

THE YALE LAW JOURNAL

NOAH FELDMAN

Cosmopolitan Law?

Cosmopolitanism: Ethics in a World of Strangers

BY KWAME ANTHONY APPIAH

NEW YORK: W.W. NORTON & CO., 2006. PP. 256. \$23.95

The Ethics of Identity

BY KWAME ANTHONY APPIAH

PRINCETON: PRINCETON UNIVERSITY PRESS, 2005. PP. 384. \$32.95

Frontiers of Justice: Disability, Nationality, Species Membership

BY MARTHA C. NUSSBAUM

CAMBRIDGE: HARVARD UNIVERSITY PRESS, 2006. PP. 512. \$35.00

AUTHOR. Cecelia Goetz Professor of Law, New York University School of Law. Thanks to Ronald Dworkin, David Golove, Leslie Green, Rick Hills, Lewis Kornhauser, Mattias Kumm, Andreas Lowenfeld, Stephen Macedo, Liam Murphy, Tom Nagel, Jeannie Suk, Jeremy Waldron, and Katrina Wyman, and to Jennifer Hainsfurther and Ian Mitch for research assistance.



REVIEW CONTENTS

INTRODUCTION	1024
I. WHAT IS COSMOPOLITANISM?	1026
A. Political Theory and the Citizen of the World	1026
B. Prelude to Complex Cosmopolitanism	1030
II. MORALS BEYOND BORDERS	1033
A. What's Wrong with the Social Contract?	1033
B. The Social Contract and the State	1037
C. Law and the Consequences of Capabilities	1040
III. ETHICS AND OTHERS	1042
A. The Cosmopolitan Self	1042
B. Neutrality, Cosmopolitanism, and Coercion	1045
IV. COSMOPOLITAN LAW	1049
A. The Political Conception of Law	1049
1. Political Association as a Condition of Law	1049
2. The Political Conception and U.S. Law	1053
B. Cosmopolitan Law	1056
1. Nature's Option	1056
2. The Moral Argument for Universal Jurisdiction	1061
3. Minimalist Legal Cosmopolitanism	1065
CONCLUSION	1069

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 personally belong to any political association to which we belong and whose governments and ours do not both belong to relevant legal or political associations? If so, are the duties reciprocal? Can we also make legal demands and impose legal liabilities on people with whom we are not joined in any meaningful form of political association?

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? 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?²

In the realm of partisan politics, these questions have generated a range of cross-cutting answers, not all of which are internally consistent. Many on the left of the political spectrum believe that war criminals such as former Chilean dictator Augusto Pinochet should be tried by courts wherever they may be found under a theory of universal jurisdiction; yet many of these same people oppose the idea that Osama bin Laden's driver, one Salim Ahmed Hamdan, can be put on trial by the United States in Guantánamo. Meanwhile, on the right, many who embrace the Guantánamo military tribunals reject out of hand the notion of universal jurisdiction for heads of state and strongly oppose entrance by the United States into the treaty creating the International Criminal Court.

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 officials seeking to guide the executive branch with

-
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. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (considering the liability of one noncitizen to another noncitizen for events taking place outside the United States under the Alien Tort Statute and the Federal Tort Claims Act).

predictions of what courts might do in future cases;³ 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: is political association a necessary condition for law?

Traditional liberal conceptions of law tend to hold that law, properly so called, can only exist and justifiably coerce people when it emanates from some political association such as a state, a treaty regime, or the international community (conceived as a meaningful political association). In what follows, I set out to explore the possibility that law may arise, and coercion to comply with it may be justified, even when the law does not issue from a political association. Doubtless political associations have the capacity to make law and to justify legal coercion. And any institution that applies law will probably have to be some sort of political association. But perhaps there are other ways for binding law to come into existence.

To see what these might be, I draw on the difficult, contested, but nonetheless important concept of cosmopolitanism. In particular, I consider two recent, powerful attempts—by Martha Nussbaum⁴ and Kwame Anthony Appiah⁵—to make cosmopolitanism useful for political theory, and I reflect on the legal implications of these undertakings. The reason for this turn to cosmopolitanism is that, while much liberal theory treats political association as a necessary condition for law, cosmopolitanism generally directs our attention away from political associations like states as relevant makers of moral categories. By treating the individual as primary, and his or her political associations as secondary, cosmopolitanism can clear the way to imagining not only moral and ethical but also legal duties justifiably arising outside the bounds of state or other political power.

It is no coincidence, I suggest, that modern legal and political theory treats the state (or some comparable association) as the necessary source of legal

-
3. Many such internal government memoranda appear in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen J. Greenberg & Joshua L. Dratel eds., 2005). For my view on their character, see Noah Feldman, *Ugly Americans*, in *THE TORTURE DEBATE IN AMERICA* 267 (Karen J. Greenberg ed., 2006).
 4. MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006).
 5. 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*].

obligation: these theories developed to justify the coercion characteristic of the modern state and its claim to monopolize violence. But there was law before there were modern states—law that claimed to derive its binding authority not from political association but from other sources and that was applied by institutions of very limited and certainly nonexclusive power. That law may have been capable of having the moral authority to bind through coercion—and it still may, whether it is found in failed states, where no one has a monopoly on violence, or in the international sphere, where there are many laws whose authority cannot so easily be said to derive from political association.

My argument proceeds in three steps. First, I consider briefly what is meant by cosmopolitanism itself. I then consider Nussbaum's and Appiah's arguments and investigate their implications for the question of law on which I focus. Finally, I offer three possible approaches to the problem of cosmopolitanism and law.

I. WHAT IS COSMOPOLITANISM?

A. *Political Theory and the Citizen of the World*

In today's English, a "cosmopolitan" is the kind of person who knows where to find the good tapas bars in Barcelona, the graphic artists in Osaka, the most interesting khat-fueled salon conversation in Aden.⁶ A cosmopolitan judge (the standard is lower) 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 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

6. Cf. Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REFORM 751, 754 (1992). Waldron revisits some of these ideas in Jeremy Waldron, *What Is Cosmopolitan?*, 8 J. POL. PHIL. 227, 231-34, 243 (2000).

from, replied, “I am a citizen of the world [*kosmopolites*].”⁷ Diogenes was himself an exile from his native Sinope.⁸ 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 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.

As with most comments attributed to Diogenes, we have this cryptic statement only by secondhand report and without much context. But it is fair to say that, as in many of his recorded remarks, 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.⁹ 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.”¹⁰

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 St. Augustine’s City of God¹¹ or the *umma* of the Muslims.¹² In

-
7. 2 DIOGENES LAERTIUS, *LIVES OF EMINENT PHILOSOPHERS* bk. VI, para. 63, at 65 (Jeffrey Henderson ed., R.D. Hicks trans., Harvard Univ. Press 2005) [hereinafter DIOGENES LAERTIUS].
 8. *Id.* bk. V, para. 20, at 23. “[W]hen some one reminded [Diogenes] that the people of Sinope had sentenced him to exile, ‘and I them,’ said he, ‘to home-staying.’” *Id.* bk. VI, para. 49, at 51.
 9. See, e.g., ARISTOTLE, *NICOMACHEAN ETHICS* bk. IV, at 15-16 (G.P. Goold ed., H. Rackham trans., Harvard Univ. Press rev. ed. 1934) (c. 384-322 B.C.E.) (discussing the active life of politics).
 10. DIOGENES LAERTIUS, *supra* note 7, bk. V, para. 54, at 55.
 11. See AUGUSTINE, *THE CITY OF GOD* (Marcus Dods trans., Modern Library 1950) (426).
 12. For works treating the *umma* as a polis see, for example, AVERROES ON PLATO’S *REPUBLIC* (Ralph Lerner trans., Cornell Univ. Press 2005); and IBN KHALDŪN, *THE MUQADDIMAH: AN INTRODUCTION TO HISTORY* (Franz Rosenthal trans., Princeton Univ. Press 1967).

