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Cosmopolitan Law?

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Introduction

We have ethical and moral responsibilities to citizens of other countries who live far away and whose lives barely interact with ours. But do we have *legal* duties to those people? Do we have legal duties, that is, to people who do not belong to any institutional regime to which we belong, and whose governments have not entered into binding legal arrangements with us? If so, are the duties reciprocal? Can we also make legal demands and impose legal liabilities on people who have never agreed, directly or indirectly, to enter into legal privity with us, and who might not agree to do so even if they were asked?

These questions are of the utmost practical importance. In one form or another, they have haunted several of the most important decisions to face our courts and our government in recent years. What legal duties have we toward persons captured outside the United States—in Afghanistan and elsewhere—and then held outside the United States—in Guantánamo and beyond?¹ Are there some people in some places whose treatment falls entirely outside any legal order or regime?² Reciprocally, what kinds of legal claims—if any—are cognizable in U.S. courts regarding events that took place outside the United States, and may not even have involved any U.S. citizens?³

Within the U.S. Government, answers to these pressing questions have been proffered by courts striving to determine and specify the law of the United States; by government officials seeking to guide the executive branch by predicting what courts might do in future cases;⁴ and by legislators considering the best way to design U.S. law to accord with American values and interests. These government actors have tackled the issues from different perspectives corresponding to their different institutional roles. Although they have not always acknowledged it, each of their inquiries implicates a fundamental problem in legal theory: What justifies extending legal duties and demands outside the bonds of citizenship or the ambit of treaties?

In what follows, I set out to investigate the problem of the justifiability of legal duties that apply beyond the reach of familiar legal institutions like states and the treaty regimes states enter. To do so I want to draw on the difficult, contested, but nonetheless important concept of cosmopolitanism. In particular, I will consider two recent, powerful attempts—by Martha Nussbaum⁵ and Kwame Anthony Appiah⁶—to make cosmopolitanism useful for political theory, and will reflect on the legal implications of these undertakings. First, though, I want to consider briefly what is meant by cosmopolitanism itself; then,

after considering Nussbaum's and Appiah's arguments, to offer my own views on cosmopolitanism and law.

i. What is Cosmopolitanism?

A. Political Theory and the Citizen of the World

In ordinary English language usage today, a cosmopolitan is the kind of person who knows the good tapas bars in Barcelona, how to meet a graphic artist in Osaka, and where to find the most interesting khat-fueled salon conversation in Aden.⁷ A cosmopolitan judge (the standard is lower) might be one who wears English suits, speaks French or Swedish, and is not averse to citing international legal materials he or she picked up while summering in Salzburg with judges from other countries. "Cosmopolitan" is, of course, also the name of a mid-market women's magazine and, more tellingly, of a pinkish vodka drink (now thankfully passé) that somehow was thought to capture the glamour of the pre-9/11 cultural moment in New York.

The evident triviality of these contemporary uses of the term bears some consideration in the light of its historical origins. Its inventor seems to have been Diogenes the Cynic (d. 323 B.C.E.), who, when asked where he came from, replied, "I am a citizen of the world [*kosmopolites*]."⁸ Diogenes was himself an exile from his native Sinope.⁹ Like his contemporary Aristotle, though unlike Socrates and Plato, he was a stranger in Athens, not a citizen. His answer, then, captured both his own sense of unrootedness and also a more profound suggestion about the pointlessness of citizenship. To be a citizen of the world, Diogenes implied, is to feel at once common affective bonds with the whole world and—in the absence of any imaginable world state—to acknowledge political bonds with no one at all.

Like most comments attributed to Diogenes, we have this cryptic statement only by second-hand report and without much context. But it is fair to say that, as in many of his recorded comments, Diogenes intended some complicated combination of superficial parody and foundational depth. His suggestion would have been deeply subversive of contemporary Greek ideals of the virtue of participatory citizenship.¹⁰ Indeed, Diogenes's whole career may be read as a sort of critical send-up of the familiar Athenian virtues of action and contemplation. Asked what sort of a man he considered himself to be, he replied, "A Socrates gone mad."¹¹

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Diogenes, then, was not a theorist of the polis, but a gadfly. His coinage was meant to call into question the centrality of political allegiance as a category of self-construction. So it is intriguing that today, political theorists in particular use the term “cosmopolitan” in a serious, distinctive, and developed way.

It was not always thus. As its name implies, political theory is primarily directed toward the relations formed within and around the polis. The polis has been, in its day, a city, a kingdom, and even, for some theorists, a religious community like Augustine’s City of God¹² or the *umma* of the Muslims.¹³ In the modern era, however, the polis par excellence has been the state. Consequently, political theory since Hobbes’s *Leviathan*¹⁴ has focused largely on the functioning of states. With its three epochal wars among states,¹⁵ the twentieth century seemed to confirm the value of this state-centered focus. The most influential work of political theory written during the third—or “cold”—war of the century was John Rawls’s *A Theory of Justice*,¹⁶ a work focused mainly on evaluating the distributive arrangements adopted internally by states.¹⁷

The end of the twentieth century, though, led to some reconsideration of political theory’s focus on the polis itself. The rise of the European Union and the end of the Cold War combined to make states seem both less necessary and (after the collapse of the Soviet Union and Yugoslavia) less durable than before. Political theorists gradually started to focus on other levels of communal organization and to ask questions about the relationship between those organizations and the state. One direction taken, under the rubric of multiculturalism, was to focus on cultural or ethnic groupings of persons that typically operated at the sub-state level.¹⁸ Another was to focus on identities, groupings, and organizations that might operate above and outside the state.¹⁹ This latter conversation, closely related to the topic of multiculturalism, has proceeded under the heading of cosmopolitanism.

For contemporary political theorists, cosmopolitanism as citizenship of the world also implies a critique of ordinary theories of political obligation, with their tendency to focus on our duties to fellow citizens, not to people elsewhere. The ultimate literal expression of cosmopolitanism would of course be a single world government with corresponding global citizenship. Today, such an aspiration is almost unheard of in serious circles, notwithstanding the imaginings of the Michigan militia and their paranoid brethren everywhere.²⁰ Nevertheless there is a type of contemporary cosmopolitanism, which had its origins even before the end of the Cold War, that seeks to include everyone in the world in a single global web of mutual obligations. This approach

took Rawls's influential theory and expanded it to the international plane.²¹ Rawls had famously proposed that, in the original position, behind the veil of ignorance, the members of a society would rationally agree to a system of redistribution that would leave the worst-off person at least as comfortable as he would have been under conditions of strict egalitarian redistribution. The global approach—call it contractarian cosmopolitanism²²—took this Rawlsian redistribution to the world level.

At a theoretical level, this expansion may be accomplished either by treating states (or the peoples composing them) as members of a redistributive social contract that follows an initial social contract within states,²³ or by treating individual people, wherever they live, as the participants in a single, one-stage hypothetical social contract.²⁴ At a practical level, though, there is something unsatisfying about contractarian cosmopolitanism. Though not as utopian as world government, it is plagued by the mismatch between the theory of a global contract and the reality of the power and persistence of the state system in the face of the weakness and unenforceability of international agreements. A theorist of contractarian cosmopolitanism could find it “astonishing” that Rawls himself appeared to accept familiar, state-centered principles of international law.²⁵ But in making the social contract first a phenomenon of individual peoples, and only secondarily and more weakly imagining a global contract, Rawls was in effect acknowledging the institutional reality of the preeminence of states and the weakness of international institutions.²⁶

The practical limitations of contractarian cosmopolitanism opened the door to another trend in political theory: the attempt to bring something of the ideals of cosmopolitanism into relation with existing duties of citizenship. It is not easy to epitomize the content of such an approach or to explain exactly what is cosmopolitan about it. Contractarian cosmopolitanism at least has the advantage of being obviously cosmopolitan, in that it confers rights and duties on people everywhere as though they were citizens of the same world entity. More subtle, complex kinds of cosmopolitanism, however, insist on a balance between thinking of oneself as a citizen of an actual state and imagining oneself in terms of global obligation. Balancing makes for good political theory, of course, but it does not always make for clarity or ease of exposition. Nonetheless it deserves our attention, now more than ever.

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B. Prelude to Complex Cosmopolitanism

One step in the development of the political theory of complex cosmopolitanism took place in 1994, when Martha Nussbaum published an essay under the title “Patriotism and Cosmopolitanism.”²⁷ In the essay, Nussbaum, a distinguished classicist as well as a philosopher, introduced cosmopolitanism through its Stoic origins. The Stoics, she argued, transformed Diogenes’s *bon mot* into a more fully formed theory. For them, the aspiration to be a citizen not of a particular polis but of the world meant “that we should give our first allegiance to no mere form of government, no temporal power, but to the moral community made up by the humanity of all human beings.”²⁸ Nussbaum hastened to note that the Stoics were not seeking “the abolition of local and national forms of political organization and the creation of a world state.”²⁹ They had in mind something else altogether—a shift in one’s internal perspective away from the “local origins and group memberships, so central to the self-image of the conventional Greek male.”³⁰

In presenting Stoic cosmopolitanism, Nussbaum emphasized the participatory aspects of the view over its self-alienating aspect. The choice reflected her goal of making cosmopolitanism into a useful tool of political theory. As she well knew, the Stoics embraced the notion of exile in a deep sense.³¹ They were fully capable of seeing the cosmopolitan—even one who lived as a citizen in the place where he was born—as a kind of internal exile, a lonely man who by embracing a universal perspective weakened his affective bonds to the actually existing political community around him.³² This notion has a long subsequent philosophical history. From Avempace (d. 1138) in his *Governance of the Solitary*³³ to Joseph Soloveitchik (d. 1993) in his *Lonely Man of Faith*,³⁴ there have always been thinkers who emphasized the obligation of the reflective individual to separate himself inwardly from the society in which he is enmeshed. But this particular philosophical tendency, embraced by at least some ancient thinkers who could be called cosmopolitans, is in tension with the alternative impulse to make the philosophical content of political theory useful to actual state governance in the real world.

In a parallel sense, Nussbaum de-emphasized the world-government theme that arguably can be found in Roman Stoicism. If a world state were unimaginable to Diogenes at Athens, and if the Greek Stoics speaking of citizenship were “picturing, as it were, a dream or image of the philosopher’s well regulated society,”³⁵ the same was hardly the case for the citizens of the Roman Empire at its world-dominating height.

One leading Stoic, Marcus Aurelius, was actually the emperor. For him, and perhaps for other Roman Stoics, the notion of citizenship of the world may have corresponded to citizenship in the Empire. This cosmopolitan interest in at least the possibility of world government would have been inappropriate for Nussbaum's purposes, given the unpopularity and great unlikelihood of world government today, not to mention the discrediting of the Roman Empire itself.

By injecting cosmopolitanism into practical prescriptions for political theory, and insisting on a cosmopolitanism with room for local, "patriotic" attachments, Nussbaum foreshadowed what would become a characteristic and often difficult feature of complex cosmopolitanism. For cosmopolitanism to contribute to political theory--not to mention policy debate--it must necessarily abjure some of the radicalism that may be found in its ancient origins, and indeed beyond. It must move away from Diogenes the Cynic's hint that civic duty is a bit pointless. To be useful in the real world, cosmopolitanism must be understood to engage actual political duties, not to demonstrate their evanescence and unimportance. It needs to deemphasize the side of Stoicism that commanded internal alienation, and focus on the side that commends political activity to help people everywhere. To some degree, complex cosmopolitanism today must also steer away from the universalist one-worldism arguably present in some of its forms. A political cosmopolitanism must be modified, regulated, and controlled so as to engage the realities of the modern state and the system in which it operates.

