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## Lecture by John Tasioulas: Just Global Health: Integrating Human Rights and Common Goods.

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## **LECTURE BY JOHN TASIOULAS: JUST GLOBAL HEALTH: INTEGRATING HUMAN RIGHTS AND COMMON GOODS.**

Prof. Jeffery Pojanowski, Professor of Law at Notre Dame Law School, moderates a lecture by Prof. John Tasioulas, Director of the Institute for Ethics in AI and Professor of Ethics and Legal Philosophy at the University of Oxford and Notre Dame London Law Program. The lecture was given virtually on November 5, 2020 as part of a global lawyering webinar series organized by International and Graduate Programs Office and the London Law Program in partnership with Notre Dame International of the Notre Dame Law School. The lecture was on fundamental questions about global health justice and the institutions that are tasked with securing it during the Covid-19 pandemic. The following is an edited transcript of their conversation.

### TRANSCRIPT

**POJANOWSKI:** Hello, everyone. Welcome to our most recent edition—or the latest edition—of our global lawyering spotlight lecture. My name is Jeff Pojanowski, I'm a Professor of Law here at Notre Dame Law School. Good afternoon if you are in the United States, good evening if you're over with our friends in the UK, and good morning if you're somewhere else. I'm delighted to welcome you to today's lecture by Professor John Tasioulas on global health and human rights, part of the University of Notre Dame Law School's Global Lawyering Spotlight Series this year. Before we begin, just a few words about the series: The Notre Dame Law School's Global Lawyering Initiative creates opportunities for Notre Dame students, faculty, and staff to engage globally in the teaching, study, and research of legal questions that connect to us all—and thus concern us all—wherever and however they arise. The Global Lawyering Initiative has multiple related components that use the University's network of campuses and centers around the world, including (most relevant here) in London. It's worth highlighting the Notre Dame Law School has offered its London Law Program at the London Global Gateway for over 50 years. Under the direction today of Professor Michael Addo, the program is the only year-long study abroad program approved by the American Bar Association, and it continues to offer a singular opportunity for our students and faculty to learn from, teach, and collaborate with world class scholars from the UK and Europe. This year, the Global Learning Spotlight Series is an effort to continue this work, albeit in a unique format, undeterred by the challenges of our present moment. I'm thus delighted to introduce to you Professor John Tasioulas, whose lecture is entitled "Just Global Health: Integrating Human Rights and Common Goods." Professor Tasioulas is a professor of ethics and legal philosophy on the faculty for philosophy at the University of Oxford. Before coming to Oxford he directed the Center for Politics, Philosophy, and Law at Kings College London. He's held visiting posts at the University of Chicago, Harvard, and in his hometown, at the University of Melbourne. Once this poisonous fog of COVID lifts from our plans and aspirations, he'll be teaching students in Notre Dame's London Law Center as a Visiting Professor and Distinguished Fellow. We're happy to pull him ever, ever deeper into our web at Notre Dame. He's also on the editorial board of the American Journal of Jurisprudence, which is an Oxford-Notre

Dame joint project as well. Now, Professor Tasioulas' most recent achievement is being named the inaugural Director of Oxford's Institute for Ethics and Artificial Intelligence. His intelligence, however, is anything but artificial. His work spans broadly in moral, legal, and political philosophy. He has written widely, deeply, and incisively on topics like punishment theory, moral relativism, games in play, the ethics of robots and AI, and the philosophy of international law. He is also—and most importantly for present purposes—a leading figure in global discussion on human rights, their philosophical foundation, and their relationship with international and domestic law. It is a privilege to welcome and introduce him today. Professor Tasioulas, the floor is yours.

**TASIOULAS:** Thank you so much, Jeff, for that very kind introduction. Thank you to Michael Addo for suggesting that I do this talk. I'm grateful to everyone participating. I particularly am aware of the fact that there are some exciting events happening in America, so I'm just very grateful to act as a distraction perhaps from some of that. This talk is not really about COVID, but I think one of the things that COVID should prompt us to do is to re-examine some of the underlying structures with which we responded to this crisis. And some of the structures are, of course, institutional or governmental, but no less important—I think—are the underlying ideas that we bring to bear in thinking about a crisis like COVID.

That leads us back to the question: what are the underlying ideas that have been developed in global health policy? That's what I want to look at today, because the talk I'm giving is based on a co-authored paper that was published recently in Tom Brooks' Oxford Handbook to Global Justice.<sup>1</sup> It's the product of a couple of years of work [from] some time ago, looking at the deep underlying ethical structure of global health policy. In many ways, it's an iconoclastic paper. It's basically saying there are quite a few problems with the basic ideas that have risen to the status of orthodoxy. I don't mean that in any kind of denigrating way because I think, obviously, there is a lot of very powerful work in this area; but at the same time, we have to acknowledge that, for example, thought about socioeconomic rights is at a pretty rudimentary stage compared to, for example, classic civil and political rights. I think we also have to admit that thinking about how we integrate rights with wider public goods or common goods is also at a fairly rudimentary stage. So what the paper and this talk are trying to do is highlight certain ways in which the existing framework that we have is problematic and may be improved. No doubt, down the line, the hope is getting clarity on that framework, and having a better framework will ultimately pay off in terms of better decisions that affect people's lives.