the modern era, however, the polis par excellence has been the state. Consequently, political theory since Thomas Hobbes's *Leviathan*¹³ has focused largely on the functioning of states. With its three epochal wars among states,¹⁴ 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*,¹⁵ which focused mainly on evaluating the distributive arrangements adopted internally by states.¹⁶

The end of the twentieth century, however, led to some reconsideration of political theory's focus on the polis. 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 that typically operated at the sub-state level.¹⁷ Another was to focus on identities, groupings, and organizations that might operate above and outside the state.¹⁸ 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

-
13. THOMAS HOBBS, *LEVIATHAN* (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).
 14. 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).
 15. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).
 16. Robert Nozick's famous contemporary work *Anarchy, State, and Utopia* also related primarily to the distributive consequences of the author's account of the justifiable state structure. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974). Rawls did of course touch on international issues in *A Theory of Justice*, see RAWLS, *supra* note 15, at 377-79, but the book's overall focus was on justice at the state level.
 17. See, e.g., WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); *THE RIGHTS OF MINORITY CULTURES* (Will Kymlicka ed., 1995).
 18. 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), and Thomas Pogge, *Rawls and Global Justice*, 18 *CAN. J. PHIL.* 227 (1988). 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.

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.¹⁹ Nevertheless, there is a type of contemporary cosmopolitanism with origins 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.²⁰ 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 cosmopolitanism²¹—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,²² or by treating individual people, wherever they live, as the participants in a single, one-stage hypothetical social contract.²³ Whatever its theoretical appeal, however, at a practical level 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.²⁴ But in making

-
19. 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).
 20. See BEITZ, POLITICAL THEORY, *supra* note 18, at 136-43 (describing a Rawls-inspired principle of cross-border natural resource redistribution); POGGE, REALIZING RAWLS, *supra* note 18, at 240-73 (arguing for globalized contractarianism).
 21. Cf. POGGE, REALIZING RAWLS, *supra* note 18, at 240 (referring to Rawls's vision as “cosmopolitan”).
 22. See, e.g., BEITZ, POLITICAL THEORY, *supra* note 18, at 136-43.
 23. See, e.g., POGGE, REALIZING RAWLS, *supra* note 18, at 243-44.
 24. *Id.* at 243.

the social contract first a phenomenon of individual peoples and only second and more weakly a global phenomenon, Rawls was in effect acknowledging the reality of the preeminence of states and the weakness of international institutions.²⁵

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.

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*.²⁶ In the essay, Nussbaum, who is not only a philosopher but also a classicist, 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."²⁷ Nussbaum hastened to note that the Stoics were not seeking "the abolition of local and

25. See *id.* at 241 (noting that Rawls conceived of justice as a property of institutions that, "by hypothesis, are absent on the global plane"); see also RAWLS, *supra* note 15, at 8 (asserting that the "significance" of considering justice within a particular society "is obvious and needs no explanation").

26. The essay appeared in the *Boston Review* together with a number of responses by important philosophical and legal figures. Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, BOSTON REV., Oct.-Nov. 1994, at 3. It was later collected and expanded into a short book alongside those and other responses. Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, in FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM 2 (Joshua Cohen ed., 1996) [hereinafter Nussbaum, *Patriotism and Cosmopolitanism*].

27. Nussbaum, *Patriotism and Cosmopolitanism*, *supra* note 26, at 7.

national forms of political organization and the creation of a world state.”²⁸ 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.”²⁹

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 for political theory. As she well knew, the Stoics embraced the notion of exile in a deep sense.³⁰ 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 existing political community around him.³¹ This notion has a long subsequent philosophical history. From Avempace (d. 1138) in *The Governance of the Solitary*³² to Joseph Soloveitchik (d. 1993) in *The Lonely Man of Faith*,³³ 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

28. *Id.*

29. *Id.* at 6–7.

30. Cf. PLUTARCH, *On Exile* (c. 90–110), in 7 PLUTARCH’S MORALIA 513, 527 (Phillip H. de Lacy & Benedict Einarson trans., Harvard Univ. Press 1959) (“For by nature there is no such thing as a native land, any more than there is by nature a house or farm or forge or surgery . . .”); *id.* at 533 (“For nature leaves us free and untrammelled; it is we who bind ourselves, confine ourselves, immure ourselves, herd ourselves into cramped and sordid quarters.”); *id.* at 537 (“Indeed, if you lay aside unfounded opinion and consider the truth, the man who has a single city is a stranger and an alien to all the rest . . .”); *id.* at 545, 547 (“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 . . .”). In at least one subsequent work, Nussbaum has explicitly addressed the tension between Stoic cosmopolitanism’s participatory and self-alienating aspects. Martha C. Nussbaum, *Kant and Stoic Cosmopolitanism*, 5 J. POL. PHIL. 1 (1997).

31. Nussbaum herself has acknowledged as much. See Martha C. Nussbaum, *Compassion and 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”).

32. ABU BAKR MUHAMMAD IBN BAJJAH [AVEMPACE], TADBIR AL-MUTAWAHHID (Ma’an Ziade ed., 1978) (c. 1095–1138). For excerpts in English, see Avempace, *The Governance of the Solitary*, in MEDIEVAL POLITICAL PHILOSOPHY 122 (Ralph Lerner & Muhsin Mahdi eds., Lawrence Berman trans., Cornell Univ. Press 1963).

33. Joseph B. Soloveitchik, *The Lonely Man of Faith*, TRADITION, Summer 1965, at 5, reprinted as JOSEPH B. SOLOVEITCHIK, THE LONELY MAN OF FAITH (1992).

the alternative impulse to make the philosophical content of political theory useful to state governance in the real world.

In a parallel sense, Nussbaum deemphasized 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,”³⁴ 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 of 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 must deemphasize the side of Stoicism that commands internal alienation and focus on the side that commends political activity to help people everywhere. To some degree, complex cosmopolitanism 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.³⁵ This essay, entitled *Cosmopolitan Patriots*, took as its starting

34. Plutarch, *On the Fortune of Alexander* (c. 46-120), in 1 THE HELLENISTIC PHILOSOPHERS 67a (A.A. Long & D. Sedley eds., 1987). For a discussion of this passage, see Sandrine Berges, *Loneliness and Belonging: Is Stoic Cosmopolitanism Still Defensible?*, 11 RES PUBLICA: J. LEGAL & SOC. PHIL. 3, 6-9 (2005).

35. Like Nussbaum’s essay, Appiah’s essay first appeared in the *Boston Review*. Kwame Anthony Appiah, *Loyalty to Humanity*, BOSTON REV., Oct.-Nov. 1994, at 10. It was then reprinted in

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."³⁶ Appiah reconciled the two "sentiments"³⁷ 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 universalism of radical cosmopolitanism. It was also well timed. 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. In 2006, more than a decade after their essays appeared, they both published books addressing the issues first raised therein. It is to these works that we now turn.