Such a reining-in of cosmopolitanism was visible in the response to Nussbaum's essay written by the philosopher and cultural theorist Kwame Anthony Appiah.³⁶ This essay, entitled *Cosmopolitan Patriots*, took as its starting point two different statements by Appiah's father: a newspaper article arguing that Ghana (his home country) was worth dying for, and an ethical will to his children reminding them that, as both Ghanaians and Englishmen, they should "[r]emember that [they] are citizens of the world."³⁷ Appiah reconciled the two "sentiments" of cosmopolitanism and patriotism by asserting that cosmopolitanism, far from demanding a universal form of identity, "celebrates the fact that there are different local human ways of being."³⁸ At the same time, Appiah went on to suggest that the state itself is a morally significant (and desirable) structure, insofar as "living in political communities narrower than the species is better for us than would be our engulfment in a single world state."³⁹

Appiah's formulation of two balanced sentiments was well drawn to contribute to political theory. It eschewed the alienation and extreme

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universalism of radical cosmopolitanism. In particular, as Appiah explicitly noted, the “current preoccupation” within political theory was coming to center on the question of how to extend Rawls’s political theory to the international realm, where Rawls himself had not (yet) taken it.⁴⁰ As it turned out, Nussbaum and Appiah were to become two of the major figures in the conversation about complex cosmopolitanism. Now, in 2006, more than a decade after their essays first appeared, they have published books addressing the issues first raised there. It is to these works that we now turn.

ii. Morals beyond Borders

A. *What’s Wrong with the Social Contract?*

Although Martha Nussbaum’s *Frontiers of Justice*⁴¹ takes the form of a sustained criticism of Rawls, by her own account Nussbaum is after even bigger game. Nussbaum sets out to criticize and supplement the basic idea of the social contract which has dominated political theory since Hobbes. The main tool she uses to accomplish this task is a species of complex cosmopolitanism. It rests on the insight that social contract theories correspond so closely to the design of states that they cannot really tell us how to do justice to those who fall outside the basic requirements of equal citizenship.

The argument of the book is involved, but Nussbaum’s challenge to liberal social contract theory⁴² can be summarized with only limited damage to its structure.⁴³ It begins with the “Circumstances of Justice” (always capitalized Nussbaum’s book), which are, roughly speaking, the conditions under which justice can be said to apply as a relevant criterion. The locus classicus for an account of these conditions is to be found in Hume, who argued that the facts of human selfishness, limited generosity, and the comparative scarcity of the material stuff we need to sustain us were the circumstances that created a need for human cooperation through a system of laws.⁴⁴ Rawls drew on Hume’s account, emphasizing that the possibility and need for cooperation arise when individuals coexist in the same territory; are “roughly similar in physical and mental powers” so that none alone can dominate the others; live subject to conditions of “moderate scarcity”; and alongside their complementary interests in cooperation also have differing life-plans.⁴⁵

Nussbaum argues that social contract theories usually rely on something like the circumstances of justice to explain why the contract would be desirable for individuals to enter. This worries her, for two

reasons. First, she focuses on Rawls' suggestion that the parties suitable for social cooperation must be free, equal, and independent.⁴⁶ What troubles Nussbaum are those cases in which these conditions cannot be said to apply. Most important for our purposes,⁴⁷ she argues that nation-states cannot be imagined as rough equals, given that they differ so widely in size, power, and resources.⁴⁸ This would appear to preclude states from having the right incentives to entering into a redistributive social contract of their own, which in turn means that the citizens of those states may end up living under conditions of great inequality in which some are barely surviving or are not surviving at all. Bracketing the possibility that the social contract should exist among all persons regardless of their states,⁴⁹ Nussbaum considers this result to reflect a major problem for social contractarianism.

Nussbaum's second worry about the conditions for the social contract has to do with the idea that human selfishness provides the motivation that explains why people would (either actually or hypothetically) enter into an agreement for mutual advantage.⁵⁰ Hobbes managed this problem by pointing out that although our natural passions put us at odds with one another, the fact that humans are by nature roughly equal in physical and mental capacities means they have an incentive to enter into the social contract.⁵¹ Without fully embracing Hobbes' anthropology, Locke thought likewise that mutual advantage was a source for the social contract, and, says Nussbaum, even "Kant seems to hold that it is . . . advantageous . . . for all persons to join the contract."⁵²

Nussbaum finds this starting assumption about mutual advantage problematic. What happens when we cannot find a mutual advantage for cooperation a given situation where some people--like people living in other countries -- are nevertheless in dire need? Can it really be the case that justice as a category does not apply under these circumstances? For Nussbaum, this limitation of social contract theory gives us a reason to seek a non-contractarian alternative account of political justice.⁵³

The place to start looking, Nussbaum says, is Hugo Grotius' account of "basic principles of international relations," which have domestic uses as well.⁵⁴ These principles, she says, were built on a base derived from the ancient Stoics (also, let us recall, the inventors of cosmopolitanism), who believed that humans had both an inherent dignity and an inherent bent toward sociability.⁵⁵ Emphasizing these features -- not equality or selfishness-- led Grotius to reject a theory of mutual advantage: "Grotius argues explicitly that we must not attempt to derive our fundamental principles from an idea of mutual advantage

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alone; human sociability indicates that advantage is not the only reason for which human beings act justly.”⁵⁶

The avowedly Grotian alternative Nussbaum proposes grounds justice in the idea of what she calls central human capabilities.⁵⁷ These are universal capacities of everyone everywhere, without which one cannot live a life “worthy of human dignity.”⁵⁸ Nussbaum explains that her theory shares with Rawls’s (and liberalism generally) the core ideas of human dignity and the inviolability of the person.⁵⁹ It differs, though, by explicitly rejecting the procedural fairness model in favor of particular outcomes. Indeed, says Nussbaum, the capabilities approach is outcome-driven and consequentialist: it begins with the basic human capabilities, then works backward to develop an account of justice that assures that people everywhere will be entitled to exercise those capabilities.

Taken on its own terms, the capabilities approach would seem to represent a basic challenge to contractarianism: if the social contract cannot provide justice to all who deserve it, this would seem to call into question its value as the basis for a theory of justice. Nussbaum modestly prefers to say “not that we should reject Rawls’s theory or any other contractarian theory, but that we should keep working on alternative theories, which may possibly enhance our understanding of justice and enable us to extend those very theories.”⁶⁰ Elsewhere she says it is up to the reader to decide if Rawls’s approach is still worth pursuing.⁶¹ She also explains that she does not wish to reject the contractarian cosmopolitanism of Thomas Pogge or Charles Beitz,⁶² and her main criticisms of them relate to their vagueness.⁶³ Given Nussbaum’s professedly consequentialist view with respect to capabilities, however, one might wonder whether her unwillingness to jettison contractarianism might stem from similarly consequentialist motives.

Cosmopolitanism is not explicitly invoked in *Frontiers of Justice*—in fact, the term does not even appear in the book’s index. Nonetheless its relevance to the capabilities approach is clear, and not only from the Stoic origins that Nussbaum gives to Grotius. Nussbaum says that her argument grew out of her thinking about international development policy,⁶⁴ the area from which Amartya Sen’s cognate work on capabilities also sprung.⁶⁵ As she acknowledges, the capabilities approach was originally born as a way to replace the utilitarian economic reasoning so prevalent in this field,⁶⁶ but of course utilitarianism is not the only target of the progressive movement in international development. Still more fundamental an enemy is the view that certain moral duties do not run across borders, to people in far-away

places.⁶⁷ Nussbaum's concern that an adequate theory of justice must apply to all persons everywhere flows naturally from her cosmopolitan view that national boundaries are morally arbitrary.

B. The Social Contract and the State

It is, I think, significant that Nussbaum's cosmopolitan skepticism, which dates back at least to her 1994 essay, has now led Nussbaum to question social contract theory. Her outcome-oriented approach grows from the problem that social contract theory does not do an adequate job of accounting for justice to persons outside the state. The historical context in which social contract theory developed helps illuminate why this should be so: born and reared alongside the modern state, social contract theory gets into difficulties when it must confront either pre-modern or post-modern challenges of the kinds raised by cosmopolitan theory.

Social contract theory is the archetypal liberal solution to the question of the justifiability of the modern state. It does its strongest work in making sense of the state's structures and of the duties and obligations of citizens living within it, and in justifying the coercive legal apparatus that the state deploys to accomplish its goals. If we begin with assumptions about the autonomy of individuals, we need some theory to explain why the state might be justified in coercing those rights-bearing individuals against their wills to do the things that the state deems necessary.

Social contract theory traditionally answered the question by the controversial mechanism of consent. We may justifiably be coerced either because we have agreed to be coerced (actual consent); or because we would have agreed to be coerced were we rational and given the choice (hypothetical consent). Since we have agreed—or ought to have agreed—we are not really being coerced at all, and (in principle at least) our autonomy remains intact. If the state wishes to do something to us that we would not have agreed to have done, then in fact this cannot be justified. Our inalienable rights are protected, and through them our dignity and inviolability as humans.

Notice that in its classical, Lockean form, social contract theory mostly accounted for negative rights held against the state, while authorizing coercion that did not violate those rights.⁶⁸ This function corresponded to the legal structures of the eighteenth century, which protected negative liberties (rights against the state) rather than positive liberties (rights to opportunities or resources). Rawls saved social

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contract theory from oblivion by using it to justify the redistributive structure of the modern welfare state. Had it not been able to explain the emergence of a positive right to a share in the overall wealth of the society, social contract theory would have seemed irretrievably irrelevant to the existing political order. In the process, Rawls also sought to shift the function of consent in contractarianism by arguing that hypothetical consent to certain moral principles does not authorize coercion but rather offers a reason for believing that there is a natural duty to comply with the state's just demands. Rawls's historical importance thus derives from his extraordinary accomplishment of grafting a Kantian-inspired moral theory onto a familiar discourse of social contract, and using the resulting product to justify the Western welfare state, and thus welfare capitalism itself.

In Rawls's work, then, as in that of his predecessors, social contract theory corresponded to the legal structures of the state, which now through taxation appropriated wealth and redistributed it in the form of property. It is no coincidence that *A Theory of Justice* (1971) was roughly contemporaneous with *Goldberg v. Kelly* (1970),⁶⁹ in which the constitutional-legal character of the redistributive welfare state came closest to being acknowledged by the Supreme Court. According to the logic of *Goldberg's* holding, welfare entitlements were not just government largesse; they were actual entitlements due to citizens and held by them in some version of familiar property terms.⁷⁰ The state, on this view, was redistributing wealth as a matter of the citizen's right—and contractarian political theory explained why this was justified.

So we should not be especially surprised if, as cosmopolitanism moves political theory beyond the level of the state itself, social contract theory begins to look inadequate to the task. Through Rawls, one may see the astonishing flexibility and durability of social contract theory. Hobbes's contractarianism could justify despotism; Rousseau's contractarianism could, if necessary, be made to justify a dictatorship of the proletariat; Locke's that of a property-protecting slave republic; Rawls's the welfare state. Indeed, one could be forgiven for thinking that social contract theory, properly tinkered with, could justify any internal state structure.

