repertoires*, 54.
[153] Anderson, 13-14.

society. People are motivated to maintain these affective meanings by perpetuating its meaning and policing deviations from commonly accepted definitions. Emotions act as signals to convey whether situations and events helped maintain people's self-conceptions and self-identity meanings. As signals, emotions facilitate both people's anticipation of future (re)actions and the ability to convey to others our own beliefs and opinions.[154]

The reason that people strive to maintain affective meanings is two fold. Foremost, affective meanings are necessary for helping people to understand the world around them and to orient themselves accordingly. If an object lost its affective meaning, then it would become difficult for people to effectively anticipate the future reactions of others because there is no longer a collective shared understanding of that object. Stable (structures of) affective meanings, more generally, help people control their own emotions, dispositions, mood, etc. Entering a world filled with unclear affective meanings (or devoid of familiar meanings) would be disorienting, even physically uncomforting. At a small, limited scale, the motive to maintain affective meanings is functional — at a macroscopic level, the motivation becomes continued confidence in one's ability to accurately perceive reality. People can also be motivated to maintain affective meanings when the meanings help explicate larger political, economic, and cultural structures; these structures place individuals in roles relative to others and color social expectations, thereby establishing hierarchies. Changes to certain affective meanings could alter how people understood the social hierarchy; for those in privileged positions in society, maintaining affective meanings may be necessary for maintaining their position within the social hierarchy. In this way, we can see how the epistemological contract plays an important role: it helps define the privileges of certain social

[154] Robinson D., Smith-Lovin, and Wisecup, "Affect Control Theory," 179-180.

relations. Social movements achieve moral progress by both achieving tangible political victories/policy schemes and changing social/moral norms.[155]

Applying affect control theory to social movements, displays of emotions are a necessary part of inducing practical reasoning and substantiating moral arguments. Passionate displays of worthiness, unity, numbers, and commitment underscore a social movement's platform by conveying the failure of powerful elites to uphold conditions necessary for maintaining self-conceptions. These displays achieve a level of cognitive uptake unobtainable through moral argumentation. This is because moral arguments — the act of doing it, through (in)formal institutions — are explicitly structured to only include arguments based on 'logic and reason' and to only use 'fact-based' or quantitative evidence. In academia and elsewhere, appeals to emotion, anecdotes, and narrative structures are dismissed as insufficient evidence. Whatever epistemological or ontological views one may have, it is an undeniable fact that the majority of people can find emotional/narrative arguments convincing, and can be skeptical of mathematical or logically complex arguments. Emotions convey people's affective relationship with the world, and this is necessary for overcoming the arrogant and ignorant biases of powerful elites.

The reason social movements are able to induce practical reasoning among citizens about social norms not only because emotional displays supplement moral argumentation — social movements' actions offend individuals' moderate sensibilities by challenging, and violating, social norms. There is no such thing as a convenient place to march or convenient time to go on strike. Successful social movements are successful because they are able to mobilize sufficient numbers of protesters to disrupt the daily lives of a large enough population. It is, of course, not socially acceptable to sit in the middle of the street; when enough people get together to block entire

[155] Ibid., 181-184.

highways, it makes people upset. But in disrupting their affect control by upsetting people, social movements compel people to think about what would lead a large, unified number of worthy, committed people to violate social norms. When a social movement becomes large enough, popular support for contested norms fails to lead to shared acceptance and acquiescence, meaning the affective meaning is lost. If a social movement is successful, then it will have presented new social norms/affective meanings ready to replace the old norms/meanings, and people will have accepted and internalized them.

During a social movement's campaign, there comes a point where public discontent with and rejection of current norms is enough to undermine the existence of affective meaning, but the platform of new norms/meanings has not yet been widely accepted. In this limbo, some moderates will deny the need for change and argue in the status quo's defense, while others will proffer incremental, concrete changes that maintain the overall material and ideological framework. Others will recognize the inadequacy of the status quo's social norms to regulate society, but reject the social movement's platform for new norms. Given a social movement's unity, there generally will not be significant internal disagreements about the fundamental tenets of the platform. Petty squabbling, factionalism, and the narcissism of small differences can lead to organizational splits. This, however, does not entail a fracture of the social movement; social movements are not clearly structured organization, but rather informal, social entities. Rival, competing groups are still a part of the same social movement because they are working for the same platform, even if the work is not done together. How does this apply to the social contract?

Social movements achieve a third state of nature through civil disobedience by suspending people's beliefs in the regulatory power of moral norms and disrupting affective meanings. Mass acts of civil disobedience disrupt people's faith that they live in a well-ordered society. If people

believed that they lived a morally just society, they would have no reason to mass protest or endure police brutality or block roads and bridges and stage sit-ins at dinners. Because of civil disobedience, people who believe themselves to be ethical individuals are faced with the question, "is there something wrong with our society, and if so, what can I do to change it?" Because there is a suspension of belief in the regulatory power of moral norms/meanings, people are forced to examine what the principles society is based upon, and whether they ought to be changed. Successful social movements are able to radically change not only institutions of power, but the very moral conceptions that everyday people have about what is good and bad. Because of this transformational power, social movements push society into a third state of nature, and thereby force a new social contract to be written to govern society. As I state at the beginning of this section, this third state of nature is not a state of nature in the traditional sense. But I refer to this situation as a state of nature so as to convey what conditions are necessary for the creations of a new social contract.