II. MORALS BEYOND BORDERS

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

Although Nussbaum's *Frontiers of Justice* takes the form of a sustained criticism of Rawls, by her own account Nussbaum is after even bigger game.

expanded form. Kwame Anthony Appiah, *Cosmopolitan Patriots*, in FOR LOVE OF COUNTRY, *supra* note 26, at 21 [hereinafter Appiah, *Cosmopolitan Patriots*].

36. Appiah, *Cosmopolitan Patriots*, *supra* note 35, at 21.

37. *Id.* at 23.

38. *Id.* at 25.

39. *Id.* at 29.

40. *Id.* at 24. In 1993, Rawls gave a lecture entitled *The Law of Peoples*. John Rawls, *The Law of Peoples* (1993), in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 41 (Stephen Shute & Susan Hurley eds., 1993). That same year, he also published *Political Liberalism*, and in 1999, *The Law of Peoples*. These works took up the challenge of considering, in Rawls's formulation, "how reasonable citizens and peoples might live together peacefully in a just world." JOHN RAWLS, *THE LAW OF PEOPLES*, at vi (1999).

She sets out to criticize and supplement the basic idea of the social contract, which has dominated political theory since Hobbes. One important 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 theory⁴¹ can be summarized with only limited damage to its structure.⁴² It begins with the "Circumstances of Justice" (always capitalized in the book), which are, approximately, the conditions under which justice can be said to apply as a relevant criterion. The locus classicus for an account of these conditions is the work of David Hume, who argued that the facts of human selfishness, limited generosity, and the comparative scarcity of the material stuff we need to sustain ourselves were the circumstances that created a need for cooperation through a system of laws.⁴³ 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 have differing life plans alongside their complementary interests in cooperation.⁴⁴

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's suggestion that the parties suitable for social cooperation must be free, equal, and independent.⁴⁵ What troubles Nussbaum are the cases in which these conditions cannot be said to apply. Most important for our purposes, she argues that nation-states cannot be imagined as rough equals, given that they differ so widely in size, power, and resources.⁴⁶ This would appear to preclude

41. Nussbaum restricts her critique to liberal (i.e., non-Rousseauian) social contract theories. See NUSSBAUM, *supra* note 4, at 25.

42. For ease of exposition, the order of the argument presented here differs slightly from Nussbaum's own.

43. Hume's discussion may be found in DAVID HUME, A TREATISE OF HUMAN NATURE bk. 3, pt. 2, § 2, at 311-22 (David Fate Norton & Mary J. Norton eds., 2000) (1737-1740).

44. RAWLS, *supra* note 15, at 126 & n.3, 127.

45. See NUSSBAUM, *supra* note 4, at 28.

46. *Id.* at 32. The severely disabled, Nussbaum says, also cannot be imagined as roughly equal for social contract purposes. See *id.* at 31-32. Neither can nonhuman animals, who moreover are not free. See *id.* Important as these subjects are, they are not directly relevant to the topic of cosmopolitanism, and I therefore do not address them here.

states from having the right incentives to enter 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,⁴⁷ 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.⁴⁸ 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.⁴⁹ Without fully embracing Hobbes's anthropology, Locke likewise thought 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."⁵⁰

Nussbaum finds this starting assumption about mutual advantage problematic. What happens when we cannot find a mutual advantage for cooperation in a given situation in which some people—such as those 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 an alternative account of political justice.⁵¹

The place to start looking, Nussbaum suggests, is Hugo Grotius's account of the "basic principles of international relations," which have domestic uses as well.⁵² The core of these principles, she says, derived from the ancient Stoics (also, recall, the inventors of cosmopolitanism), who believed that humans had both an inherent dignity and an inherent bent toward sociability.⁵³ Emphasizing these features—rather than equality or selfishness—led Grotius to reject a theory of mutual advantage: "Grotius argues explicitly that we must *not*

47. Nussbaum points out that Rawls in his later work did imagine that the social contract ideal might be applied among peoples organized into states. *See id.* at 238–55.

48. *See id.* at 34.

49. *See id.* at 30 (citing HOBBS, *supra* note 13, ch. 13, at 86–87).

50. *Id.* at 51.

51. *See id.* at 25.

52. *Id.* at 36.

53. *Id.*

attempt to derive our fundamental principles from an idea of mutual advantage alone; human sociability indicates that advantage is not the only reason for which human beings act justly.”⁵⁴

The avowedly Grotian alternative Nussbaum proposes grounds justice in the idea of what she calls central human capabilities.⁵⁵ These are universal capacities of everyone everywhere, without which one cannot live a life “worthy of human dignity.”⁵⁶ Nussbaum explains that her theory shares with Rawls’s theory (and with liberalism generally) the core ideas of human dignity and the inviolability of the person.⁵⁷ 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.”⁵⁸ Elsewhere she states that the capabilities approach may be seen as “an extension of or complement to Rawls’s theory, with . . . new problems in focus.”⁵⁹ She also explains that she does not wish to reject the contractarian cosmopolitanism of Thomas Pogge or Charles Beitz,⁶⁰ and her main criticisms of them relate to their vagueness.⁶¹ Given Nussbaum’s professedly consequentialist view with respect to capabilities, however, and her observation

54. *Id.* at 37.

55. *See id.* at 76-78. Nussbaum has developed the capabilities idea in her earlier work. *See, e.g.*, MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000).

56. NUSSBAUM, *supra* note 4, at 78.

57. *Id.* at 75.

58. *Id.* at 25.

59. *Id.* at 69; *see also id.* at 95 (describing contractarian theories as “close allies of the capabilities approach”).

60. *See supra* notes 18-24 and accompanying text.

61. *See* NUSSBAUM, *supra* note 4, at 264-70.

that her project is “urgently practical,”⁶² 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 assigns to Grotius. Nussbaum says that her argument grew out of her thinking about international development policy,⁶³ the area from which Amartya Sen’s cognate work on capabilities also sprung.⁶⁴ As she acknowledges, the capabilities approach was originally born as a way to replace the utilitarian economic reasoning so prevalent in this field,⁶⁵ 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 faraway places.⁶⁶ 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 her 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 premodern or postmodern challenges of the kinds raised by cosmopolitan theory.

62. *Id.* at 306.

63. *See id.* at 71-72.

64. For the comparison, see *id.* at 70, 284-87, 315-16. For Sen’s work on capabilities, see, for example, AMARTYA SEN, *COMMODITIES AND CAPABILITIES* (1985); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999); and AMARTYA SEN, *INEQUALITY REEXAMINED* (1992).

65. NUSSBAUM, *supra* note 4, at 71.

66. 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).

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 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 this 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). Because 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 rights held against the state, while authorizing coercion that did not violate those rights.⁶⁷ 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 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 share in the overall wealth of 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. Instead of following the traditional view that hypothetical consent to certain principles authorizes coercion, he proposed that the heuristic device of the hypothetical agreement of reasonable people 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—yet modified—discourse of social contract and then using the resulting product to justify the Western welfare state, and thus welfare capitalism itself.

67. See generally JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). On positive and negative liberty, see ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969).

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),⁶⁸ 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.⁶⁹ 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, 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 cooperation among politically associated 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. Similarly, we would not find it easy to imagine joining others everywhere in being governed by a common law—not unless we were to postulate a world-governing God for whom distance is as nothing and the nations of the world are as a drop from the bucket.