So when I say that there is a problem with the underlying framework that's mobilized in thinking about global health policy, what am I talking about? Well, I'm going to talk about two specific things. The first thing I'm going to say is that the received view of the right to health in particular—but of rights generally, but let's just focus on the right to health—is a bloated one, an unhelpfully bloated one, and it's bloated in two ways: bloated in its scope (i.e. the subject matter that it covers) and then bloated also in its content (the content of the obligations that

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<sup>1</sup> John Tasioulas and Effy Vayena, *Just Global Health: Integrating Human Rights and Common Goods*, THE OXFORD HANDBOOK OF GLOBAL JUSTICE (2020).

are thought to fall under the right to health). So there is this kind of dual bloating that undermines the ability of the right to health to play an important and valuable role in global health policy. So that's my first theme, and the other theme I'm going to pursue is that there are, I think, deep confusions and problems about the relationship between health rights, rights more generally, and common goods or public goods—we could also call them “[goods] related to health.” So one looks like an individualistic consideration about my particular entitlements (whether to be free or whether to have access to healthcare), the other looks like a more communal kind of notion (the level of health enjoyed within a particular community). How do those two things fit together? That's a very difficult problem, and I think the existing framework is not helpful in understanding how those two things fit together. In discussing that, I will make some reference to COVID because I do think one of the rubrics under which COVID has been grappled with is the rubric of “how do you balance individual rights against the common good?” in eradicating or containing a pandemic.

So let me begin with my claims about bloating. In the background to these claims is a certain account of human rights that I have developed over the past years that Jeff [Pojanowski] adverted to. To say very quickly something about it, because I think it gives the philosophical background to the other moves I'm making to this paper: I have a view of human rights that is pluralistic in four ways, at least. One is that human rights are grounded in a plurality of values. There isn't one master value from which all human rights are derived. So what I say is there are two kinds of values that human rights derive from: one is the inherent value of all human beings as human beings, so we could call that the “dignity of human beings” (the dignity the value they had simply as humans), and then the second kind of value involves universal interests, those things that, in the case of all human beings, tends to make their life better. For me, there isn't one master interest that's relevant to human rights. [While] some people think there is only one master interest—autonomy—I think autonomy is one amongst a number of universal human interests, including friendship and accomplishing something with one's life, that are relevant to generating human rights. The way that human rights are generated is when these two considerations, with dignity and your set of interests, in the case of each human being are sufficient to justify imposing obligations on others to provide them with certain goods or to act in certain ways towards them. So, it's not enough to talk about dignity and interests. You don't have a threshold question of “are these considerations my dignity, my interest sufficient to impose an obligation on others?”.

These obligations are the content of our human rights, and this is the second way in which my account is pluralistic: I think human rights have obligations that are both negative and positive in nature. So there are negative obligations to refrain from doing certain things to people, for example, torturing them. I also think that there are positive obligations associated with human rights, for example, to provide them job opportunities, or food, etc. Some people think this division between negative and positive tracks the division between civil and political rights and socioeconomic rights. I think that's mistaken because in the proper—and, I think, received—understanding of civil and political rights they also include positive obligations. So, for example, the right not to be tortured doesn't simply impose a negative obligation on states to refrain from torturing; it imposes a positive obligation to, for example, train officials so that they don't engage in torture, or to set up institutions for deterring torture, for trying people

convicted of torture or accused of torture, or for punishing them. So there's going to be a multiplicity of kinds of obligations, not purely negative obligations.

The third way in which my view is pluralistic is I don't think the exclusive bearers of human rights obligations are states. This may be a view that's true to an extent about international human rights law, but at a deeper, moral level the obligations associated with human rights can also fall on individual human beings or on corporations. Corporations can have human rights obligations, and one important recognition of that is the 2011 Guiding Principles on Business and Human Rights, formulated by John Ruggie at Harvard, which say corporations directly have human rights obligations—irrespective of what the law may say on the matter—and these obligations are not fundamentally legal.<sup>2</sup>

The fourth point about pluralism is a lot of people think that if you're talking about human rights, you're necessarily talking about law as the mechanism through which they are realized—that unless you're talking about law, these aren't really human rights. I think that's a mistake. I think law is an important means of institution in realizing and enforcing human rights, but it's only one of many. There might be some human rights, like the—in a sense famous—example of the right to be consulted regarding major family decisions, which the law shouldn't embody because it would be (1) counterproductive and (2) there is an in-principle reason—it would interfere with the privacy of the family. So the idea is there are multiple ways of realizing human rights, law is just one amongst them. So that's the background view of human rights that I have, and as I point out in the paper it contrasts with some other views (for example, views such as the capabilities theory, and we can talk about that in the Q&A if people want to discuss it). So I say the received understanding of the right to health is bloated. It's bloated in two ways and this makes it an ineffective, or not as effective, tool as it should be in thinking about global health policy.