But this flexibility depended, crucially, on the metaphor of agreement among similarly situated people trying to preserve mutual advantage, and that metaphor was closely conjoined to the structure of the state. The force of Nussbaum's complex cosmopolitanism is to urge us to move our attention away from the state, to persons far away—and when we do so, the power of the contract metaphor begins to melt away. Nussbaum is quite right that we cannot easily be imagined to have

entered into a mutually advantageous agreement with all the people in the world, much less all the beings. Not coincidentally, we have difficulty imagining joining others everywhere in being governed by a common law—not unless we postulate a world-governing God for whom distance is as nothing and the nations of the world are as a drop from the bucket.

C. Law and the Consequences of Capabilities

What actual, legal obligations or institutions would arise if we were to adopt Nussbaum's capabilities approach as our own? The specter of world government and the need to avoid it haunt Nussbaum's concrete proposals for implementing the capabilities approach that she advocates. She wants everyone everywhere to be entitled to all the capabilities on her list. She wants rich nations to transfer wealth to poor ones, and she wants multinational corporations to promote capabilities wherever they do business.⁷¹ But she also wants state sovereignty to be protected, because the state is a morally meaningful "expression of human choice and autonomy,"⁷² and because of the risks of tyranny, unaccountability, and the erosion of diversity.⁷³ So when it comes to establishing international institutions to facilitate the transfer of wealth necessary to deliver on the capabilities approach, Nussbaum calls for only a "thin system of global governance," with limited coercive powers—which on further investigation turns out to look very similar to the international order we have now, with a World Bank, an International Monetary Fund, a General Agreement on Trade and Tariffs, a World Health Organization, and other usual suspects.⁷⁴

This recommendation is perfectly reasonable, and it successfully represses the threat of world government. But in so doing it runs into the other horn of the dilemma created by a chastened and constrained cosmopolitanism: will it matter, in legal terms? If we are not to have a world government, who is going to make sovereign states overcome collective action problems and comply with their duties under the capabilities approach by actually funding these institutions and transferring wealth to poorer countries?⁷⁵

I shall suggest later in this essay that it may be possible to envision legal duties without a unified government or treaty regime at the back of them; but for now it suffices to raise the question of how we should give practical effect to the cosmopolitanism of capabilities. Of course states inspired by the capabilities approach could pass their own laws directing their governments to promote capabilities of persons elsewhere. But these would not amount to the creation of legal relations between the

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citizens of the donor states and the recipients of their Nussbaum-inspired redistribution. A worldwide treaty promising to deliver the key capabilities to all persons everywhere might do the trick. It would certainly create international legal duties between the signatory states, and maybe, by association, between signatory states and the individuals to whom duties are owed. But on closer examination such a treaty looks like contractual cosmopolitanism, a position Nussbaum does not, in this work, adopt. Her reasons for this restraint are plausible ones, namely the difficulty of imagining such an arrangement working in theory or practice.

It emerges that the capabilities approach differs from the contractarian in that it does perhaps a better job of telling us what people are owed morally—but it does not tell us why we or even if would be justified in coercing other people to give them their due. Nussbaum acknowledges as much when she says that the allocation of responsibility for capabilities-promotion to various international institutions “is aspirational” but lacks “any coercive structure over the whole that would enforce on any given part a definite set of tasks.”⁷⁶ Indeed, says Nussbaum, referring back to Grotius and his Stoic predecessors, her approach “is a version of the old natural law approach: the requirements at the world level are moral requirements, not captured fully in any set of coercive political structures.”⁷⁷

In principle, the capabilities approach could justify coercion regarding, say, the transfer of property, without recourse to a global social contract. The state may be justified in taking my property through force or the threat of force because someone else needs it more than I do, and indeed cannot live a life of human dignity without it. The location of that other person is morally irrelevant. According to this avowedly non-contractarian view, it does not matter that I myself might not consent (hypothetically or otherwise) to a system of government that takes my property for the purpose of raising to decency the standard of living of people on another continent. Those people are owed such a basic standard as a matter of morality, and it is my bad luck if I object.⁷⁸

Nussbaum does not take this tack, perhaps because she does not wish to compromise the ideal of autonomy in order to effectuate the ideal of universal dignity—a tradeoff that sounds in the tradition of Marx’s 1844 *Manuscripts*,⁷⁹ with their classic formulation of the notion of a “truly human functioning.”⁸⁰ There may be a connection between the state-centered localism of social contract theory and what is usually thought to make that theory liberal: the focus on autonomy. The ideal of autonomy underlies the mythic notion of free individuals coming together by choice to form the polis.

By encouraging a view of humans not primarily as citizens of such voluntarily constructed entities, but rather as members of a broader world, Nussbaum's version of cosmopolitanism emphasizes the unchosen fact of being human over the chosen fact of political citizenship. In this sense, at least, cosmopolitanism creates some tension with traditional contractarian liberalism and its concern with justifying coercive law. According to social contract theory, our status as citizens of particular law-governed states is freely chosen and, by hypothetical consent, continuously re-chosen. None of us, however, chooses to be born into the world.

iii. Ethics and Others

A. *The Cosmopolitan Self*

Kwame Anthony Appiah would surely reject the notion that a focus on autonomy runs counter to cosmopolitanism in any way. Indeed, in two nearly simultaneously published books, *The Ethics of Identity*⁸¹ and *Cosmopolitanism: Ethics in a World of Strangers*,⁸² he develops an attractive version of cosmopolitanism that derives from a Millian commitment to the construction of the self through a series of highly autonomous personal choices.⁸³ Both books build on the ideas Appiah first laid out in his 1994 reply to Nussbaum;⁸⁴ and if *The Ethics of Identity* is a systematic work while *Cosmopolitanism* is more of an extended philosophical meditation on his father's two dicta,⁸⁵ both sustain an internally consistent ethical vision, according to which we must remember our obligations to people far away even as we take an interest in the peculiarities of human difference. For Appiah, taking an interest in difference means noticing the ways individual humans shape their lives using the tools and materials provided by culture. This, then, is a cosmopolitanism driven precisely by liberal autonomy.

The differences between Appiah's cosmopolitanism and Nussbaum's are pronounced. Appiah's brand—which he calls both “rooted cosmopolitanism”⁸⁶ and, in a moment of candor, “wish-washy cosmopolitanism”⁸⁷—is more fine-grained and subtle than Nussbaum's, and also less radically demanding in the sphere of recentered consciousness. His ancient motto comes not from a philosopher wracked by the torments of self-alienation but from Terence, the Carthaginian slave turned successful comic playwright: “I am human: nothing human is alien to me.”⁸⁸

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For Appiah, the key to a defensible and manageable cosmopolitanism is that it must reconcile itself to “at least some forms of partiality.”⁸⁹ (This acknowledgment goes all the way back to Appiah’s response to Nussbaum in 1994 and his desire to reconcile the twin sentiments of patriotism and cosmopolitanism.)⁹⁰ In order to justify such partiality, Appiah has recourse to Ronald Dworkin’s distinction between ethics, which “includes convictions about which kinds of lives are good or bad for a person to lead,” and morality, which “includes principles about how a person should treat other people.”⁹¹ Ethics is a way of talking that makes sense only within a particular community of persons who share a vision of the good life. “Ethical obligation . . . is internal to . . . identity.”⁹² In the ethical sphere, therefore, partiality is appropriate, and even necessary, to the extent one is partial to the ethical community where one belongs. Partiality, however, has no place in moral discourse, where all persons must be treated as possessing equal worth.

Distinguishing partial ethics from universal morality turns out to have far-reaching effects. It leads Appiah to propose a further distinction between the state and other forms of community ranging from the nation to “the county, the town, the street, the business, the craft, the profession,” and beyond.⁹³ These forms of organization have *ethical* significance because they are “cared about by autonomous agents.”⁹⁴ Communities like these deserve our partiality to the extent that they enable (and presumably result from) the autonomous choices of individuals to author their own lives in the Millian sense that Appiah values. The state, by contrast, is something else again. “States . . . have intrinsic *moral* value: they matter not because people care about them but because they regulate our lives through forms of coercion that will always require moral justification.”⁹⁵

What does this distinction between ethically significant communities and the morally significant state mean for rooted cosmopolitanism? Rootedness—partiality to one’s community—is desirable on ethical grounds. So, too, is cosmopolitanism, understood as concern for others elsewhere and an interest in how they live. Within states, Appiah says, there can be “decrees and injunctions”⁹⁶ -- in other words, laws whose coercive effects must be justified in moral terms.⁹⁷ But when the conversation is not “within but among polities,”⁹⁸ law no longer applies, and so moral justification is not the issue. “We must rely on the ability to listen and to talk to people whose commitments, beliefs, and projects may seem distant from our own.”⁹⁹ This is cosmopolitanism as ethical enquiry—rich and deeply valuable, but operating on a different plane than the one occupied by a political theory focused on the state.

As a result of the distinction between ethically significant communities and the morally significant state, it turns out that Appiah's "rooted cosmopolitanism" applies to the realm of personal relations situated within communities but is of limited applicability at the level of the state. To speak of rooted cosmopolitanism as an approach capable of justifying binding laws would be an analytic error. Cosmopolitan ethics cannot on their own justify the decrees and injunctions of coercive law—for that work of political theory we need a moral accounting, not an ethical one.

It follows, I think, that for Appiah, the cosmopolitan ethical attitude is not well-formed to do the work of justifying legal coercion. It is, rather, going to give us good ideas for how we ought to structure our lives. We may well want to adopt some of those ethical insights into positive law; but we are not going to be under a moral obligation to do so, and indeed some forms of partiality that would be ethically desirable within communities would be morally impermissible if the state were to attempt to make them into law. The justification for coercion in our system will have to come from some other source than cosmopolitan ethics.

This approach of Appiah's is wonderfully clear, and in applying it to law, one can see that it is also theoretically elegant. But for our purposes, it is important to note the apparently limited applicability of Appiah's ethical cosmopolitanism to the analysis of legal duty. In its small-scale horizon, the measured, witty cosmopolitanism of Terence has little to do with the wild-eyed philosophical ideal of the Stoics, or, for that matter, the relentless universalism of the contractarian cosmopolitans. Being worldly-wise is not quite the same as being a citizen of the world.

B. Neutrality, Cosmopolitanism, and Coercion

Appiah is rigorously consistent in maintaining a distinction between moral forms of argument that justify state coercion and ethical forms of argument that, at least when applied to states, amount to non-binding (though by no means weak) normative suggestions. This leads to some surprising results in the controversial areas of lawmaking that one might expect to be informed by cosmopolitan ethical attitudes. In particular, when Appiah addresses the question of how law should engage problems of identity, his terms of reference derive from moral theory, not ethical theory.

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Take as one example the problem of respect for beliefs that we might consider unreasonable. Imagine that the state adopts a law ordering blood transfusions for unconscious patients who have a medical need for them. Writing in *The Ethics of Identity*, Appiah introduces a moral principle—“neutrality as equal respect”—according to which the state must not “disadvantage anyone in virtue of his identity.”¹⁰⁰ He then applies that principle to blood transfusion law. Jehovah’s Witnesses, he says, may object to the law on the ground that a transfusion will lead to damnation. The state must then consider whether there is some policy that would avoid thwarting the Witnesses.¹⁰¹ But there is no such policy, for “a policy requiring us to establish consent would endanger the lives of many.”¹⁰² The state may therefore justifiably adopt the law imposing transfusions on the unconscious. Even though the Witnesses (among others) will be coerced, Appiah says, they are not being coerced because they are Witnesses, but because we have made a general law that cannot tolerate exceptions without costing lives. They have therefore been given equal respect.