68. 397 U.S. 254 (1970).

69. See *id.* at 262 n.8 (quoting Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 *YALE L.J.* 1245, 1255 (1965)) (citing Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964)).

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. 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.⁷⁰ But she also wants state sovereignty to be protected, because the state is a morally meaningful "expression of human choice and autonomy"⁷¹ and because of the risks of tyranny, unaccountability, and the erosion of diversity.⁷² 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.⁷³ On further investigation, this system turns out to resemble closely the international order we have now, albeit with certain improvements. Here are, in essence, a World Bank, an International Monetary Fund, a General Agreement on Trade and Tariffs, a World Health Organization, and other usual suspects; to these Nussbaum would add "world environmental regulations with enforcement mechanisms," enhanced "global labor standards for both the formal and the informal sector," and "some limited forms" of globally redistributive taxation.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? States are not so different from individuals when it comes to doing the right thing: laziness, self-interest, and collective action problems all stand in the way of universal voluntary compliance with improving the status of people elsewhere. If we are not to have a world government, who is going to make sovereign states comply with their duties under the capabilities approach by actually funding international institutions and transferring wealth to poorer countries?⁷⁵

70. See NUSSBAUM, *supra* note 4, at 316-18.

71. *Id.* at 262. Nussbaum does not expand on this point except to insist that, unlike Rawls, she attributes no agency to "peoples." *Id.*

72. See *id.* at 313-14.

73. *Id.* at 319.

74. *Id.* at 319-20.

75. For Nussbaum's own expression of this concern, see *id.* at 315-20.

I suggest later in this Review that it may be possible to envision legal duties without a unified government or treaty regime at the back of them,⁷⁶ 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 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, to be sure – namely, the difficulty of imagining such an arrangement working in theory or in practice.

It emerges that the capabilities approach differs from the contractarian in that it does perhaps a better job of telling us what people outside the contract are owed morally – but it does not tell us why or even if we 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” and lacks any “coercive structure over the whole that would enforce on any given part a definite set of tasks.”⁷⁷ 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.”⁷⁸

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 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.

76. See *infra* Part IV.

77. NUSSBAUM, *supra* note 4, at 315.

78. *Id.*

Nussbaum does not take this tack,⁷⁹ 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*,⁸⁰ with their classic formulation of the notion of a “truly human functioning.”⁸¹ 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 encourages us to consider the unchosen fact of being human over what classical liberalism imagined as 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 classical 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*

Appiah would surely reject the notion that a focus on autonomy runs counter to cosmopolitanism. Indeed, in two nearly simultaneously published books, *The Ethics of Identity* and *Cosmopolitanism: Ethics in a World of Strangers*, 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.⁸² Both books build on the ideas Appiah first laid out in his 1994 reply to Nussbaum;⁸³ and if *The Ethics of Identity* is a systematic work while *Cosmopolitanism* is more of an extended philosophical meditation

79. Nussbaum does acknowledge the work of Pogge and Beitz, which seeks to move the ground of the contractarian model to the whole world. See *id.* at 264-70.

80. KARL MARX, ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844 (Dirk J. Struik ed., Martin Milligan trans., Int’l Publishers 1964).

81. NUSSBAUM, *supra* note 4, at 74 (quoting Marx).

82. On Appiah’s debt to John Stuart Mill, see, for example, APPIAH, ETHICS OF IDENTITY, *supra* note 5, at 1-13, 271-72.

83. See sources cited *supra* note 35.

on his father's two dicta,⁸⁴ 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 individuals 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”⁸⁵ and, in a moment of candor, “wishy-washy” cosmopolitanism⁸⁶—is more fine-grained and subtle than Nussbaum's and is 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.”⁸⁷

For Appiah, the key to a defensible and manageable cosmopolitanism is that it must reconcile itself to “at least some forms of partiality.”⁸⁸ (This acknowledgment goes all the way back to Appiah's 1994 response to Nussbaum and his desire to reconcile the twin sentiments of patriotism and cosmopolitanism.⁸⁹) 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.”⁹⁰ 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.”⁹¹ In the ethical sphere, therefore, partiality is appropriate, and even necessary, to the extent that one is partial to the ethical community to which one belongs. Partiality, however, has no place in moral discourse, in which all persons must be treated as possessing equal worth.

84. See *supra* note 36 and accompanying text.

85. APPIAH, ETHICS OF IDENTITY, *supra* note 5, at 213.

86. *Id.* at 222.

87. APPIAH, COSMOPOLITANISM, *supra* note 5, at 111.

88. APPIAH, ETHICS OF IDENTITY, *supra* note 5, at 223.

89. See *supra* notes 35-39 and accompanying text.

90. APPIAH, ETHICS OF IDENTITY, *supra* note 5, 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 *Moralität*, see *id.* at 232-33.

91. *Id.* at 236.

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.⁹² These forms of organization have *ethical* significance because they are “cared about by autonomous agents.”⁹³ 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.”⁹⁴

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”⁹⁵—in other words, laws with coercive effect that must be justified in moral terms.⁹⁶ But when the conversation is not “within but among polities,”⁹⁷ law no longer applies, 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.”⁹⁸ This is cosmopolitanism as ethical enquiry—rich and deeply valuable, but operating on a different plane than that 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

92. *Id.* at 246.

93. *Id.* at 245.

94. *Id.* (emphasis added).

95. *Id.* at 246.

96. For Appiah, state coercion is justified only when the state treats persons impartially and as possessing equal moral worth. *See id.* at 88–99, 228–30.

97. *Id.* at 246.

98. *Id.*

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. Rather, it will 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 nonbinding (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.

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. 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."⁹⁹ He then applies this 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

99. *Id.* at 91.

is some policy that would avoid thwarting the Witnesses.¹⁰⁰ But there is no such policy, for “a policy requiring us to establish consent would endanger the lives of many.”¹⁰¹ The state may therefore justifiably adopt the law imposing transfusions on the unconscious. Even though the Witnesses (among others) will be coerced, Appiah contends, 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 the concerns of a fringe religious minority. Appiah acknowledges that if we believed the Witnesses and agreed that transfusions lead to damnation, we would have a reason not to pass the law in the first place.¹⁰² Indeed, says Appiah, “[w]e mostly do not think it is even reasonable to believe” that transfusions lead to damnation.¹⁰³ 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 nonreligious 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.¹⁰⁴ Appiah acknowledges that this attribution will seem mistaken to Westerners who have been reared on the germ theory, and he in fact raises the possibility that the belief in witchcraft is not merely false but “irrational,”¹⁰⁵ 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 cause to viruses even when the virus cannot be treated and no tests have been done to ascertain the cause.¹⁰⁶ Unless they are virologists, the Manhattanites are relying on authority, not independent proof,

100. *Id.* at 93-94.

101. *Id.* at 93.

102. *Id.*

103. *Id.*

104. APPIAH, *COSMOPOLITANISM*, *supra* note 5, at 35.

105. *Id.* at 36.

106. *Id.* at 38.

for their theory of disease, just as the residents of Kumasi, Ghana, rely on authority in ascribing similar illnesses to witchcraft.¹⁰⁷

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.”¹⁰⁸ 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.¹⁰⁹ 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: according to Appiah, the falsehood of the Witnesses’ view—not its unreasonableness—is what 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.¹¹⁰) 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 striking, 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”¹¹¹—is what makes their views reasonable; yet the state must ignore this particularity to fulfill its moral duty of neutrality. Even Appiah’s concern to try to avoid coercing the Witnesses

107. See *id.* at 38-39.

108. *Id.* at 39.