The first way in which it is bloated is in its range of coverage or its scope, the sorts of considerations that come under the heading of the right to health. So if we think about the right to health, the standard view—and I take the standard view to be that articulated by the Committee on Economic Social and Cultural Rights in General Comment 14,<sup>3</sup> as well as other UN bodies and leading global health scholars—this view seems to suggest that any right that is partly justified by its protection of our interest in health comes under the right to health. So for example, according to General Comment 14, the right to food, the right to housing, the right to life, to education, privacy, to access to information, all come under the right to health.<sup>4</sup> Why? Well, if you're deprived of access to information, this can negatively impact your health. So too can deprivation of privacy. So too can, most importantly, deprivation of education, one of the most fundamental considerations in determining health outcomes. So, suddenly, the right to health incorporates these other rights. Larry Gostin—one of the leading writers in this field—says the General Comment doesn't go far enough. We have to include rights to gender equality, rights to employment, rights to social inclusion, as part of the right to health.<sup>5</sup> Why? Well, of course, if you lack a job,

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2 United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011).

3 Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

4 *Id.* at ¶ 11.

5 LAWRENCE GOSTIN, *GLOBAL HEALTH LAW* 257 (2014)

that threatens your health. If you're subject to gender discrimination, that also threatens your health. And similarly, if you're socially excluded, that threatens your health. So now we come to the conclusion, according to the received view, that practically any right we can think of that's in the Universal Declaration is going to be part of the right to health. Why? Because you can readily imagine circumstances where being deprived of that right is going to impact negatively on your health. Now, I say that this is a problem, this bloated conception. It's a problem because it undermines the very idea that you have a list of human rights. What's the point of having a list of discrete human rights if, in fact, all of them can be subsumed under one particular given right? This is not just a problem about the right to health; a similar problem arises with respect to the right to life. And in the most recent General Comment on the right to life, the right is reconfigured as a right to live with a certain level of dignity, and now this is understood as incorporating many of the rights that are familiar socioeconomic rights. So again, you have this tremendous overlap and I say, conceptually, this is problematic because it undermines the whole point of having separate rights. Secondly, as a practical matter, it renders each of these rights very cumbersome and difficult methods of assessment, because in order to identify whether the right to health is being satisfied in any given context, you then have to go through all the other rights on the list in the Universal Declaration of Human Rights.

Now, you might ask the question: "well why on earth do people have this bloated conception of the right to health?" I think part of it is because bureaucracies [and] institutions want to have as wide an ambit as possible. Think about the World Health Organization's definition of health—it's a state of complete physical, mental, and social well-being, right? So, the World Health Organization is identifying health with the whole of human well-being, but that doesn't consider the fact that health is one component of human well-being, and it is a component that we sometimes have to trade off against other components. So, for example, a scholar might, for example, destroy his eyesight in order to spend time in dark libraries pursuing arcane research. They're doing that for the sake of another element of well-being—achievement—and they're willing to sacrifice their health in order to achieve something in the scholarly domain. But by the WHO's definition, there's no tradeoff at all because all of these things come under the heading "health"—but that's not helpful. Yet it's done, I think, in order to maximize the jurisdictional ranges at work, and I think a similar thing is happening with the right to health.

Another thing that's probably happening—this was suggested to me by Mindy Roseman—is that it's partly, in the case of the right to health, a reflection of the fact that many people are skeptical about socioeconomic rights. They don't believe that they exist. So if you can include the right not to be tortured in the right to health, for example, then you can purport to respond to someone who is skeptical about the right to health by saying "well, look, it actually includes one of the rights that you, yourself, were okay with: the right not to be tortured."

The third reason is a purely strategic reason. Say you're in a country whose constitution includes the right to health but doesn't include the right to work, or doesn't include the right against gender discrimination. Well in this view, it's very handy if you are a lawyer. You can strategically appeal to the right to health and say, "oh, and by the way, it includes practically every other right in the Universal Declaration." I don't totally dismiss these strategic points. I can see

that they have their value, but at a deep conceptual level I think they're obfuscating. I think we need to recover an idea of the right to health scope (i.e. its subject matter over which it ranges) that is much more disciplined than this bloated conception.

What I suggest in the article is that, instead of identifying the scope of the right to health by reference to all the rights that somehow bear on our health, you should instead identify the scope of the right to health by reference to the subject matter of its obligations. And I say the subject matter of the obligations associated with the right to health should be those pertaining to the provision of healthcare by medical professionals in particular, certain public health measures such as sanitation or vaccination, and some social determinants of health that are not covered by other rights. That's the first step, I think, for clarity. We don't have to see the right to health as massively overlapping with all other rights, provided we say what we're covering under the right to health is not all rights that bear on health (because practically anything could bear on health), but rather those rights-based duties that pertain to the subject matter of provision of health care, public health measures, and certain social conditions of health. That's the first point of about bloating the range over which the right to health ranges.

The second point is—okay, if it is about these sorts of obligations about the provision of health care, public health measures, and certain social determinants of health—how do we determine the content of those obligations? Now I come to the second kind of bloating that I think affects our thinking on these matters, and that is that there's a huge tendency to simply identify the content of the right with anything that bears on our interests. And again, I think this is a fundamental mistake because it means that the right to health ranges over a whole series of interests that we have in health. But merely having an interest in something based on, for example, one's interest in health, doesn't show that the failure to provide that thing is a wrong. We often set back people's interests in ways that are entirely innocent, for example, you beat someone fair and square for a job. You've set back their interest, but you haven't wronged them. But what's distinctive about rights is that they do have associated obligations; and going against an obligation is a matter of wronging someone. So we have to think beyond simply interests in determining the content of the right to health, or any right, and think about further questions of feasibility.