Of course it will not look that way to the Witnesses. They will surely feel that their concerns were rejected precisely because they were those of a fringe religious minority. Appiah acknowledges that if we believed the Witnesses and agreed that transfusions led to damnation, we would have a reason not to pass the law in the first place.¹⁰³ So the Witnesses’ belief is being rejected as false. Indeed, says Appiah, “[w]e mostly do not think it is even reasonable to believe [that transfusions lead to damnation].”¹⁰⁴ The key to his view that the Witnesses are nonetheless being respected equally must be that their belief is false (and irrational)—irrespective of the fact that they hold it *as* Jehovah’s Witnesses. We would react the same way to the false, irrational views of non-religious persons or indeed anyone. The moral claim to equal treatment does not entitle a group to have its partial views accepted or even treated as plausible, just not to be rejected on identitarian grounds.

Yet in *Cosmopolitanism*, Appiah offers a striking counterpoint through a discussion of theories about the causes of disease. In Ghana, he says, it is not uncommon to ascribe illness to witchcraft.¹⁰⁵ Appiah acknowledges that this attribution will seem mistaken to Westerners who have been reared on the germ theory, and in fact raises the possibility that the belief in witchcraft is not merely false but “irrational,”¹⁰⁶ much like the Witnesses’ belief that blood transfusions lead to damnation. Yet he rejects this suggestion, and on interesting grounds. He points out that when most Manhattanites encounter minor illness, they attribute the causes to viruses even when the virus cannot be treated and no tests are done to ascertain the cause.¹⁰⁷ Unless they are

virologists, the Manhattanites are relying on authority, not independent proof, for their theory of disease, just as the residents of Kumasi, Ghana rely on authority in ascribing similar illnesses to witchcraft.¹⁰⁸

From the undeniable fact that most people rely on authority rather than proof to explain the world around them, Appiah concludes that Ghanaians who believe in witchcraft are not being unreasonable. “What it’s reasonable for you to think, faced with a particular experience, depends on what ideas you already have.”¹⁰⁹ This recognition turns out to be an important piece of the cosmopolitan ethical picture. It clarifies that we must engage in cross-cultural conversation without necessarily expecting agreement.¹¹⁰ To be a cosmopolitan does not require relativism about the truth—I am still entitled to believe that viruses affect health while witchcraft does not—but it does require a certain attitude toward reasonableness.

What is remarkable about the *Cosmopolitanism* passage on the reasonableness of witchcraft is how it differs from the passage in *The Ethics of Identity* on blood transfusions. Strictly speaking the two passages do not contradict each other: the falsehood of the Witnesses’ view, not its unreasonableness, is the thing that according to Appiah allows us morally to overrule it. (In this Appiah differs from Thomas Nagel, according to whom we have no need to justify the state’s rational decisions in the face of irrational beliefs.¹¹¹) But compare the attitudes in Appiah’s two contemporaneous books. When it comes to making law, there are truths and falsehoods, winners and losers. The Witnesses have a moral right to be treated neutrally but not to win the argument, because (we assert) they are wrong about damnation. But when it comes to developing a cosmopolitan ethical attitude, we are urged to consider that the belief in witchcraft is no less reasonable than the (coincidentally true) belief in the germ theory of disease. The difference here depends on the distinction between the impersonal morality of the state and the deeply personalized ethic of cosmopolitanism.

This result is remarkable, to say the least. The respectful cosmopolitan attitude buys the minority little that is legally useful to them. Their particularity—in the sense of the ideas they “already have”¹¹²—is what makes their views reasonable; and yet this particularity must be ignored by the state in order for it to fulfill its moral duty of neutrality. Even Appiah’s concern to try to avoid coercing the Witnesses comes not from his cosmopolitanism but from the liberal moral duty of equal respect.

Notice the difference between this outcome and the one that might be urged by an alternative cosmopolitan legal order. Beginning with Appiah’s expansive cosmopolitan conception of reasonableness, we

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might conclude that the state should treat equally all conceptions of the world that are in this sense reasonable. If that were so, we could not so cavalierly dismiss the Witnesses' belief as false, and so we could not so easily justify coercing them through the force of law. Cosmopolitanism of this sort, with legal teeth, would raise serious and difficult problems for explaining how it might ever be justified to coerce people who in practice do not accept the reigning orthodoxies of the state. It might lead us to the conclusion that the state in fact cannot coerce people who reject the grounds for coercion. That would mean that the government of a cosmopolis might be pretty weak when it came to certain outlying cases—but it would also be a government with very attractive and extensive respect for rights.

The difficulty with applying Appiah's cosmopolitan ideas to law is also revealed when Appiah, in *Cosmopolitanism*, discusses the right regime to govern cultural patrimony. He adopts a cosmopolitan ethical standpoint,¹¹³ one that pays attention both to local cultures and to the interest of people everywhere in being exposed directly to important art of all kinds. Appiah thinks that articles of cultural heritage should not themselves be repatriated, for they in some sense belong to humanity; but he also thinks Western museums should compensate the peoples whose artifacts they plundered by sending them world art, including Western art.¹¹⁴ This is true cosmopolitanism: reasonable, worldly, and a perhaps just the slightest bit utopian.

The result of this original and rather appealing analysis, however, is not a single legal or moral principle that must be applied by states. Instead we get a looser set of recommendations that states or international organizations would (by Appiah's lights) do well to consider. Laws could certainly be adopted that flow from Appiah's ethical arguments, but the justifiability of any coercion that followed would come not from the ethical character of the laws but from the moral justifiability of the entities that adopted them and their internal political procedures—no small concern in the realm of international law. The well-developed difference between the moral and the ethical in Appiah's writing ultimately makes it difficult to think of cosmopolitanism as a source for justifying legal obligation.

iv. Cosmopolitan Law

A. *The Political Conception of Legal Duty*

In order to reexamine the question of cosmopolitan legal duty, it is worthwhile to begin by reminding ourselves how we think legal duty arises within the polis. The traditional liberal answer to why the state is justified in coercing us through law relies on consent. In one familiar version of the consent story, the polis itself arises out of collective agreement—whether actual or hypothetical—among autonomous individuals. Duly constituted by contractual agreement, the polis is from its very origin empowered to enact and apply coercive law subject to the limitation that it may not violate basic rights.¹¹⁵ In this sense, classical liberal theory makes entrance into political agreement a condition precedent for the imposition of justifiable legal duty.¹¹⁶

It follows from this view, presumably, that in the absence of political agreement, there can be no justified legal duty.¹¹⁷ Let us call this the *political* conception of legal duty, because it is a theory that makes the agreement that gives rise to the polis into a necessary condition of law.¹¹⁸ Nussbaum seems to hold some version of this view; and something like it is also implicit in Appiah's view that legal obligation arises within states, not among them.¹¹⁹ It has several important consequences for legal duties to people who are outside the polis—consequences that operate at the level of legal duties of individuals and at the level of legal duties of states.

According to the political conception, individual legal duties arise toward individual people who live outside the polis only to the extent that such duties may be derived from legal duties that the state imposes on its own citizens, who have entered into political agreement to be bound by its laws. Thus, the state may justifiably direct its citizens not to engage in certain harmful conduct wherever they might be, and thereby create in its citizens a duty not to do certain kinds of harm even when they are outside the polis. The United States Congress may, for example, justifiably pass a law prohibiting its citizens from traveling abroad for the purpose of having sex with minors.¹²⁰ This law creates a legal duty to minors abroad—insofar as they encounter Americans.

As for the state, it may enact laws binding itself (through its own actors) from engaging in certain conduct, wherever it might be acting. A salient example in this context would be the statute recently enacted by Congress prohibiting government personnel from engaging in acts of torture anywhere.¹²¹ This law also creates a duty that applies outside the

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polity insofar as U.S. government officials are active there. A variant on this scenario is the entrance by the state into an international treaty obligation, such as the Convention Against Torture.¹²² Even if the treaty is not self-executing, so that no individual legal duty arises absent the enactment of a separate statute, the state nevertheless incurs an international legal duty not to torture.¹²³

According to the political conception of legal duty, however, a state could not justifiably enact or enforce laws governing the conduct of persons who have never entered into political agreement with it. Congress, on this view, could not pass a law prohibiting just anyone from having sex with minors anywhere. According to this view, it would be unjustified for the United States to enforce such a law against, say, a German citizen who had sex with a minor in Thailand. Unlike an American citizen, the German could not be said to have consented, actually or hypothetically, to be bound by U.S. law.

It is an important but easily overlooked feature of this political conception that under it, legal duties cannot arise except where there has been political agreement. Thus, according to the political conception of legal duty, if the United States is under no international legal duty and no domestic legal duty not to engage in certain conduct, that conduct necessarily remains lawful. Consider inhumane treatment that falls short of torture as defined either by positive or customary international law¹²⁴ and is outside the purview of the Eighth Amendment: if no law prohibits the conduct, then according to the political theory of legal duty, it remains lawful for the government of the United States. This feature has been at the heart of the debate about recent legislation that among other things specifies U.S. obligations to detainees under the Geneva Conventions.¹²⁵ critics have been arguing that the law in effect permits (by not criminalizing) inhumane treatment that falls short of torture.

Does the political conception of legal duty underlie the practices of U.S. law? This is not at all clear. Consider the following formulation from the *Restatement (Third) of Foreign Relations Law of the United States*:

Subject to § 403 [which prohibits jurisdiction when it would be “unreasonable” for a set of specified reasons], a state has jurisdiction to prescribe law with respect to

- (1) (a) conduct that, wholly or in substantial part, takes place within its territory;
- (b) the status of persons, or interests in things, present within its territory;

- (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
- (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
- (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

The *Restatement* is not (consciously) a book of moral philosophy. Nevertheless, this passage is intended normatively, and it makes sense only if construed as intended to give an account of where and to whom U.S. law may justifiably be applied.¹²⁶ Its logic corresponds closely to the political conception as I have presented it. The focus is first on the state's territory -- the space in which the political agreement finds its primary expression; second on the "nationals" of the state, which is to say those who participate in the agreement; and third and most remotely on extraterritorial conduct by non-nationals that nevertheless directly affects the state or its (important) interests. Conduct abroad not involving the state or its citizens is putatively excluded.

Yet despite this formulation, some U.S. laws seem to challenge the political conception of legal duty by holding liable persons who have not entered into political agreement in or with the United States. Federal law makes it a crime for anyone to kill Americans abroad, or even to conspire to kill them.¹²⁷ This law embodies what is sometimes called the "passive personality principle," which might possibly be justified under the political conception of legal duty on the ground that the state is protecting its citizens wherever they go.¹²⁸ But the Alien Tort Claims Act (ATCA) goes further, conferring subject matter jurisdiction on the U.S. courts to adjudicate cases where non-citizens have violated either a U.S. treaty or "the law of nations," without regard to where that conduct has occurred.¹²⁹ Another U.S. law criminalizes hijacking an aircraft outside the United States.¹³⁰ The *Restatement* provides a principle that covers such expansive exercises of extraterritorial jurisdiction:

A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 [discussed above] is present.¹³¹

It seems possible that this formulation of universal jurisdiction, like the ATCA that it arguably covers, does not rest on the political

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conception of legal duty. Persons subjected to liability under the terms of a U.S. treaty or even the law of nations may never have agreed to be so bound; and it is possible to imagine reasonable people who would never have agreed hypothetically to be so bound.