109. See *id.* at 44.

110. See APPIAH, *ETHICS OF IDENTITY*, *supra* note 5, at 92-96 (discussing Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 *PHIL. & PUB. AFF.* 215 (1987)).

111. APPIAH, *COSMOPOLITANISM*, *supra* note 5, at 39.

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 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 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 internally when it came to certain outlying cases—but it would also be a government with very attractive and extensive respect for rights. Its affirmative responsibilities to give aid to people living elsewhere might not be very extensive, but its duty to respect the views of persons everywhere might well be rigorous.

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,¹¹² 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.¹¹³ This is true cosmopolitanism: reasonable, worldly, and 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

112. See *id.* at 126–27.

113. See *id.* at 122–24.

ultimately makes it difficult to think of cosmopolitanism as a source for justifying legal obligation.

IV. COSMOPOLITAN LAW

A. *The Political Conception of Law*

1. *Political Association as a Condition of Law*

To reexamine the question of cosmopolitan law, it is worthwhile to begin by reminding ourselves how we think law justifiably arises within the polis. The traditional liberal answer to why the state is justified in coercing us through law—and why we have a corresponding duty to obey the law, if we do—relies on consent. In one familiar version of the consent story, the polis itself is understood to arise out of collective agreement among autonomous individuals. Duly constituted by contractual agreement, the polis was from its very origin empowered to enact and apply coercive law subject to the limitation that it may not violate basic rights.¹¹⁴ The consent could be presented as an event that actually occurred, either expressly or tacitly (the Lockean view), or it could be understood as hypothetical consent that a reasonable person would logically give (Kant's approach).¹¹⁵ Either way, classical liberal theory makes entrance into political agreement a condition precedent for the imposition of justifiable legal duty.¹¹⁶

114. 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 is giving an argument for why we are responsible for addressing arbitrary economic inequalities within a given political society in which 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 system, 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.

115. For this account of two forms of consent theory, see Leslie Green, *Globalization, Disobedience, and the Rule of Law*, <http://www.law.nyu.edu/kingsburyb/fallo6/globalization/papers/Leslie%20Green.pdf> (last visited Jan. 31, 2007).

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 individuals have also consented to be governed by their host country's law by being there, despite the fact that they have not entered into the political agreement that applies to citizens. See Jeremy Waldron, *Special Ties and Natural Duties*, 22 PHIL. & PUB. AFF. 3, 8-9 (1993).

In recent decades, skepticism about the mechanism of consent has given rise to a new set of liberal arguments designed to ground the justifiability of state coercion in some other moral framework. Such justifications grow out of doubt about whether tacit consent is meaningful and whether hypothetical consent can ever really do the work of consent at all. Aiming to avoid these problems, such theories do not rely on traditional notions of consent but rather on some other feature of membership in a political community that is thought to provide a ground for justifying coercion. Thus, for example, as part of his influential theory of law, Dworkin argues that “associative or communal obligations” provide the basis for justified state coercion.¹¹⁷ When certain conditions of mutuality, concern, and respect apply, says Dworkin, people in communities have these associative obligations “whether or not they want them.”¹¹⁸ According to this view, the fact of associative membership is necessary to justify coercion. Absent such association, binding obligations cannot justifiably be conferred: “I would not become a citizen of Fiji if people there decided for some reason to treat me as one of them.”¹¹⁹

Let us call a *political* conception of law any theory that makes either consent or some weaker form of communal association a condition of law.¹²⁰ 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.¹²¹ 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 both individuals and states.

It follows from a political conception of law that in the absence of political membership, there can be no justified legal duty.¹²² According to the political

117. RONALD DWORKIN, *LAW’S EMPIRE* 196 (1986).

118. *Id.* at 201.

119. *Id.* at 202.

120. In *The Problem of Global Justice*, Nagel 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. See Nagel, *supra* note 114, at 119–21. The political conception of legal duty that I am developing is a little different. It makes political agreement 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.

121. See APPIAH, *ETHICS OF IDENTITY*, *supra* note 5, at 246 (“[O]nce we are speaking not within but among polities, we cannot rely upon decrees and injunctions.”).

122. Note that this view need not entail any commitment regarding 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.

conception, individual legal duties justifiably 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 belong to a political association and are therefore 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.¹²³ 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.¹²⁴ This law also creates a duty that applies outside the polity insofar as Americans (in this case, 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.¹²⁵ 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.¹²⁶

123. See Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18, 21, 28, and 42 U.S.C.).

124. Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1003, 119 Stat. 2739, 2739-40 (codified at 10 U.S.C.A § 801 note and 42 U.S.C.A. §§ 2000dd to 2000dd-1 (West 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.”).

125. 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.

126. One would think it obvious that this obligation applies everywhere. But astonishingly, the U.S. government has sometimes suggested otherwise. Article 2, section 1 of the Convention Against Torture 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,” *id.* art. 2, § 1, and Article 16, section 1 adds that “[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture,” *id.* art. 16, § 1. The government has occasionally claimed that this language means the Convention does not apply to its activities outside “its jurisdiction”—i.e., the United States. See Letter from William E. Moschella, Assistant Attorney Gen., to Sen. Patrick J. Leahy, Ranking Minority Member, Senate Comm. on the Judiciary (Apr. 4, 2005), available at <http://www.scotusblog.com/movabletype/archives/CAT%20Article%2016.Leahy-Feinstein-Feingold%20Letters.pdf>; Marty

According to a political conception of law, however, a state could not justifiably enact or enforce laws governing the conduct of persons who have never been in political association with it. Congress, on this view, could not pass a law prohibiting just anyone from having sex with minors anywhere; 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 theory that under it, logically there can be no law except where political association exists. Thus, according to the political conception of law, if the United States is under no international or domestic legal duty not to engage in certain conduct, that conduct necessarily remains unrestricted. Consider inhumane treatment that falls short of torture as defined by either positive or customary international law¹²⁷ and is outside the purview of the Eighth Amendment: if no law prohibits the U.S. government from engaging in the conduct, then according to the political theory of legal duty it remains lawful. This feature has been at the heart of the debate about recent legislation specifying U.S. obligations to detainees under the Geneva Conventions¹²⁸: critics have argued that the legislation in effect permits (by not criminalizing) inhumane treatment that falls short of torture.¹²⁹

Lederman, *Has Congress Prohibited "Torture Light"?*, Balkinization, May 11, 2005, <http://balkin.blogspot.com/2005/05/has-congress-prohibited-torture-light.html>. This seems to me a misreading.

127. The complex and important question of customary international law is beyond the scope of this Review. 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. Cf. *Alvarez-Machain v. United States*, 331 F.3d 604, 613 (9th Cir. 2003) (en banc), *rev'd sub nom.* *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (asserting that customary international law "derives solely from the consent of states").
128. The key pieces of legislation are the Military Commissions Act of 2006, Pub. L. No. 109-366, 2006 U.S.C.C.A.N. (120 Stat.) 2600 (to be codified in scattered sections of 10, 18, and 28 U.S.C.), which was signed on October 17, 2006, and the Detainee Treatment Act of 2005.
129. See Marty Lederman, *Senators Snatch Defeat from Jaws of Victory: U.S. To Be First Nation To Authorize Violations of Geneva*, Balkinization, Sept. 21, 2005, <http://balkin.blogspot.com/2006/09/senators-snatch-defeat-from-jaws-of.html>.