Those are the points that I make in this piece and at somewhat greater length elsewhere. One is “is it possible to deliver, to further the interest in a given way?” It might not be possible because of resource limitations. Second question: “even if it is possible, would it be excessively burdensome to further the interest in that particular way?” So, sure, the person has need of a kidney transplant and, for sure, it's possible for me to donate my kidney to them—but it would be excessively burdensome to regard me as being under an obligation to donate my kidney to them. It would be a nice thing to do, but it's not something that can be thought of as a matter of obligation. Therefore, it can't be thought of as a matter of rights. So we have to have this test of feasibility in order for health-related interests to generate any kind of obligation that makes them part of the content of the right to health. I think one of the great difficulties we've had in thinking about global health policy is people don't get beyond thinking simply about certain important interests. But the fact that an interest is important doesn't mean that I have a right to its fulfillment. I mean there are very few things more important than having a satisfying personal relationship or having love in one's

life, but most people would not accept the idea that there is a right to be loved—that others have an obligation to love us—leaving aside cases for children, for example. So there could be something that's a very important interest, but it is a further question whether there is an obligation. But unfortunately (and often in the context of global health especially), when I was regularly attending conferences with people working in this area, I would ask them “you stress very powerfully that health is a human right—what does that mean, what does that come down to?” And very often the person in question—it was typically a highly accomplished individual in their area of expertise—would simply say “well, it's an important interest of all human beings.” But I think you don't get to the structure of rights unless you get to say the interest generates an obligation. And in order to do so, it has to pass these parameters.

Once we've understood human rights in a way that is not bloated, then I think we have to reject one of the leading ideas in human rights thinking about health today, associated with Larry Gostin and his colleagues, which is that you could have a framework for global health policy that was grounded exclusively in the right to health. Now you can partly see why Gostin believes this, because he has this inclusive—this bloated, as I call it pejoratively—conception of the right to health, as including all other rights, pretty much, that bear on health. But if, like me, you don't think that this bloated conception is helpful, then there's no way at all that you could have a framework for thinking about global health grounded exclusively in the right to health. At the very least, it would have to be grounded in other rights considerations as well the various rights to liberty, or the right not to be tortured, or the right not to be discriminated against (extremely important in this context). So that whole project of making global health coherent by reducing it down to one right, satisfying as though it may appear in a kind of intellectual basis, I think is deeply mistaken and is partly what fuels this bloated conception of the right to health. So we need to think about more than just the right to health in thinking about global health policy.

The next point I'm going to make is that we need to think about more than just human rights when contemplating global health policy. Now, the way we can see this is, as I say in the paper, if we imagine a situation whereby all human rights were observed, would there be any health deficits still in existence that global health policy might have to address? Or would global health policy have done its work once all human rights are complied with? My claim in the paper is that, of course, there would be still work for global health policy to do; because even in a world where all human rights are complied with, there might be deficits in health. One example would be health deficits arising from people who had every opportunity to have a good diet and healthy lifestyle failing to do so. So if they voluntarily, and despite all resources and despite all education, adopt a couch potato lifestyle, and there's a high incidence of obesity, you've got a health deficit. You've got a health problem that has to be grappled with, but it's not adequately grappled with under the heading of a human rights violation in the circumstances that I am describing. It's better grappled with under the heading of “people not complying with their duty to themselves”—which is not a human rights duty (as human rights duties are duties to others)—it is their duty to themselves, to maintain themselves in a certain minimally healthy condition.

Now the question is: how can health policy encourage them, enable them to do that thing? Another way in which you could have health deficit, I say, is if, for example, there were insufficient organs donated for transplant, or there was



insufficient participation by ordinary people in clinical trials for developing new drugs. That could slow down our capacity to address health issues. But it's not a human rights problem, necessarily, because people have a right not to donate their organs. They have a right not to participate in clinical trials. So, again, you would have to address the issue of fostering a more...let's call it "charitable" culture in which people *do* donate organs, in which they *do* participate in clinical trials. But this would not be a matter of securing rights.

One of the things I want to say at this point is, for example, living in a culture where people *do* donate, living in a culture where people *do* participate in clinical trials, is what might be called a "common good." Common goods, in addition to rights, have to be quite central in our ethical framework for global health policy. Now, this is the part where COVID is going to come in a little bit. Some might say "well, it's no news that global health policy has to be attentive to both rights and common goods or public goods—that's been widely recognized that we have to integrate both of these considerations." My worry is that integration that has been achieved, at least a theoretical level, is not an adequate integration—that we haven't brought together these two ideas of the rights that we have pertaining to health and public health goals, communal goals more generally. We haven't brought them together in a coherent and satisfying way. So let me give you an example—and some of the background to this is kind of an interesting historical perspective developed by John Fabian Witt, a Yale Law professor in his new book *American Contagions, Epidemics, and the Law: from Smallpox to COVID*, which was published earlier this year.<sup>6</sup> Witt refers to the Great American public health figure Jonathan Mann and his pioneering work on HIV and AIDS, both for the U.S. and for the World Health Organization. It's said he led its global program on AIDS. Now Mann's insight was that individual rights and public health could be harmonized because respect for human rights tends to, as he put it, markedly better protection, prevention, and treatment.<sup>7</sup> So if you respect human rights, you're also going to be in a better position to ensure prevention and treatment. So adopting coercive measures that breach human rights, he said, undermines the trust required for people to comply with public health measures. It drives a disease like AIDS underground and facilitates its spread. So it turns out, just as a matter of contingent fact, that human rights and public health goals (like achieving herd immunity, like eradicating a disease) are not starkly opposed. It just so turns out that a rights-respecting strategy is the one that will yield the best payoff in terms of public health goals. But this reconciliation of rights and public health, although important so far as it goes, is a precarious reconciliation because it's merely contingent and nearly dependent upon circumstances that may, in fact, change.