We can also think of the act of engaging in a social movement as taking a similar place as the act of creating a social contract. As Anderson argues, moral argumentation and moral reasoning is not enough to produce changes in people's moral beliefs. In order to produce the type of reflection necessary for actual change you must engage in practical reasoning, which is only activated when thought is paired with practice. As Hobbes argues, laws of natures are preceptes or general rules that are found out by reason.[156] So, if social contracts are supposed to enshrine natural laws into civil constitutions, then it can only be done when parties to the contract know the content of natural laws. The powerful elites of course have their own beliefs, and we might say that they actually have no intention of actually bringing natural laws into civil society because they just

[156] Hobbes, *Leviathan*, 79.

want to perpetrate a ruse against the poor. But, insofar as citizens believe that their society operates on the consent of the governed and that their moral and political principles derive from natural laws, then we must consider the act of engaging in practical reasoning so as to change the foundational principles of society as an act of rewriting the social contract. As such, the purpose of social movements is to demonstrate that their government does not, in fact, operate with the consent of the governed.

Looking to countries undergoing transitional justice, I believe we can see what represents the failure of social movements. Social movements are successful when they are (mostly) non-violent. But when people are unable to petition their grievances in a peaceful manner, some people will inevitably turn to violence. This mobilization in turn spurs a counter-mobilization, and leads to violent contentious politics. From there, the situation can either escalate further, or the government could accede to demands for reform. This very scenario is what led to the Troubles in Ireland and the United Kingdom.[157] In 1968, peaceful Catholic protesters in Northern Ireland marched for changes to the voting laws, and for other reforms. They were met with violent crackdowns by police. In 1969, loyalist mobs began attacking the Catholic protesters. Starting April, loyalists went so far as to plant bombs at electrical plants and water refinement centers so that the IRA would be blamed for it.[158] Protests later devolved into riots. In August, a particularly bad riot broke out. By October of the same year, loyalists shot and killed an Irish police officer, and the Troubles began. The peaceful protests of a social movement provoked a rage in the hearts of loyalists, so instead of seeing their government concede reforms to the protestors, they met non-violence with violence.

[157] O'Hagan, "Northern Ireland's Lost Moment."
[158] "CAIN: Chronology of the Conflict 1969."

The violence of the Troubles led to what Mezzera, et. al. calls 'conflict-affected countries' (or regions). In Northern Ireland you had non-state actors and informal institutions performing tasks that normally were performed by the state. In such a situation, society (and really there were almost two separate societies that co-habitated, between the Catholics and Protestants) devolved in a way into a state of nature. There was some political authority, but it was constantly being challenged, undermined, or even outright ignored. The Troubles was a war, in the sense that we would consider a state of nature on the broad interpretation. As Hobbes argues, "so the nature of war consisteth not in the actual fighting, but in the known disposition thereto during all the time there is no assurance to the contrary."[159] The war may not have been 'hot' the entire time, but the possibility of a car bombing or assassination or ambush always laid around the corner.

Looking beyond Northern Ireland, we can see other situations where societies are close to a state of nature, and societies undergoing transitions are faced with similar situations. Countries faced with high degrees of social contradictions and conflicting material interests are then vulnerable to falling into a state of nature. It may be the first state of nature where different factions fight each other, it may be the second state of nature where the government suspends the rule of law and brutally represses its people to avoid unrest or revolution, or it could be a third state of nature where social movements upend society in a mostly non-violent way. In all three situations, there will be a return to a state governed by a social contract. Wars eventually end in either defeat for one side or a negotiated peace; repressions either fail and the government is toppled or succeed and dissidents are routed; and social movements are either successfully repressed, break into war, or succeed in not only securing changes to the material framework of society but also change people's conceptions of what constitutes a morally just society. When there is success, there is a

[159] Hobbes, 76.

new social contract, and we could understand this period as one of transitional justice. When there is failure to change a regime, the old contract is reinstituted, or circumscribed, and there is no transitional justice. By understanding social movements as vehicles for (relatively) peacefully returning a society to a state of nature, thereby allowing for a new social contract to be written, we can see how societies could be changed without genocide or war or revolution, and the international community can implement policies to support the creation of social movements throughout the world. Moreover, in countries that have undergone violence and now transitional justice, it should be clear that the international community should support the conditions necessary for social movements and transitional justice mechanisms should be understood as contributing to this framework, because the continued success of transitional justice requires that governments respond to the demands of its citizens. In this way, we can see how social contract theory and transitional justice inform each other.

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