Of course the political conception of legal duty *could* be at work here. International political agreements might be the reason that prosecutions under universal jurisdiction are justified; and all persons might be understood to have consented hypothetically to abide by such agreements. But this seems at least a little bit far-fetched as an account of why it is justifiable to hold an individual – who, let us imagine, may be a stateless person like a pirate—liable for actions barred by agreements between states.

It is true that the U.S. legal principle of personal jurisdiction requires that a party either be in the United States or have substantial contacts with the United States in order for laws like the ATCA to be applied to him by the U.S. courts.¹³² It could perhaps be argued, then, that the personal jurisdiction requirement incorporates the political conception of legal duty. Through its application, U.S. laws will be applied in U.S. courts only to persons who have entered into some sort of (limited) agreement with the state to be present therein.

The problem with this suggestion is that the ATCA—like all U.S. laws—can be applied to persons who are unwillingly and even unlawfully present within the jurisdiction of the U.S. courts.¹³³ They might have been kidnapped (“*male captus*”) or extradited or captured on the battlefield or served with a subpoena while in the U.S. on U.N. business, but in any case it is very difficult to claim that they have agreed or would have agreed to be subjected to U.S. law. Even if such a claim could be sustained in the case of someone who kills a U.S. citizen—the theory being that by that act the killer consents to U.S. jurisdiction—it would not work, presumably, for a person who is abducted abroad, brought into the United States, and then subjected to jurisdiction.¹³⁴

Furthermore, in the case of the ATCA, even if the defendant enters the United States willingly, it is far from clear that by this act he consents to be held liable for conduct he may have performed years before, outside the United States. In the extreme case, the conduct might not have been unlawful under some U.S. treaty even when it was performed, but might have become unlawful via a retrospective treaty conferring civil liability.¹³⁵ This does not look much like a political conception of legal duty. It leaves us to wonder if some other theory might be at work.

B. Cosmopolitan Legal Duty

1. Nature's Option

How would a cosmopolitan conception of legal duty differ from a political conception? A world government would create legal duties on all and toward all—and could do so without, in theory, violating the principle of consent or political membership. Contractarian cosmopolitanism offers another possible version of cosmopolitan legal duties. A world treaty arrangement might do the same. It could confer legal duties on and toward all states or all citizens.

But notice that these views, though undoubtedly cosmopolitan in their substance, essentially embrace the political conception of legal duty. Agreement is made the condition of legal duty—it is just that the agreement is extended globally, either through the original social contract or some secondary contract among peoples or states. Legal coercion is said to be justified by virtue of participation in that border-transcending agreement.

I want to suggest that it is possible to imagine—and subsequently to evaluate—a conception of legal duty that is cosmopolitan in a different and arguably deeper sense. Such a conception would eschew the notion that legal duty derives from actual or hypothetical agreement, however, extended. Instead the imposition of legal duty would be justified on the basis of some other principle that would extend to people and places everywhere, regardless of whether they had ever actually agreed with each other or hypothetically would so agree.

What principle, then, would satisfy this cosmopolitan conception of legal duty? One possible answer is that legal duty is justified insofar as it may be understood as a species of natural duty. It seems implausible in the extreme to think that there could be a natural duty to comply with any old law promulgated by any old lawgiving entity. But perhaps some laws do rise to the level of justifiably mandating obedience as a matter of natural duty. If so, the duty to obey such a law would apply even if one had no agreement of any kind with the entity that brought the law into existence. The duty would apply everywhere, and to everyone. Such a conception of legal duty would be distinctively cosmopolitan, not political in the sense I have been using of deriving from agreement.

What laws would fill this bill of mandating obedience as a natural duty? The most obvious and traditional answer—and one today in some dispute – is that natural laws, that is to say laws inherent to the nature of persons, must be followed as a matter of natural duty. This would

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certainly have been the answer of the Stoic cosmopolitans, who were sympathetic to the notion of a universal law of nature. Another person who treats me with hostility, said Marcus Aurelius, must be met with the recognition of his common humanity. One must say that he

is from one of the same stock, and a kinsman and partner, one who knows not however what is according to his nature. But I know; for this reason I behave towards him according to the natural law of fellowship with benevolence and justice.¹³⁶

This natural law deserves my obedience just because it is natural; and it certainly transcends political agreement. Indeed, this view of humans as belonging to a common stock tends to undercut the very notion of political duty by destabilizing the archetypal political distinction between friend and foe.¹³⁷ But Marcus was not undermining the notion of *legal* duty. (After all, as emperor he was presiding over and contributing to the most advanced legal system the world had ever known.)¹³⁸ The reason there was no tension for Marcus is that he presumably thought our legal duties, whether enacted by the emperor or otherwise, rested upon the natural law of human benevolence.¹³⁹

Closer to home than ancient Stoicism, the affinity between natural law theory and a cosmopolitan conception of legal duty may go some way toward explaining those elements of U.S. law that seem to rely on such a cosmopolitan theory. After all, the authors of the Declaration of Independence articulated a universal natural law theory in order to justify what was otherwise an act of disobedience to the norms of the British constitution. The U.S. Constitution itself studiously avoided the problem of natural law, but vestiges of natural law theory may be found in various places in our legal universe.¹⁴⁰ Natural law ideas have also come into play whenever complex problems of obedience to legal duty have arisen in American legal thought. Martin Luther King, Jr.'s "Letter from a Birmingham Jail," with its dual appeal to the law of God and the laws of man, provides one of the most famous examples.¹⁴¹

Of course today it is at the very least unfashionable—and very possibly irresponsible—to subscribe to the notion of natural laws to which obedience is a natural duty. Our account of which laws mandate a natural duty of obedience will have to be more circumscribed, and will have to derive not from nature but from the inherent justice of those laws. Nevertheless this possibility of a natural duty to obey at least some just laws, regardless of actual or hypothetical agreement to enter the jurisdiction of the entity that enacted them, is not as outré as it might at first sound.

Building upon Rawls' view that the duty of justice is "a fundamental natural duty" requiring us "to support and comply with just institutions that apply to us,"¹⁴² Jeremy Waldron has argued that "we have a natural duty to support the laws and institutions of a just state."¹⁴³ Waldron acknowledges that there is something special about the duty to comply with just institutions that, in Rawls' phrase, "apply to us" in that we may be counted among the persons "in respect of whose interests a just institution is just."¹⁴⁴ But he extends the duty beyond borders to include what one might call the weakly cosmopolitan natural duty not to interfere with the just institutions in someone else's country.¹⁴⁵ More important for our purposes, Waldron goes on to suggest that if an institution presents itself as capable of administering justice for some relevant range of persons, and actually is capable of so doing, there may be some duty to support and comply with it, not only to refrain from interfering. He concludes that his theory of natural duty "envisages moral requirement binding us to a political organization . . . quite apart from our agreement to be so bound, and quite apart from any benefits the organization has conferred on us."¹⁴⁶

What I am imagining as a cosmopolitan natural duty to comply with the law is not precisely the same as Waldron's natural duty to obey the laws of a just state. For Waldron, the natural duty flows to the just state that promulgates the law; and that organization can only claim our compliance if it is actually capable of delivering on its promise of justice. But I do not think that the institutional pedigree of a law need necessarily be relevant to the existence of a natural duty to comply with it. In fact, there might be a natural duty to obey a truly just law even if it was not promulgated by a state (or states) at all.

To see why this is so, consider why it is that Waldron makes the natural duty to obey a just law run to the state: it is, I imagine, because he is following Rawls' view (derived in turn from Hume¹⁴⁷) that justice is the virtue of political organizations. It would, according to this view, be absurd to speak of a "just" law promulgated by anything other than a political organization. The feature of justice in a law is borrowed from the justice of the institution that gives the law life. But this view depends, I think, on the idea that laws properly so-called always come into existence from the top down, from the commands of unitary sovereigns or sovereign-like entities capable of assuring cooperation. Waldron explains that assurance of cooperation is a key feature of justice, and he says that such assurance can be provided "only if the number of institutions addressing the problem that concerns me is limited (perhaps to one)."¹⁴⁸

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This need not be so. Legal systems often come into existence piecemeal, first competing with other means of dispute resolution and of the exercise of power. The modern state may need to assert a monopoly on violence, but there can be (there were!) laws without modern states. Whether it is a medieval English king urging individuals to seek justice in his courts rather than those of the feudal lords, or a qadi setting up shop to adjudicate disputes under Islamic law in the wake of the collapse of the state in Afghanistan or Somalia, there are persons and institutions who do law in the absence of any political agreement--and their legal judgments are susceptible of being adjudged just or unjust.

Thus, when one initially powerless person or entity proposes some law, and many persons or states then develop the practice of voluntarily complying with it, there can emerge a just norm that eventually may be enforced by a collectivity that has formed around the practice of compliance. It would be a mistake, I think, to say that the initial proposal is not susceptible of being described as just, and that only the fully developed, enforceable norm associated with a robust institution is capable of being labeled properly just. A norm only modestly and incompletely enforced can be just, and it can be law.

Now if it is true that there can be just laws without states attached to them, then there could perhaps be a natural duty to obey some such just laws. This natural duty would exist wholly outside of political agreement of any kind. In fact, such a natural duty to obey just laws might be especially salient where there was no single dominant political agreement, no effective modern state. This situation--the circumstances of justice for such laws, if you will--would obtain in failed states or quasi-anarchic situations. And it would obtain, *mutatis mutandis*, in the international sphere.

2. *The Moral Argument for Universal Jurisdiction*

It is possible, then, to imagine a cosmopolitan conception of legal duty that relies on a natural duty to comply with just laws. But what if we wish to avoid the difficult subject of natural duty altogether, and postulate other versions of a cosmopolitan conception? One way to get at an alternative is to examine the legal doctrines that seem to rest upon such a conception, and to try to uncover their theoretical roots.

Universal jurisdiction is the leading example of a legal doctrine that sits uneasily with the political conception of legal duty. The view associated with universal jurisdiction seems to be that all legitimate

local legal systems ought to embrace some universal commitments to persons everywhere. But why?

One simple and even attractive answer is that legal systems should embrace these universal commitments simply in virtue of being legitimate legal systems. To be a legitimate legal system, on this view--coercing and demanding compliance--requires satisfying some basic moral requirements. Those requirements will add up to a moral account of what justifies the very undertaking of doing law. This account does not focus on the duty to comply with a system that satisfies these moral requirements. Instead it focuses on the justifiability of coercing people who as a matter of luck come into contact with the system. The justification for subjecting them to jurisdiction would derive from the cosmopolitan insight that that moral significance should not depend on accidents of place. In other words, it would be morally arbitrary to exempt some persons from legal regulation just because of where they happen to live or where they happen to be when the system encounters them.

Let me begin by sketching the claim that a legal system, to qualify as legitimate, must satisfy some substantive moral requirements.¹⁴⁹ It would be foolhardy to attempt to list all such requirements here. But let us say that one such moral requirement is that the legal system must not make morally arbitrary judgments among persons. Another might be that heinous crimes – a category defined in moral terms – must not be left unpunished. A third requirement might be that basic human rights must be protected.

These three moral requirements – which are only a small subset of all the requirements one could imagine -- should suffice to make out the basic argument I have in mind. There will no doubt be disagreement among legal systems about what distinctions between persons are arbitrary, which crimes are heinous, and exactly what count as basic human rights. But no matter: we should be able to agree that no legal system that fails to satisfy some version of any of these three principles should be counted as a morally legitimate system.