Witt, in his book, helpfully identifies one change in circumstances that may make it no longer the case that voluntary compliance is the most efficient way to achieve public health goals.<sup>8</sup> Remember, Mann's idea is that you won't get voluntary compliance unless you respect people's rights.<sup>9</sup> But what if you don't need voluntary compliance? So, as Witt puts it, "new technologies such as apps

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6 JOHN FABIAN WITT, *AMERICAN CONTAGIONS: EPIDEMICS AND THE LAW FROM SMALLPOX TO COVID-19* (2020).

7 Jonathan M. Mann, Lawrence Gostin, Sofia Gruskin, Troyen Brennan, Zita Lazzarini & Harvey V. Fineberg, *Health and Human Rights*, 1 HEALTH & HUM. RTS. 6 (1994).

8 Witt, *supra* note 6, at 145-46.

9 *See id.* at 91.

for cell phones and cell phone tracing threatened to alter the precarious balance between liberty and health. If states or other powerful institutions were able to develop technology capable of testing, tracking, and tracing individuals in ways that defeated evasion, then the calculus [calculus between individual rights and public health] might change.”<sup>10</sup>

And what Witt puts forward here as a hypothetical case has required a kind of concrete reality in recent months as shown by the fact that some authoritarian societies—or, at least, less than fully liberal societies to put it mildly—in Asia have greater success in stemming the COVID pandemic than democratic countries like Britain, France, and the U.S. So, implicated here in our understanding of the relationship between rights and public health goods is a broader ideological struggle between liberal democracies and rising authoritarian powers in the world today. Which of them, the question arises, is best equipped to protect their citizens from public health crises like the COVID pandemic? Answering that question will partly depend on how we understand the proper relationship between rights and public health goods.

So, what I’m going to suggest is we need to go beyond the kind of contingent reconciliation that Mann talks about to a deeper reconciliation, a deeper way in which you can integrate concerns with people’s individual rights and concerns with public health goods, like eradicating a certain disease.

I think the starting point for this is the notion of the common good. The notion of the common good that is usually in play these days is almost always utilitarian. It’s an aggregated notion; it’s about aggregating across a range of individuals, what their interests are, and then considering different policies by reference to which strikes the overall best balance of interests. There are going to be winners and losers, but in this process, we identify the policy that will have the best outcome overall. It won’t benefit everyone to the same extent—some people might not be benefited by it at all, or even harmed by it—but it’s justified in the aggregate totting up of interests by reference to it maximizing overall interests. I think that’s the standard understanding of the common good, and I think it’s deeply flawed for all the reasons that utilitarianism is deeply flawed. It’s best summed up in the phrase of John Rawls: “utilitarianism ignores the distinctness of persons.”<sup>11</sup> It ignores the fact that we are each individuals whose interests cannot simply be subsumed within an overarching calculus, in fact, aggregated calculus. That is the whole point of having rights; they protect us from being subsumed in that kind of way, or it’s one of the most important points of having them. I think the notion of the common good that’s typically at play, influenced by utilitarianism, is actually not fit for that purpose. You can see why it’s attractive to bureaucrats and others, because it promises to reduce serious moral problems down to something that’s tractable in terms of quantitative methods. But that’s getting the cart before the horse; our methods should be guided by the goals and values that we want to achieve. We shouldn’t choose our values in terms of what methods we have at our disposal.

So, what I suggest in the article that this talk is based on is that the relevant notion of common good is an Aristotelian one. It’s not an aggregate of notion that trades off some people’s interest against others, but the notion of a common good—say for example, a language is a common good, or herd immunity is a

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<sup>10</sup> *Id.* at 106.

<sup>11</sup> JOHN RAWLS, A THEORY OF JUSTICE 29 (1971).

common good—is in the interest of everyone, serves everyone's interest in the same way, and serves people's interests in a non-rivalrous way. Having a common language whereby my interest in being able to communicate is served, by speaking English for example, is in no way in competition with your interest in using English to communicate also.

I think, strangely enough, the figure that we need is Aristotle to reconcile this discrepancy between rights and the common good. Once we understand the common good in an Aristotelian, rather than a utilitarian aggregated fashion, then we can make a further step and say that typically the structures that secure rights are themselves part of the common good. So, living in a society where the right not to be tortured is protected, for example, serves everyone's interest in not being tortured. It serves everyone's interest in the same way by providing institutional framework where torture is deterred and punished, and its serving my interest is in no way in competition with its serving your interest. So now we have the view that actually, rights form part of the common good; not the entirety of the common good, but they definitely form part of the common good. And this changes the way in which we understand the problem from the stark contrast of something that's entirely individualistic versus something that is based on solidaristic or collected considerations.