2. *The Political Conception and U.S. Law*

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 section 402 of the *Restatement (Third) of the 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.¹³⁰

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.¹³¹ 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 association finds its primary expression; second on the “nationals” of the state, which is to say those who are directly implicated in the association; and third and most remotely on extraterritorial conduct by nonnationals 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 go beyond a political conception of law by holding liable persons who have not entered into political association with the United States. The Alien Tort Statute (ATS) confers

130. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987).

131. Thus if Congress were to pass a law that applied more broadly, the authors of the *Restatement* would presumably consider the law unwise and unjustified but not invalid or unconstitutional.

subject matter jurisdiction on U.S. courts to adjudicate cases in which noncitizens have violated either a U.S. treaty or “the law of nations,” without regard to where that conduct has occurred.¹³² Although the treaty regime or the law of nations might be said to derive from some form of international political association, at least some kinds of international law cannot be so derived. Federal law makes it a crime for anyone to kill—or even conspire to kill—Americans abroad.¹³³ This law embodies what is sometimes called the “passive personality principle,” which might be justified under a political conception of legal duty on the ground that the state is protecting its citizens wherever they go. (Although it remains unclear why this self-protective motive justifies the imposition of duties on others.) The Torture Victim Protection Act goes further, creating civil liability in the U.S. courts against anyone who has engaged in extrajudicial torture or killing outside the United States under color of law.¹³⁴ Another U.S. law criminalizes hijacking an aircraft outside the United States.¹³⁵

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 is present.¹³⁶

It seems possible that this formulation of universal jurisdiction, like the ATS that it arguably covers, does not rest on the political conception of legal duty. Persons subjected to liability under the terms of a U.S. treaty or even the law of

132. 28 U.S.C. § 1350 (2000) (“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.”); see also U.S. CONST. art. I, § 8, cl. 10 (granting Congress the power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”).

133. See 18 U.S.C. § 2332(a)-(b) (2000) (criminalizing murder of and conspiracy to murder a U.S. national outside the United States).

134. Torture Victims Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350).

135. 49 U.S.C. § 46,502(b) (2000). 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 L. 880 (1989).

136. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

nations may never have entered into political association with the United States. It would appear that, when the crimes get serious enough, the baseline assumption of a political conception of law begins to be supplemented by something else.

Of course a political conception of legal duty *could* be at work here. International political agreements or duties arising out of the association of nations with each other (“the community of nations”) might be the reason that prosecutions under universal jurisdiction are justified, and all persons might be understood to belong to such associations. But it seems at least a little 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 a law derived from the association among 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 before U.S. courts can apply to him laws such as the ATS.¹³⁷ One could perhaps argue, 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) association with the state by being present therein.

The problem with this suggestion is that the ATS—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.¹³⁸ They might have been kidnapped (“*male captus*”), or extradited, or captured on the battlefield, or served with a subpoena while in the country on United Nations business, but in any case it is very difficult to claim that they have a political or communal association with the United States sufficient to make them subject to U.S. law. Even if such a claim could be sustained in the case of someone who kills a U.S. citizen—the doubtful theory being that by that act the killer associates himself with the community of persons subject 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.¹³⁹ This would surely be taking too far the theory of involuntary political association as a condition for legal duty.

137. See, e.g., *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316-19 (1945).

138. This is the so-called Ker-Frisbie rule. See *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886). On this rule, see Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 460-67 (1990).

139. As was the case with, for example, the Panamanian dictator Manuel Noriega. See generally STEVE ALBERT, *THE CASE AGAINST THE GENERAL: MANUEL NORIEGA AND THE POLITICS OF AMERICAN JUSTICE* (1993) (explaining the legal proceedings against Noriega).

Furthermore, in the case of the ATS, even if the defendant enters the United States willingly, it is far from clear that by this act he associates himself with the United States in such a way as to justifiably be held liable for conduct he may have performed years before, outside the United States. In the extreme case, the conduct may have been lawful when it was performed but then became unlawful via a retrospective treaty conferring civil liability.¹⁴⁰ This does not look much like a political conception of law. It leaves us to wonder if some other theory might be at work.

B. *Cosmopolitan Law*

1. *Nature's Option*

How would a cosmopolitan conception of law 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 political membership. Contractarian cosmopolitanism offers another possible version of cosmopolitan law, according to which all persons, wherever they are, are said to be sufficiently associated in the world community that the community may justifiably bind and coerce them through universal law. A world treaty arrangement might effect the same result in a less abstract manner. Its institutions could create political associations across borders sufficient to ground the conferral of legal duties on and toward all states or citizens.

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

I take it as given that political associations may, under the right conditions, justifiably make laws. I want to suggest, however, that it is possible to imagine—and subsequently to evaluate—a conception of law that is cosmopolitan in a different and arguably deeper sense. Such a conception would eschew the notion that law necessarily derives from political association, however extended. Perhaps the coercive imposition of legal duty could be justified on the basis of some other principle that would extend to people and

140. Following *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), retroactive civil liability has often been found not to violate the Ex Post Facto Clause or constitutional due process. See, e.g., *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994); *United States v. Sperry Corp.* 493 U.S. 52 (1989).

places everywhere, regardless of whether they had ever been in political association with each other; perhaps this principle would also justify a corresponding duty to obey certain laws.

What principle, then, would satisfy this cosmopolitan conception of law? One possible answer is that legal duty is justified insofar as it may be understood as a species of natural duty. It seems implausible 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 could apply even if one had no association of any kind with the entity that brought the law into existence. The duty would apply everywhere, and to everyone. Such a conception of law would be distinctively cosmopolitan, not political in the sense I have been using of deriving from association.

What laws would fill this bill of mandating obedience as a natural duty? The most obvious and traditional answer—and one in some disrepute today—is that natural laws (laws inherent to the nature of humans and their relations) must be followed as a matter of natural duty, regardless of political association. As Nussbaum hints by pointing our attention to that great natural lawyer Grotius and then back to antiquity,¹⁴¹ this would 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. I must acknowledge 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.”¹⁴²

This natural law deserves my obedience just because it is natural, and it certainly transcends political association. 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

141. See *supra* note 78 and accompanying text.

142. This is the felicitous translation of George Long, appearing in *THE THOUGHTS OF THE EMPEROR MARCUS AURELIUS ANTONINUS* 114 (George Long trans., Boston, Little, Brown & Co. 1891) (c. 161-180). For the Greek text, see *MARCUS AURELIUS, THE COMMUNINGS WITH HIMSELF OF MARCUS AURELIUS ANTONINUS EMPEROR OF ROME* bk. III, § 11, at 60 (C.R. Haines ed. & trans., Harvard Univ. Press 1916). Charles Haines translates this passage as: “while that comes from a clansman and a kinsman and a neighbour, albeit one who is ignorant of what is really in accordance with his nature. But I am not ignorant, therefore I treat him kindly and justly, in accordance with the natural law of neighbourliness . . .” *Id.* bk. III, § 11, at 61 (emphasis omitted).

foe.¹⁴³ But Marcus Aurelius 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.¹⁴⁴) The reason Marcus Aurelius did not think he was weakening legal duty by weakening political duty is presumably that he did not believe the former was dependent on the latter. Rather, he likely thought that our obligation to perform legal duties, whether enacted by the emperor or otherwise, rested upon the natural law of human benevolence, not on promulgation by a political association.¹⁴⁵ Take the state away, and that duty would remain.