Now consider the situation where a particular local legal system finds itself seized of someone who has, say, committed unquestionably heinous crimes. (The standard theory of universal jurisdiction includes piracy, hijacking, and other crimes notable mostly for occurring outside the boundaries of states; but also genocide, presumably included because it is thought to be so horrible.) The system must not let these crimes go unpunished. It would be morally arbitrary to punish only nationals, not non-nationals, for these crimes. And when it comes to

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detaining or trying such a person, his basic human rights cannot be violated without compromising the third principle.

If the legal system is to satisfy its requirements for moral legitimacy, it must try and punish the offender. It is not a satisfying answer to say that whether a non-national may be tried is itself an instance of the question whether non-punishment of foreign nationals would be morally arbitrary. Even if one were to concede that different moral standards are applicable to the question of the wrongfulness of the defendant's conduct or the propriety of holding him liable,¹⁵⁰ it still must be explained why it would not be arbitrary to punish one murderer and free another just because of the accident of where the crime was committed. The cosmopolitan would surely hold the view that the location of the crime is irrelevant: murder is as wrong here as in Persia.¹⁵¹

Notice that the justifiability of coercive legal action in this instance does not rest primarily on the legal duty of the defendant. It is simply an accident that he has fallen into the hands of this legal system. It is his bad luck. Indeed, even if some legal wrong has been done in bringing him into custody – if he falls under the doctrine of *male captus* – this accidental fact also may be morally arbitrary with respect to the system's duty to punish him. (This is the cosmopolitan moral insight behind the American rule that a person may be subjected to jurisdiction even when he ought not be in the U.S.¹⁵²) We are faced here with a case not dissimilar from the freeing of a murderer on a procedural technicality; and as we know, justifying such a decision on moral grounds probably depends on some claim about the justice of the system. Here, the legitimacy of the system probably cannot withstand the decision to release the murderer because of an accident of place of his crime.

Fully cashed out, this view would generate a cosmopolitan conception of legal duty insofar as each system would have the duty to apply its version of the set of universal laws to everyone with whom it comes into contact. According to this view, the cure for the quandary of failing to do justice to the people who fall outside a jurisdiction is simply to override the jurisdictional boundaries and do justice to all comers. The United States, on this view, might not be warranted in enacting and then seeking to apply a traffic code purporting to govern the behavior of Germans in Thailand. But it might well be warranted in passing and applying laws that protect the universal human rights of all minors against forcible sexual exploitation. Human rights violations anywhere are the business of good persons—and good legal systems—everywhere.

This universal jurisdiction idea, which is by no means fanciful, does not imply or require any institutions of world government. To the contrary, it leaves us with the local legal systems we have, and seeks to have each of them do what is morally right. Something like this notion arguably inheres in the ATCA's authorization of suits by one foreigner against another for violations of the law of nations that may have taken place outside the United States.¹⁵³

The strongest theoretical argument against this kind of universal jurisdiction is that it conflates the moral wrongs done by human rights violators with legal wrongs, and so assumes that any serious moral harm must be susceptible to legal sanction. In a sense this is a fair criticism. Nevertheless the argument rests not on the notion that some wrongs are so grave that they must be unlawful, but rather on the proposition that actually existing legal systems must address grave wrongs that come before them if they are to justify their existence. Legality and morality are not wholly conflated. The universal rights enforced in various jurisdictions can be made known in advance. They will not reach all wrongs, just the most egregious. Those wrongs may be sanctioned, not because their doers have agreed to be bound, but because it would be morally illegitimate for a just legal system to let them pass unpunished.

3. Minimalist Legal Cosmopolitanism

The foregoing account of a cosmopolitan conception of legal duty derived from the theory of universal jurisdiction is potentially quite radical. It could potentially be used to expand the reach of universal jurisdiction to cover a broad range of crimes on which there is no international consensus. As a result, it is likely to be unpopular with those who fear being subjected to the legal regimes of other countries. So it is also worth considering a more modest version of a cosmopolitan conception of legal duty.

Like the approach derived from universal jurisdiction, this approach, too would begin with an account of the morality of legal systems. But instead of focusing on the moral legitimacy of any one particular legal system, this approach – call it minimalist legal cosmopolitanism – would focus on the moral legitimacy of the summed set of all operating legal systems around the world. The central claim would be that we are justified in applying coercive law to particular persons in order to achieve the overall goal of rendering legitimate the entire global set of legal systems.

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The core insight in back of such a minimalist cosmopolitan approach is the normative view that *some* law must apply to every person and action, either authorizing it or prohibiting it. According to this view, no conduct or person should be deemed “off the grid” legally speaking because of the morally arbitrary accident of where the person is or the conduct has occurred. The set of global legal systems would be morally illegitimate if it allowed law-free zones in which the accident of place or status meant that there was no law at all. Not all law must reach everywhere, but every place and person must be subject to some law.

Thus, in the world envisioned by minimalist legal cosmopolitanism, individual legal systems would not adopt universal jurisdiction, and would ordinarily stick to applying their own local laws. But those local laws would be arranged and interpreted to avoid the anomaly of situations in which no law at all applies. If some local legal system refused to admit that its laws applied at all to a given situation, then other legal systems would, in a limited way, be justified in expanding their jurisdictions to fill the apparent gap – indeed, there would exist a general moral duty that at least one legal system extend itself to fill it. There would not need to be a single principle of universal jurisdiction—but *some* jurisdiction would apply everywhere. The result would preclude the possibility of legal vacuum – a possibility that can logically arise under the political conception of legal duty. No place on earth would be treated as a law-free zone.¹⁵⁴

The Rome statute of the International Criminal Court (ICC) arguably enacts a version of this sort of minimalist legal cosmopolitanism. Although the ICC is sometimes depicted in the United States as the harbinger of universal jurisdiction, in fact its jurisdiction kicks in when a local legal system has inadequately addressed a crime, either by failing to prohibit the conduct or failing to bring an offender to justice.¹⁵⁵ The ICC therefore functions as a stopgap to fill legal vacuums that are treated as morally illegitimate. It would of course be possible to have minimalist legal cosmopolitanism without an international organization stepping in to fill local gaps. The gaps could be filled locally. But it is easy to see that there is a practical benefit to a single entity playing this role, provided it has adequate resources and performs well.

Guantánamo Bay gives us an illustrative example of what minimalist legal cosmopolitanism would look like in practice at the local level. In front of the Supreme Court, the Bush Administration maintained that Guantánamo was not governed by U.S. law, but also was not governed by Cuban law, because it was leased in perpetuity from the predecessor government of Cuba.¹⁵⁶ (The island of Diego Garcia, leased by the United States from the British Crown, is another example of a spot

where the “off the grid” argument could be mounted;¹⁵⁷ there are persistent reports of secret U.S. detention facilities there.¹⁵⁸)

Minimalist legal cosmopolitanism would hold that it is justified and indeed obligatory for *some* law to apply in Guantánamo. It is possible to interpret the Court’s decision in *Rasul v. Bush* along these lines. Although a precedent of the Court had denied that the federal habeas corpus statute applied in Guantánamo¹⁵⁹ (which was the reason the government had put the detainees there in the first place), the Court bent over backwards to distinguish that case, all but overruling it to hold that the habeas statute did apply there.¹⁶⁰ The Court also asserted that in effect, the United States exercised control over Guantánamo, and that the federal habeas law therefore applied there.¹⁶¹

These statements suggest that the Court did not want to accept the Government’s argument that Guantánamo is a place where no law applies. The justices’ motivation could have been simply that such a holding would render U.S. law morally illegitimate; but even this view suggests that the illegitimacy would be part of a broader international problem about the legitimacy of the set of all legal systems. More to the point, finding such a gap would have invited the international community to attempt to plug it in some way.

A different version of the argument against legal gaps may be seen in *United States v. Hamdan*. This time the Government maintained not that a place was off the legal grid, but that certain persons were: it asserted inter alia that that no provision of the Geneva Conventions applied to “enemy combatants” captured on the battlefield in Afghanistan.¹⁶² Once again, the Court rejected this view. It held narrowly that the Government could not rely on this theory, and that Common Article Three of the Geneva Conventions did apply to the detainee in question and others similarly situated.¹⁶³

What makes this view cosmopolitan, despite its reliance on local laws, is its normative suggestion that as a citizen of the world, I should always be protected by the laws of the place in which I happen to be. This is not because I owe or am owed some political duty to the polis in that place. Nor is it because some agreement unites the world. It is because law ought to protect the citizen *of* the world everywhere *in* the world.

On this view, legal duties still correspond to political boundaries. But jurisdiction is not a moral or theoretical consequence of borders; it is a practical consequence of them. To a cosmopolitan, we are only accidentally citizens of states. We are not, however, only accidentally bound by laws. Wherever we go, some law should find us and bind us.

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Conclusion

At its irreducible core, cosmopolitanism demands that the general human qualities of another be put ahead of his particular allegiances. It follows that, through the heuristic device of the “citizen of the world,” cosmopolitanism does intend to weaken somewhat our sense of the primacy of political obligation.¹⁶⁴ It is therefore intriguing that, taken on its own terms, the cosmopolitan attitude does not weaken *legal* obligation the way it does particular *political* bonds. One might imagine that given the close association between the polis and the law, weakening bonds to the one might weaken the sense of a duty to the other. Yet there is no discernible antinomian thread in the cosmopolitan tradition.

Why doesn't cosmopolitanism weaken legal obligation alongside political obligation? The reason lies, I think, precisely in its stubborn insistence that the state is not the right level of analysis for making sense of our lives and obligations—not even the legal ones. For the cosmopolitan, there is no weakening of legal duty when one turns away from the state because legal duty does not ultimately derive from the state—nor, one might add, from fear of punishment by it.

Cosmopolitanism has always been interested in the predicament of the stranger, whether it is the expatriate who has abandoned his state to become a citizen of the world or the inwardly exiled philosopher who has weakened his affective bonds to the political community. I have suggested in this essay that the emphasis on the stranger may also suggest some theories that would account for our legal duties to the stranger, and his to us.

Law, on the account I have been offering, contains at once the commands of a particular community and an aspiration to the universal. Diogenes the Cynic made a characteristically barbed comment that may be read to incorporate this duality of the global and the local. “[I]t is impossible,” he said, “for society to exist without law.”¹⁶⁵ Yet at same time, “there is no advantage to law without a city.”¹⁶⁶ Law, in its purest and most general sense, is the condition for civilization itself. But the institutions that apply law best are in the end political ones; and without them, the best legal principles can give humans no advantage.