I want to conclude by considering an important argument. The argument I've made so far is that the right to health is not enough; we need to consider all human rights when formulating global health policy. And human rights are not enough; we also have to consider public goods (although an important component of those public goods or common goods will be the measures that are created to secure rights).

I'm going to consider an argument now by Gopal Sreenivasan, a distinguished philosopher at Duke University, who says actually global health policy doesn't really need to think about rights, it just needs to think about common goods.<sup>12</sup> The reason for this, he would say, for example, all the measures that secure herd immunity to diphtheria are common goods. They serve everyone's interests in the way I've described—in the same way—and they're non-rivalrous. But he says how could they be a matter of rights? How could my interest in being secure from diphtheria generate an obligation to set up a whole vaccination program against diphtheria? Think of all the material costs of setting up such a program, think about the moral cost of setting it up, which is the restriction on people's liberty. How can my interest in being secured against diphtheria justify all of that?

That's quite an interesting and powerful challenge, and I try to answer it in the in the paper by saying the argument isn't that my solitary interest would justify the entirety of the cost. If that were the case, then we would hardly have any rights, because how could my interest in not being tortured, for example, justify the entirety of the cost of all the structures that are needed to stamp out torture, or to prevent it? It's actually an argument that generalizes quite drastically and threatens to undermine pretty much all the rights that we think we have. The answer cannot be that my individual interest justifies the incurring of the totality of the costs of securing these common goods but, I say in this paper, the proportion of the cost attributable to my participation. So, roughly,

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12 Gopal Sreenivasan, *A Human Right to Health? Some Inconclusive Skepticism*, 86 *ARISTOTELIAN SOCIETY SUPPLEMENTARY* 256 (2012).

the idea is there is a societal benefit of having certain common goods, for example, herd immunity. But then we have to ask ourselves how many people are benefiting from this? And I can't just then say the system is justified, and is something I have a right to, if my particular interest justifies the whole cost. Rather, it must justify the share of the cost that's entailed in rolling out that program of vaccination to me and that's a far lesser cost than the entirety of the cost. It's basically the entirety of the cost divided by the number of people who benefit from it. And in that way, we can see both that there is an individual right to health and that securing this right to health is part of the common good.

The failure to see that argument leads, I think, to Gostin's quite startling conclusion in his book *Global Health Law*, where he starts by recognizing that the best way to advance the right to health, or to advance health generally, is through public health measures.<sup>13</sup> And then, of course, he seems to encounter something like Sreenivasan's problem; how can my individual interests justify the huge expense of these public health measures? And he comes to the conclusion—and this is the leading writer on the right to health today—that the right to health is a collective—not an individual—right but a right of groups.<sup>14</sup> That's his way of trying to cope with the fact that these public goods are so expensive, whereas the claim that I'm making is we don't have to suddenly say that the right to health is a collective right; it remains an individual right. But what justifies it is not being able to justify the entirety of the cost, but just the proportion of the cost attributable to my participation in the scheme.

We then come to the conclusion that it's not the case that once you've admitted common goods then there's no more place for rights. Both have their place. I think I'm going to stop there because my time is over. Thank you very much and I look forward to questions.

**POJANOWSKI:** Wonderful. Thank you, John. So, if you look at the bottom of your Zoom screen, you'll see a Q & A function. You can type in a question and send it to me. We've got a couple in the queue, and we'll get going. The first one is from my colleague Mary Ellen O'Connell. She says, "Professor Tasioulas, would you make the same critique of the right to health as bloated with respect its treatment and authoritative decisions, in particular, SERAC? Also, the bloat you refer to arises when the right is built out of other rights, in general, IRHL conventions. Bloat would not be a problem with respect to a focus treaty such as the planned FCGH, correct?"

**TASIOULAS:** I need to have some of those um those acronyms spelled out for me, I'm afraid.

**POJANOWSKI:** Sure. Mary Ellen, feel free to type in again, but "authoritative decisions such as SERAC." So, "Would you make the same critique of the right to health as bloated with respect to its treatment and authoritative decisions, in particular, SERAC. Also, the bloat you refer to arises when the right is built out of other rights, in general, IRHL conventions. Bloat would not be a problem with respect to a focused treaty, such as the planned FCGH, correct?"

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<sup>13</sup> Gostin, *supra* note 5, at 426.

<sup>14</sup> Sreenivasan, *supra* note 5, at 86.

**TASIOULAS:** I think that might be Framework Convention on Global Health, I can make sense of that one. I think, just to take the second question, I think if you had a focused convention that referred to the right to health, it would still raise an interpretive question of “how am I going to interpret the right to health?” So, if the canonical understanding of the right to health is that it includes a bunch of other rights, then it seems to me that that canonical understanding of it could also influence the Framework Convention on Global Health. And the main proponent of the Framework Convention on Global Health is indeed Larry Gostin, who does adhere to a conception of the right to health which is even more expansive. And he straight out criticizes the General Comment on the right to health for being not expansive enough. So, I don't see that that follows.