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 conception of law. After all, the authors of the Declaration of Independence articulated a universal natural law ideal 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.¹⁴⁶ 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.¹⁴⁷

Of course today it is at the very least unfashionable—and, given the great difficulty in identifying the laws of nature, very possibly irresponsible—to subscribe to the notion of natural laws. Our account of which laws mandate a natural duty of obedience will have to be more circumscribed and will have to

143. Cf. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (George Schwab trans., Univ. of Chi. Press 1996) (1932).

144. See 1 *THE SCRIPTORES HISTORIAE AUGUSTAE* 157-63 (David Magie trans., Harvard Univ. Press 1921).

145. See *THE THOUGHTS OF THE EMPEROR MARCUS AURELIUS ANTONINUS*, *supra* note 142, at 114 (describing “the natural law of fellowship with benevolence and justice”); *id.* at 174 (“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 . . .” (footnote omitted)).

146. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (grounding the due process right to be free from prohibitions on consensual same-sex sexual conduct in an account of human functioning); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”).

147. MARTIN LUTHER KING, JR., *Letter from a Birmingham Jail* (1963), in *WHY WE CAN’T WAIT* 77 (1964).

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 association with a political entity that enacted them, is not as *outré* as it might at first sound.

Building upon Rawls's view that the duty of justice is "a fundamental natural duty" requiring us "to support and to comply with just institutions that . . . apply to us,"¹⁴⁸ Jeremy Waldron has argued that "we have a *natural* duty to support the laws and institutions of a just state."¹⁴⁹ For Rawls, the words "apply to us" seem to capture some notion of political association. Waldron, too, acknowledges that there is something special about the duty to comply with just institutions that, in Rawls's phrase, "apply to us" in that we may be counted among the persons "in respect of whose interests a just institution is just."¹⁵⁰ But he extends this duty beyond borders to include what one might call the weakly cosmopolitan natural obligation not to interfere with just institutions in someone else's country, with which one has no particular political association.¹⁵¹

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 requirements 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."¹⁵²

What I am imagining as a cosmopolitan natural duty to comply with a just law, regardless of political association, builds upon but goes still further than 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. It must, it seems, be a state or some other sovereign political institution to make its legal dictates binding. But the institutional pedigree of a law is not necessarily relevant to the existence of a natural duty to comply with it. In fact, I want to propose that there may be a natural duty to obey a truly just law even if it was not promulgated by a state (or states) at all.

148. RAWLS, *supra* note 15, at 115.

149. Waldron, *supra* note 116, at 3.

150. *Id.* at 19.

151. *See id.* at 13.

152. *Id.* at 20.

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 because he is following Rawls's view (derived in turn from Hume¹⁵³) 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 . . . is limited (perhaps to one)."¹⁵⁴

This need not be the case. 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 in those of the feudal lords, or a *qadi* setting up shop to adjudicate disputes under Islamic law in the wake of the state's collapse in Somalia or Afghanistan, 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 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. Historically, this would be a king offering to dispense justice in a proto-state where a plurality of legal options exists, then gradually building his legal system until it eventually monopolizes justice. Today, it might be a Muslim scholar offering to decide a case between neighbors in Mogadishu where there is no functioning state at all, then finding that other scholars in similar courts did the same, until an association of such courts might make a claim to governing and reestablishing the state. Or it might be a group of countries establishing a particular dispute-resolution mechanism that eventually gains ground and comes to be seen as legally binding.

I mean to suggest that even before broad-based compliance has arisen in these cases—indeed, even if it never does arise—there are still laws in place that

153. See HUME, *supra* note 43, bk. 3, pt. 2, § 2, at 321-22.

154. Waldron, *supra* note 116, at 23.

may make a claim to obedience if in substance they are just. It would be a mistake, I think, to say that in any of these cases the initial proposal to do law 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 so described. A feudal or royal court operating under conditions of legal pluralism is still doing law, even if it does not have a legal monopoly. An Islamic court is doing Islamic law even if there is no state that can enforce its judgments. A group of nations may be doing law even when there is no overarching international political association that can enforce the results reached by the court that has been created. In each of these situations, it would be strange to suggest that there is no law to consider just or unjust. A monopoly on force may be a condition of the modern state, but if I am right that there can be law without states, it is not the condition of law. In brief, 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 laws. This natural duty would exist wholly outside of political association of any kind. In fact, such a natural duty to obey just laws may be especially salient when there is 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. Certain asserted international laws could be just, and there could be a natural duty to obey them, not because they derive from the political association of states, but simply because they are, in fact, just. These laws need not be backed by the threat of force from an overarching international association; but it might well be justifiable to enforce them through coercion.

2. *The Moral Argument for Universal Jurisdiction*

It is possible, then, to imagine a cosmopolitan conception of law 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?

It is of course possible that the laws to which universal jurisdiction applies are derived from the political association among all nations or persons—from, let us say, the international community.¹⁵⁵ But not everyone thinks that the international community is sufficiently powerful in associational terms to promulgate justifiably binding law in the way a state does; and on some important matters, it will be difficult to claim that a law actually has been promulgated at all. To see if it is possible to account for universal jurisdiction in such cases, it is worth asking whether there might be another explanation of the practice.

One alternative answer is to argue that legal systems must embrace certain universal commitments simply in virtue of being legitimate legal systems. To be a legitimate legal system, on this view, requires satisfying some basic moral requirements. Those requirements will add up to a moral account of what justifies the very undertaking of doing law, of coercing and demanding compliance. 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 the moral significance of persons or actions should not depend on accidents of place.¹⁵⁶ In other words, it would be morally arbitrary to exempt some persons from legal regulation just because of where they happened to live or where they happened to be when the system encountered them.¹⁵⁷

Let me begin by sketching the claim that a legal system, to qualify as legitimate, must satisfy certain moral requirements.¹⁵⁸ I will not try to list all

155. This seems to be, for example, the view of the authors of *The Princeton Principles on Universal Jurisdiction*, which presents universal jurisdiction as a tool for vindicating “the fundamental interests of the international community as a whole.” PRINCETON PROJECT ON UNIVERSAL JURISDICTION, *Introduction* to THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 23 (2001).

156. See *id.* princ. 1.1, at 28 (“[U]niversal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed . . . or any other connection to the state exercising jurisdiction.”).

157. There could of course be pragmatic reasons for trying someone in the first instance in the jurisdiction where the crime occurred. But these concerns need not rise to the moral level, and according to the theory I am now sketching, it is the system in which the accused finds himself that must be justified.

158. I have in mind substantive requirements, not the procedural requirements described in Jeremy Waldron, *The Concept and the Rule of Law*, <http://www.law.nyu.edu/clppt/program2006/readings/Concept%20and%20Rule%20of%20Law%20WALDRON.pdf> (last visited Jan. 31, 2007).

such requirements here. But let us say that one such moral requirement is the one Appiah applies to the state: a legal system must not make morally arbitrary judgments among persons.¹⁵⁹ Another might be that heinous crimes—a category defined in moral terms—must not be left unpunished when the system has the capacity to punish them at reasonable cost. A third requirement might be that basic human rights must be protected.