1. See, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

2. For example, detainees in secret facilities in places of doubtful jurisdiction like the island of Diego Garcia, a British possession on lease to the United States for military purposes. *See* [journalism]. [AU: Please add citations.]
3. *See, e.g.,* *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (considering liability of a non-U.S. citizen to a non-U.S. citizen for events taking place outside the United States under the Alien Tort Claims Act 28 U.S.C. § 1350 (2000)).
4. Many such internal government memoranda appear in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen Greenberg and Joshua Dratel eds. 2004). For my view on their character, see Noah Feldman, *Ugly Americans*, in *THE TORTURE DEBATE* (Karen Greenberg ed. 2006) 267.
5. Martha C. Nussbaum, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006).
6. Kwame Anthony Appiah, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* (2006) [hereinafter Appiah, *Cosmopolitanism*]; Kwame Anthony Appiah, *THE ETHICS OF IDENTITY* (2005) [hereinafter Appiah, *Ethics of Identity*].
7. *Cf.* Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REFORM 751, 754 (1992), revisited by Jeremy Waldron, *What Is Cosmopolitan?*, 8 J.POL. PHIL. 227, 231-34, 243 (2000).
8. DIOGENES LAERTIUS, 2 LIVES OF EMINENT PHILOSOPHERS 65 (Bk vi.63) (R.D.Hicks trans. 1972) (c. 200) [hereinafter DIOGENES LAERTIUS]. [LE Note switch to the Loeb edition, which is more appropriate from a scholarly standpoint. Also note we should include book and section #s in addition to loeb ed page number.]
9. *Id.* at 23 (Bk. V. 20); 51 (Bk. Vi.49) (“Again, when some one reminded him that the people of Sinope had sentenced him to exile, ‘and I them,’ said he, ‘to home-staying.’”)
10. *See, e.g.,* ARISTOTLE, *NICOMACHEAN ETHICS* Bk I.v 1095a-1096a (H. Rackham trans. 1926) 15-16 (discussing the active life of politics).
11. *Id.* at 55 (Bk v.54).
12. *See* SAINT AUGUSTINE, *DE CIVITATE DEI* (Marcus Dods trans., Modern Library 1950) (426).
13. For works treating the *umma* as a polis see, for example, *AVERROES ON PLATO’S REPUBLIC* (Ralph Lerner trans., Cornell Univ. Press 2005); *IBN KHALDŪN, THE MUQADDIMAH: AN INTRODUCTION TO HISTORY* (Franz Rosenthal trans., Princeton Univ. Press 1967)
14. THOMAS HOBBS, *LEVIATHAN* (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).
15. *See generally* PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* (2002) (describing a single long war in the twentieth century made up of the two world wars and the Cold War).
16. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).
17. Robert Nozick’s famous contemporary work, *Anarchy, State, and Utopia* (1974), also related primarily to the distributive consequences of the author’s account of the justifiable state structure. Rawls did of course touch on international issues in *A Theory of Justice*, see RAWLS, *supra* note 16, at 377-79, but the book’s overall focus is justice at the state level.

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18. See, e.g., WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); *THE RIGHTS OF MINORITY CULTURES* (Will Kymlicka ed., 1995).
19. See, e.g., CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1979) [hereinafter Beitz, *Political Theory*]; THOMAS W. POGGE, *REALIZING RAWLS* (1989) [hereinafter Pogge, *Realizing Rawls*]. Also useful are shorter works by these authors, such as Charles R. Beitz, *Bounded Morality: Justice and the State in World Politics*, 33 *Int'l Org.* 405 (1979) [hereinafter Beitz, *Bounded Morality*]; and Thomas Pogge, *Rawls and Global Justice*, 18 *Can. J. Phil.* 227 (1988) [hereinafter Pogge, *Rawls and Global Justice*]. Although both Beitz and Pogge have been important in the subsequent cosmopolitanism debates, neither by himself sparked the degree of attention to problems of international justice that followed the end of the Cold War.
20. See Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 *STAN. L. REV.* 1667, 1691-92 (2003) (summarizing the primary objections to world government and noting that “[c]osmopolitan theorists are usually quick to deny any desire for [one]”). This was not true a century ago, when world government was the rage among a certain group of utopian thinkers. See John Fabian Witt, *Crystal Eastman and the Internationalist Beginnings of American Civil Liberties*, 54 *DUKE L.J.* 705 (2004).
21. See BEITZ, *POLITICAL THEORY*, *supra* note 19, at 136-43 (describing a Rawls-inspired principle of cross-border natural resource redistribution); POGGE, *supra* note 19, at 240-73 (arguing for globalized contractarianism).
22. Cf. POGGE, *REALIZING RAWLS*, *supra* note 19, at 240 (referring to Rawls’s vision as “cosmopolitan”).
23. Beitz. [AU: Please add full cite—if you could cite to chapters or pages within the work, that would be helpful.]
24. Pogge. [AU: Same comment as above.]
25. POGGE, *REALIZING RAWLS*, *supra* note 19, at 243-44.
26. *Id.* at 244 (noting that Rawls conceives of justice as a property of institutions “which, by hypothesis, are absent on the global plane.”) See also RAWLS, *A THEORY OF JUSTICE*, *supra* note xx, at 8 (asserting that the “significance” of considering justice within a particular society “is obvious and needs no explanation.”)
27. The essay appeared in the *Boston Review* together with a number of responses by important philosophical and legal figures, and was later collected and expanded into a short book alongside those responses and a few others. Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, *BOSTON REV.*, Oct.-Nov. 1994, at 3 [hereinafter Nussbaum, *Boston Review Essay*], reprinted in *FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM 2* (Joshua Cohen ed., 1996) [hereinafter Nussbaum, *Patriotism and Cosmopolitanism*].
28. Nussbaum, *Patriotism and Cosmopolitanism*, *supra* note 27, at 7.
29. *Id.*
30. *Id.* at 6-7.
31. Cf. PLUTARCH, *On Exile*, in 7 *Plutarch’s Moralia* 527 (Philip H. De Lacy and Benedict Einarson, trans. 1959) (“For by nature there is no such thing as a native land, any more than there is by nature a house or a fram or forge or surgery”); 533

- (“For nature leaves us free and untrammled; it is we who bind ourselves, confine ourselves, immure ourselves, herd ourselves into cramped and sordid quarters.”); 537 (“Indeed, if you lasy aside unfounded opinion and consider the truth, the man who has a single city is a stranger and alien to all the rest”); 545-46 (“Zeno indeed, when he learned that his only remaining ship had been engulfed with its cargo by the sea, exclaimed: ‘Well done, Fortune! Thus to confine me to a threadbare cloak’ and a philosopher’s life”). See also Martha Nussbaum, *Kant and Stoic Cosmopolitanism*, 5 J. POL. PHIL. 1 (1997), in which she explicitly addresses the tension between Stoic cosmopolitanism’s participatory and self-alienating aspects.
32. Nussbaum herself has acknowledged as much. See Martha C. Nussbaum, *Compassion & Terror*, DAEDALUS, Winter 2003, at 10, 22 (noting that for Marcus Aurelius, achieving evenhanded concern for humans required the extirpation of personal attachments, creating a world “strangely lonely and hollow”).
 33. ABU BAKR MUHAMMAD IBN YAHYA [AVEMPACE], TADBIR AL-MUTAWAHHID (Ma’an Ziade ed., [AU: Publisher?] 1978) ([AU: original year]). [AU: Please confirm this source—we could not find the publisher or confirm the author name.] For excerpts in English, see Avempace, *The Governance of the Solitary*, in MEDIEVAL POLITICAL PHILOSOPHY 122 (Lawrence Berman trans., Ralph Lerner & Muhsin Mahdi eds., 1963).
 34. JOSEPH B. SOLOVEITCHIK, *THE LONELY MAN OF FAITH* (1992).
 35. Plutarch, *On the Fortune of Alexander*, in For a discussion of this passage, see Sandrine Berges, *Loneliness and Belonging: Is Stoic Cosmopolitanism Still Defensible?*, <http://www.bilkent.edu.tr/~berges/Loneliness%20and%20Belonging.doc> (last visited Aug. 29, 2006).
 36. Kwame Anthony Appiah, *Cosmopolitan Patriots*, in FOR LOVE OF COUNTRY, *supra* note 27, at 21.
 37. *Id.* at 22.
 38. *Id.* at 25
 39. *Id.* at 29.
 40. *Id.* at 24. Rawls gave a lecture entitled *The Law of Peoples* in 1993, reprinted in John Rawls, *The Law of Peoples*, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 41 (Stephen Shute & Susan Hurley eds., 1993). That same year, he also published *Political Liberalism* (later reissued in an enlarged edition in 1996), and in 1999, *The Law of Peoples*. These works took up the challenge of considering, according to Rawls, “how reasonable citizens and peoples might live together peacefully in a just world.” Rawls, *The Law of Peoples*, at vi.
 41. NUSSBAUM, *supra* note 5.
 42. Nussbaum restricts her critique to liberal (i.e., non-Rousseauian) social contract theories. *Id.* at 25. [AU: It might be helpful to drop a line here explaining what Rousseauian or otherwise non-liberal social contract theories might look like.]
 43. For ease of exposition, the order of the argument presented here differs slightly from Nussbaum’s own.
 44. Hume’s discussion may be found in Book 3.2.2 of his *Treatise on Human Nature*. See DAVID HUME, A TREATISE OF HUMAN NATURE 311-22 (David Fate Norton and Mary J. Norton eds. 2000, first published 1737-40).
 45. See RAWLS, A THEORY OF JUSTICE, *supra* note xx, at 126-27, and see 126 n.3.

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46. Nussbaum, *supra* note xx, at at 28.
 47. The severely disabled, Nussbaum says, also cannot be imagined as roughly equal for social contract purposes. *Id.* at 31-32. Neither can non-human animals, who also are not free. *Id.* Important as these subjects are, they are not directly relevant to the topic of cosmopolitanism and I therefore do not address them here.
 48. *Id.* at 32.
 49. Nussbaum points out that Rawls in his later work did imagine that the social contract ideal might be applied among peoples organized into states. *Id.* at 238-55.
 50. NUSSBAUM, *supra* note 5, at 34.
 51. *Id.* at 30 (citing HOBBS, *supra* note 14, at [AU: Please provide page number in Tuck ed.; was “ch. 13”]).
 52. Nussbaum at 51.
 53. *Id.* at 25.
 54. Nussbaum at 36.
 55. *Id.*
 56. *Id.* at 37.
 57. *See id.* at 76-78. Nussbaum has developed the capabilities idea in earlier work. *See, e.g.,* MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000).
 58. NUSSBAUM, *supra* note 5, at 78.
 59. *Id.* at 75.
 60. *Id.* at 25; *see also id.* at 94-95 (explaining the role of contractarian theories as “close allies of the capabilities approach”).
 61. [AU: Please add pincite(s).]
 62. *See supra* notes 19-25 and accompanying text.
 63. NUSSBAUM, *supra* note 5, at 264-70.
 64. *Id.* at 71-72.
 65. For the comparison, see *id.* at 70, **315-16**. For Sen’s work, see, for example, AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999); AMARTYA SEN, INEQUALITY REEXAMINED (1992); and AMARTYA SEN, COMMODITIES AND CAPABILITIES (1985).
 66. NUSSBAUM, *supra* note 5, at 71.
 67. Thus in one important essay, Nussbaum defends Cicero’s “cosmopolitan” view that duties of justice run to all humans, while rejecting his (corresponding) view that duties of material aid run in the first instance to one’s own fellow citizens. Martha C. Nussbaum, *Duties of Justice, Duties of Material Aid: Cicero’s Problematic Legacy*, 8 J. POL. PHIL. 176 (2000).
 68. JOHN LOCKE, TWO TREATISES OF GOVERNMENT. On positive and negative liberty, see Isaiah Berlin, Two Concepts of Liberty.
 69. 397 U.S. 254 (1970).
 70. *Id.* at 262 n.8 (citing Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964)).
 71. NUSSBAUM, *supra* note 5, at 316-18.