**POJANOWSKI:** Mary Ellen chimed in, “SERAC is a decision of the African Commission.” I don't know if you're familiar with it or not.

**TASIOULAS:** Yes. I'm afraid I would have to sort of look back, I did some work on this a couple of years ago, so I'm aware of some decisions by the constitutional court in South Africa, but I can't now bring to mind I'm afraid decisions by SERAC. I'm not saying that's inevitable, you know. My hope is that it's exactly not inevitable that people adopt this bloated conception. But what I am saying is that I find it as the dominant view, and it's not merely a mistake in the sense that some people have overlooked something, and you can just point something out to them. I think people believe they have strong reasons for this. At the deepest level I think the reason is the tendency to identify rights with a certain kind of interest, which bypasses the question of obligation. So, anything touching on that interest is going to be perceived as part of the right. But then you lose the whole distinctive significance of talking about rights once you do away with obligations.

**POJANOWSKI:** Great. Next question we have Thana de Campos writing from Santiago, Chile. She says, “Thank you, John, for a wonderful talk. Would you explain how you know your theory of human rights is different from a natural law view, please? It seems that by grounding human rights in both human dignity and a plurality of universal values you're grounding your theory in both natural rights and Razian interest theories. Is that a correct reading of your theory?”

**TASIOULAS:** I'm not sure. I guess it is a natural law theory insofar as it's claiming that there is a way of understanding that rights, at the most fundamental level, are not the products of law; that they are rights that we can identify through reason. So, at that level, it's saying that human rights are objective, moral truths. And there's no doubt that the natural rights tradition is one tradition, amongst others that has affirmed the idea that there are objective moral truths. The second way in which you might say it's close to natural law thinking is, in that sort of thinking, we do find the idea that there is intrinsic value in having the status of being a human being. I don't want to say that tradition monopolizes that view, but there is intrinsic value. So, there are two points of commonality. Where I have a difficulty is a lot of people think, probably wrongly, that if you subscribe to a natural law view, you think that you can take some value neutral description of human beings. And from this “is” statement—that it is the case that humans are like this—you can derive a bunch of “ought” statements, like they ought to

have certain rights. That part I resist, but I don't think that's part of a proper understanding of the natural law approach. As for Raz's view, it's true that he has an interest-based view of rights and I think that's where the Aristotelianism also comes in. I don't think, like Kant, you can have a theory of rights that dispenses with reference to "what are the elements of human flourishing?" The difficulty with Raz's view for me has always been that he doesn't really spell out how we get from the rights to the obligations. So "when is it the case that my interest is of sufficient importance to generate an obligation?" is something that he doesn't engage with at any length. So, I think that's something that I've been trying to grapple with over and over, the kind of Razian approach.

**POJANOWSKI:** Great. Our next person on the queue is Georgios Mukesis. Georgios asks, "How do you manage the intersection between Aristotelian common good and the respect for individual rights? There seems to be a sense of kind of a clash between kind of communitarian thinking and individual rights, we often think of these as, perhaps, intention. How do you make them work well together?"

**TASIOULAS:** That's a good question. It's a difficult question. It's a question of finding those institutions that genuinely secure rights, and in a way that we can say "look it serves everyone's interests and it does so in a non-rivalrous manner." Is it a matter of culture? It is a matter of culture in this respect. What will best secure people's interests in this way will vary from society to society—because of their level of technological developments, their history, entrenched attitudes, and so forth. So, there is going to be this element, but this element that varies from society to society has to be within a kind of overarching framework of objective value. My idea is the dignity that attaches to each human being doesn't vary from society to society; perceptions may vary, but the dignity doesn't. The fundamental interests don't vary from society to society—the ways in which they're pursued might. So, the way in which the interest in play, education, friendship, or cultural articulation manifests will vary tremendously. But we can still recognize the deep underlying interest there. So, there's a lot of work in figuring out—and this is where philosophy is not going to help you, this is where law becomes relevant, this is where statesmanship becomes relevant—what are the precise conditions that enable me to see something that's intended to fulfill rights as genuinely part of the common good?

**POJANOWSKI:** Great. The next question is from a Notre Dame SJD student, Marissa Gabriel. She asks, "How would you determine which important interests reach the threshold of imposing obligations on others? How do we go from a mere interest to a right?"

**TASIOULAS:** So, this is something I skated over, and it's a very difficult question. Raz is not so forthcoming about this. What I suggested was, number one, if I have an interest in something, then it must be possible for that thing to be delivered to me. If it's a universal right, a human right, it must be possible for that thing to be delivered to everyone. Maybe everyone has an interest in having a Rodeo Drive-style lifestyle, but it's not possible. There aren't the resources in any conceivable future that's going to enable everyone to have that interest. So, it's ruled out at the level of possibility. Some other kinds of possibilities are

more interesting and intricate. Do I have a right to romantic love? Well, romantic love is a very important thing for people. But the very idea of romantic love being offered as a matter of obligation is self-defeating. It's actually not possible for a deeper kind of reason to have a right to romantic love because it wouldn't be romantic love if someone's doing it because they're obligated to do it—it's supposed to be a spontaneous response to somebody else. So there's possibility that's going to knock out a number of things that would further my interest, but because they're not possible there can't be an obligation. Then there's this interesting question of burdensomeness. It would be in my interest to have Jeff to comment on every one of my papers and give me his valuable feedback, there's no question about that. That would further my interest, and it's certainly possible for Jeff to set aside a couple of hours a day reading my stuff and giving me feedback. But I don't feel that I've got a right to Jeff doing that, even though it's possible and it would massively increase my well-being. Why? Because it's an excessive imposition on him. Now, it's very difficult to articulate further what is this notion of excessive imposition, but this is the intuitive idea we work with, and I think it's correct. And that's why a mere shopping list of all the things that would further people's health is not really talking about their rights to health, because it's ignoring this important step about what is feasible to deliver.

The one further point I'd make about that is feasibility here cannot simply be a matter of market cost; market cost is a product of a lot of power, mobilized by groups, that may have monopoly power or various other structures that are unjust. So we can't simply say "Oh because the market price is this, therefore, that shows that it's too costly, not feasible." So that can't be the idea. Equally, if people have, for example, racist views and so complying with non-discrimination would be very painful for them, that is not a relevant kind of cost that is to be taken into account, because it's premised on mistaken ethical views that they have - i.e., that some people are of lower worth than them.

The third point beyond what's possible and what's not unduly burdensome is that it's a holistic exercise. If I'm thinking about what I'm entitled to under the right to health, I also have to be simultaneously thinking about what I'm entitled to under the right to education. I can't just put all this lavish entitlement into the right to health and then suddenly, there's nothing left for the right to education. So, I've got to think about all these rights simultaneously with the thought that if they genuinely are rights, the obligations associated with them cannot be systematically overridden. If you say I've got a right to something, you have an obligation to give it to me. But this obligation is readily and systematically overridden by other considerations, and you're back to thinking about rights as mere interests. And, of course, when we're just talking about mere interests, we're constantly trading off interests against other interests. But that's not the logic of rights—a right is something that is an obligation. Obligation, of its very nature, is something that is not readily overridden. And one of my problems with the doctrine of proportionality, as applied to human rights thinking, is that it tends to have the result that rights are simply identified with interests, and then we countenance the idea of rights infringements all over the place because eventually we have to balance these interests against each other, and we lose what's distinctive about the kind of protection that rights support. So those are the three things I would say—possibility, undue burden, and then the holistic constraint that we've got to work out the content of these rights so that compliance with them is something that's generally possible.

**POJANOWSKI:** Right, that last point reminds me a lot of Grégoire Webber's critique of rights; the right is delimited by its power, as opposed to being readily overridden.

**TASIOULAS:** Yeah, so let me say that Grégoire's work, my colleague Guglielmo Verdirame, Francisco Obina, have been lawyers who have, sort of very powerfully and bravely, tried to stem the tide of the emergence of this proportionality doctrine. Which for me, really, in many ways, is a bit like a utilitarian view that simply looks at interest and then tries to maximize their overall fulfillment. Rights get lost, even though for a lot of people, this is perceived as some sort of Rolls-Royce kind of doctrine in the theory of rights.

**POJANOWSKI:** So next we have Aphrodite Papachristodoulou. She says, "This is a more general question with regards to the bloated concept of rights and recognizing rights from existing well-established human rights. Just as an example here, we can arguably recognize a "right to be rescued at sea" as an intrinsic part of the extant "right to life", and also correlative of the existing obligation to rescue people in distress at sea. And this could be justified on the fundamental value that life has to all humans. The paradigm comes from thousands of migrants perishing at sea. Can we recognize rights, or extract rights from well-established rights, even though they're not listed in the UDHR, as you said? Or, does that create a risk because we're bloating rights in this way? Thank you."

**TASIOULAS:** That's a great question, Aphrodite. Well, this is a really good question, so I want to say that a right can incorporate others—if you like, more specific, rights—under it. And what those more specific rights are could change over time. Okay, so, think about something like the internet. You know, it wouldn't have made sense 50 years ago to say that people had a right to the internet—it didn't exist. But now you could say there is a right to the internet, and you could argue, for example, that the right to the internet falls under an existing, more general right whether that be the right to communication or something else. So, the view that I'm putting forward doesn't want to say that once you're against bloating, you're not against more specific rights emerging over time under the general heading. But they must genuinely be under the general heading. So, you know, there might be treatments for infertility, for example, that weren't simply available in the past that are available now. They fall under the right to health. Why do they fall under the right to health? Because there still are obligations pertaining to the delivery of health care. So the view that I'm putting forward is not saying that you can't have further rights, new rights, emerging under the umbrella of an existing right, but the coherence would be maintained. Why? because the obligations are still obligations of the same, general type, but the specific obligations are new because our technological capacities, for example, have changed. Thank you for that question.

**POJANOWSKI:** Wonderful. We've got a little bit more in the queue, but we are out of time. So, I want to thank you, John, for spending part of your early evening with us, and I want to thank everyone for coming by and participating with us all over the world. I hope you all have a wonderful day and rest of the evening.



**TASIOULAS:** Thanks very much. Thanks for the great questions. Thanks everybody.

**POJANOWSKI:** Bye.