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72. *Id.* at 261. Nussbaum does not expand on this point except to insist that, unlike Rawls, she attributes no agency to “peoples.” *Id.* at 262.
73. *Id.* at 313-14.
74. *Id.* at 319.
75. See Nussbaum, *supra* note xx, at 315 for her expression of this concern.
76. *Id.* at 315.
77. *Id.*
78. Nussbaum does acknowledge the work of Pogge and Beitz, which seeks to move the ground of the contractarian model to the whole world, but her approach aims to sidestep the whole apparatus. [AU: Please add *FoJ* cite here.]
79. Karl Marx, *Economic and Philosophic Manuscripts of 1844* (Dirk J. Struik ed., Int’l Publishers 1964) (1844).
80. NUSSBAUM, *supra* note 5, at 74 (quoting Marx).
81. APPIAH, *ETHICS OF IDENTITY*, *supra* note 6.
82. APPIAH, *COSMOPOLITANISM*, *supra* note 6. 74
83. On Appiah’s debt to Mill, see, for example, APPIAH, *ETHICS OF IDENTITY*, *supra* note 6, at 1-13, 271-72.
84. Appiah, *supra* note 36.
85. See *supra* note 36 and accompanying text.
86. Appiah, *Ethics of Identity*, *supra* note xx, at 212 (chapter heading).
87. *Id.* at 222.
88. APPIAH, *COSMOPOLITANISM*, *supra* note 6, at 111.
89. APPIAH, *ETHICS OF IDENTITY*, *supra* note 6, at 223.
90. See Appiah, *supra* note 36.
91. APPIAH, *ETHICS OF IDENTITY*, *supra* note 6, at xiii, 230 (citing RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 485 n.1 (2000)). The distinction is developed over several pages, see *id.* at 230-37, with reference added to Hegelian *Sittlichkeit* and *Moralitat*, see *id.* at 233.
92. APPIAH, *ETHICS OF IDENTITY*, *supra* note 6, at 236.
93. *Id.* at 246.
94. *Id.* at 245.
95. *Id.* (emphasis added).
96. *Id.* at 246
97. For Appiah, state coercion is justified only when the state treats persons impartially as possessing equal moral worth. See *id.* at 231.
98. *Id.* at 246.
99. *Id.* at 246.
100. *Id.* at 91.
101. *Id.* at 93-94.
102. *Id.* at 93.
103. *Id.*

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104. *Id.*

105. APPIAH, COSMOPOLITANISM, *supra* note 6, at 35.

106. *Id.* at 36.

107. *Id.* at 38.

108. *Id.* at 38-39.

109. *Id.* at 39.

110. *Id.* at 44.

111. APPIAH, ETHICS OF IDENTITY, *supra* note 6, at 92-96 (citing Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 PHIL. & PUB. AFF. 215 (1987)).

112. *Id.* 39.

113. *See, e.g.*, APPIAH, COSMOPOLITANISM, *supra* note 6, at 126-27. [AU: Do you want to say something more in this footnote? Just the fact Appiah's standpoint here is "cosmopolitan" is not so remarkable or interesting given that that is his standpoint throughout.]

114. *Id.* at 122-24.

115. A related yet distinct answer, focusing on "the agency or will that is inseparable from membership in a political society," may be gleaned from Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113, 128 (2005). Technically, Nagel here is not justifying legal coercion in the first place, but giving an argument for why we are responsible to address arbitrary economic inequalities within a given political society where coercive law already operates. In the course of so doing, however, he describes the state of membership in terms of the observation that we are "both putative joint authors of the coercively imposed society, and subject to its norms." *Id.* It is worth noting that Nagel downplays the element of consent in *entering* political society -- he considers the act of membership accidental -- while emphasizing the element of agency (and by implication, consent) that comes from *participating* in political society.

116. There are quirky cases like the legal duties of foreign visitors or residents. But it is customary (and somewhat plausible) to say that these, too, have consented to be governed by law by being there, despite the fact that they have not entered into the political agreement that applies to citizens. See Waldron, *Special Ties*, *supra* note xx, at 8-9.

117. Note that this view need not entail any commitment about whether law is best understood in positivist or interpretivist terms. The agreement that is a condition of justified legal duty according to this view is the political agreement to form or enter the polity, not an agreement about the content of law.

118. Nagel, in *The Problem of Global Justice*, *supra* note xx, at 119-21, distinguishes between what he calls the political conception of justice and the cosmopolitan conception of justice. In his account, according to the political conception, justice properly speaking is a virtue of states. The political conception of legal duty is a little different. It makes political agreement into the condition for justified legal duty, but it admits of the possibility that this political agreement could be between states -- hence the legal duties of international law could be thought to arise from the political theory of legal duty.

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119. APPIAH, *ETHICS OF IDENTITY*, supra note xx, at 245-46 (explaining that “once we are speaking not within but among polities, we cannot rely upon decrees and injunctions”).
120. See, e.g., Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.
121. See, e.g., Pub. L. No. 109-148, Div. A, tit. X, § 1003, 119 Stat. 2680, 2739-40 (2005) (codified at 42 U.S.C.A. § 2000dd(d) (Supp. 2006)) (“No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”). This law enacts the McCain Amendment to the Fiscal Year 2006 Defense Appropriations Bill.
122. E.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.
123. One would think it obvious that this obligation would apply everywhere. But astonishingly, the U.S. Government has sometimes suggested otherwise. Article 2, section 1 of the Convention states that “[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” The government has occasionally claimed that this language means the Convention does not apply to its action outside “its jurisdiction,” i.e. the United States. This seems to me an obvious and pernicious misreading. See also article 5.
124. The complex and important question of customary international law is beyond the scope of this essay. For our purposes it should suffice to note that just as the political conception of legal duty entails no commitment to one or another theory of the nature of domestic law, it also entails no necessary commitment to any theory about the nature or sources of international law. Customary international law could be understood as binding because state parties have actually or hypothetically consented to be bound by its norms by their entrance into the world community. *Alvarez-Machain v. United States*, 331 F.3d 604, 613 (9th Cir. 2003) (en banc), cert. granted sub nom *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).
125. Military Commissions Act of 2006.
126. Thus if Congress passed a law applying more broadly, the authors of the Restatement would presumably consider the law unwise and unjustified but not invalid or unconstitutional.
127. See 18 U.S.C. § 2332(a)-(b) (2000) (criminalizing murder and conspiracy to murder a U.S. national outside the United States).
128. Though it remains unclear why this self-protective motive justifies the imposition of duties on others.
129. “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350 (2000).
130. 49 U.S.C. app. § 1472 (n)(1). On the history of this law and on extraterritorial enforcement more broadly, see Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 AM. J. INT’L LAW 880 (1989).
131. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404.

cosmopolitan law?

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132. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).
133. This is the so-called *Ker-Frisbie* rule. See *Ker v. Illinois*, 119 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519 (1952). On the rule see Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L LAW 444, 460-67 (1990).
134. For example, Manuel Noriega.
135. Retroactive civil liability has often been found not to violate the Ex Post Facto Clause or due process. See
136. *Meditations* Bk 3. (Cite to Loeb edition)
137. Cf. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (George Schwab trans., Univ. of Chicago Press, 1996) (1932). [AU: Please add at least a parenthetical explaining your reference to Schmitt here, perhaps emphasizing the friend/foe distinction. A pincite might also help.]
138. See ANONYMOUS, 1 *HISTORIA AUGUSTA* *157-63 (David Magie trans., Loeb Classical Library 1921). [AU: We could not find this source. Can you please confirm and give us any more information you might have on it?]
139. *MEDITATIONS*, *supra* note **Error! Bookmark not defined.**, at [AU: Need to add pincite info (section/chapter/page) here.] (describing “the natural law of fellowship with benevolence and justice”); *id.* at [AU: Also need to do the same here.] (“For there is one universe made up of all things, and one God who pervades all things, and one substance, and one law, one common reason in all intelligent animals, and one truth.”).
140. See, e.g., *Casey*; *Lawrence v. Texas* (grounding the due process right to be free of prohibitions on consensual same-sex sexual conduct in the an account of human functioning).
141. Martin Luther King, Jr., Letter from a Birmingham Jail (Apr. 16, 1963), <http://www.nobelprizes.com/nobel/peace/MLK-jail.html>.
142. RAWLS, *A THEORY OF JUSTICE*, *supra* note xx, at 115.
143. Waldron, *Special Ties*, *supra* note xx, at 3
144. *Id.* At 19.
145. *Id.* At 13,
146. *Id.* At 20.
147. See HUME, *supra* note xx, at xx.
148. Waldron, *Special Ties*, *supra* note xx, at 23.
149. I have in mind substantive requirements, not the procedural requirements described by Jeremy Waldron in his draft paper on the rule of law.
150. An example of what Liam Murphy calls non-monism in analysis, differentiating an institutional morality from a personal one.
151. Something like this argument may perhaps be gleaned from some of the speeches of the Lords in the Pinochet case. [give cites]
152. The *Ker-Frisbie* rule, see *supra*, note xx.
153. See *supra* note 129 and accompanying text. [AU: It would be helpful to cite to something explaining the ATCA and how it's been interpreted and applied.]

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154. International space law lies for the moment outside the bounds of this Review . the doctrine of *res communis*, a communal ownership of space, leaves open the question of what law to apply, but it atleast hints that even off the earth, some law should apply. For now question of detention in space is a matter for the science fiction fantasist – but as the last century has taught us, the speculative has a way of becoming real.
155. Rome statute
156. *See* *Rasul v. Bush*, 542 U.S. 466, 480-81 (2004).
157. *But see* *Regina (Bancoult) v. Sec. of State*, [2001] Q.B. 1067 (U.K.). (holding that persons expelled from diego Garcia by the Crown were entitled to redress as “belongers” to territory under the Queen’s jurisdiction). *Bancoult* was decided on facts that applied before ht U.S. leased the island.
158. *See*, e.g., Dana Priest & Scott Higham, *At Guantanamo, a Prison Within a Prison: CIA Has Run a Secret Facility for Some Al Qaeda Detainees*, Officials Say, *WASH. POST*, Dec. 17, 2004, at A1.
159. Eisentrager
160. *See* *Rasul*
161. *Id.* at xx. It was not necessary for the Court to decide whether, in the absence of a statute, the Constitution would have applied in Guantánamo -- but with Congress’s subsequent enactments that restrict the statutory reach of habeas to detainees held outside the United States, it may still be necessary for the Court to reach this issue in afurther case.
162. *See* *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2794-96 (2006). *See* also Memorandum from Jay S. Bybee, Assistant Att’y Gen., to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Dep’t of Defense (Jan. 22, 2002), *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>
163. *Hamdan*, 126 S. Ct. at 2796-97. [AU: Is this the pincite you would want to use? Also, do you want to note here something about how the Court said Common Article III covers these detainees not as a matter of constitutional law, customary international law, or natural law, but because it read the UCMJ as incorporating the Geneva Conventions and the Geneva Conventions as applying CA3 to these individuals? While *Hamdan* was a very broad opinion in some respects, this particular piece of interpretive restraint (judicial minimalism) blunted somewhat the moral/ethical and international-law implications of the decision (cosmopolitan minimalism).]
164. *See supra*, TAN xx-xx. [AU: I am not sure what you are trying to cite here. The discussion on Stoic cosmopolitanism? Nussbaum’s early efforts to downplay the subversive/radical elements of classical cosmopolitanism?]
165. *See* *DIOGENES LAERTIUS*, *supra* note 8, at 75 (Bk. Vi.72).
166. *Id.*