These three moral requirements, which are only a 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 which distinctions among persons are arbitrary, which crimes are heinous, and what exactly counts as a basic human right. 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 of a particular local legal system that finds itself seized of someone who has 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 it also includes genocide, presumably because it is thought to be so horrible.¹⁶⁰) The system must not let these crimes go unpunished. It would be morally arbitrary to punish only nationals, not nonnationals, for these crimes.

Notice that this systemic approach differs subtly from the natural law view, embraced by both Grotius and Locke, that there is a natural right to punish that derives not from the state but from a prior natural right of the individual.¹⁶¹ Both Grotius and Locke used natural law to explain why the state was justified in punishing foreigners who had not consented to be governed by the state's law. According to the view I am suggesting here, it is not that the state exercises its citizens' delegated right to punish, but rather that the act of establishing a legal system that exercises coercive power subjects the system itself to certain moral duties, among them the duty not to make morally arbitrary distinctions among persons.

159. See APPIAH, *ETHICS OF IDENTITY*, *supra* note 5, at 88–99, 228–30; *see also supra* text accompanying notes 95–98.

160. *See supra* note 136 and accompanying text (quoting the list of crimes in the *Restatement (Third) of the Foreign Relations Law of the United States* that may trigger extraterritorial jurisdiction).

161. For the parallel between Grotius and Locke, see RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* 62–63 (1979). For the passages from Grotius's *De iure praedae*, see Benjamin Straumann, *The Right To Punish as a Just Cause of War in Hugo Grotius' Natural Law*, *STUD. HIST. ETHICS*, Feb. 2006, at 6–7, <http://www.historyofethics.org/022006/StraumannRightToPunish.pdf>. For Locke's passages, see LOCKE, *supra* note 67, bk. II, §§ 8–9, at 272–73.

If the legal system is to satisfy its requirements for moral legitimacy, it must therefore try to punish the offender, albeit without violating his basic human rights. It is not a satisfying answer to say that whether a nonnational may be tried is itself an instance of the question whether it would be morally arbitrary not to punish foreign nationals. 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,¹⁶² 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.

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 fact may also be morally arbitrary with respect to the system's duty to punish him. (This is the cosmopolitan moral insight behind the Ker-Frisbie rule, which allows a person to be subjected to jurisdiction even when he should not be in the United States.¹⁶³) We are faced here with a case not dissimilar to the freeing of a murderer on a procedural technicality; and as we know, justifying such a decision on moral grounds will generally depend 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 his crime's accident of place.

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, accordingly, 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.

162. This would be an example of what Liam Murphy calls non-monism in analysis—differentiating an institutional morality from a personal one. See Liam B. Murphy, *Institutions and the Demands of Justice*, 27 PHIL. & PUB. AFF. 251, 254-57 (1998).

163. See *supra* note 138 and accompanying text.

Notice that 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 ATS'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.¹⁶⁴

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 moral principles enforced in various jurisdictions can be made known in advance. They will not reach all wrongs, only 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*

Although not unrealistic from the standpoint of implementation, the foregoing account of a cosmopolitan conception of legal duty derived from the theory of universal jurisdiction is nonetheless potentially quite radical in its practical reach. It could be used to expand 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 expanding the grounds on which individuals may be subjected to the legal regimes of other countries. It could also lead to practical unworkability, with many courts attempting to try people all over the world, and odd forum-shopping distortions introduced by prosecutors, victims, and defendants alike. 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 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

¹⁶⁴. See *supra* note 132 and accompanying text.

the summed set of all operating legal systems around the world. Although the point could be disputed, the suggestion here is that it is possible to consider a set of institutions taken as a whole and to deem the collective set legitimate or illegitimate. The intuition behind this claim is that frequently an institution taken in isolation does not claim to be able to satisfy the full range of conditions that would make it morally legitimate. Background conditions beyond the control of a particular institution, as well as the decisions and actions of persons outside the institution, may directly affect its moral legitimacy.¹⁶⁵

The central claim of minimalist legal cosmopolitanism 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. The core insight behind such a minimalist cosmopolitan approach is the normative view that *some* law must apply to every person as well as to every action, either authorizing 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 where the conduct occurs. 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.

It would be insufficient, according to this view, if the local law that did apply were wholly inadequate to satisfy basic substantive standards of moral legitimacy. For the summed set of legal systems to be legitimate, each person must be within the reach not just of some law, but of some morally adequate law. The argument I advanced for universal jurisdiction depended on the idea that a legal system that purports to coerce necessarily incurs certain moral obligations.¹⁶⁶ The argument here relies on the parallel idea that the summed set of legal institutions, taken as a whole, must satisfy some basic moral standards. The reason is not that these institutions are in any political association with one another, but simply that they coexist within the world and that their moral legitimacy cannot adequately be assessed in isolation. In this sense, minimalist legal cosmopolitanism shares with Nussbaum’s capabilities approach a certain outcome orientation¹⁶⁷: we can measure moral legitimacy by

165. Take, for example, a state’s provision of asylum. If an asylum-seeker can get asylum in several places, the decision of a given state not to provide asylum seems to be morally unproblematic. But if no one else will provide asylum, the same policy of denial might begin to veer toward moral illegitimacy. (I am grateful to Stephen Holmes for the example.)

166. See *supra* Subsection IV.B.2.

167. See *supra* text accompanying notes 55-62.

whether individuals are being treated according to morally adequate legal standards.

This approach differs from universal jurisdiction, because in the world envisioned by minimalist legal cosmopolitanism, individual legal systems would ordinarily stick to applying their own local laws. But those local laws would be arranged and interpreted so as to avoid the anomaly of situations in which no law at all applies and in which failing to apply law would rise to the level of creating some moral illegitimacy in the set of all legal systems. If some local legal system refused to admit that its laws applied to a given (serious) 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, provided of course that the gap be important enough that its continued existence would undercut the moral legitimacy of the whole summed set of systems. 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 could logically arise under the political conception of legal duty. No place on earth¹⁶⁸ would be treated as a law-free zone.

The Rome Statute of the International Criminal Court (ICC) arguably enacts a version of this sort of minimalist legal cosmopolitanism.¹⁶⁹ Although the ICC is sometimes depicted in the United States as the harbinger of universal jurisdiction, in fact its jurisdiction kicks in only when a local legal system has inadequately addressed a major and serious crime (crimes against humanity, war crimes, genocide, or aggression), by failing either to prohibit the conduct or to bring an offender to justice.¹⁷⁰ 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's 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

168. International space law lies outside the bounds of this Review.

169. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

170. *Id.* arts. 5, 17.

was leased in perpetuity from the predecessor government of Cuba.¹⁷¹ (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;¹⁷² there are persistent reports of secret U.S. detention facilities there.¹⁷³)

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 Guantánamo¹⁷⁴ (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.¹⁷⁵ The Court asserted that the United States exercised effective control over Guantánamo and that the federal habeas law therefore applied there.¹⁷⁶

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. Allowing 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 *Hamdan v. Rumsfeld*.¹⁷⁷ This time the government maintained not that a place was off the legal grid, but that certain persons were: it asserted, inter alia, that no provision of the Geneva Conventions applied to “enemy combatants”

171. See *Rasul v. Bush*, 542 U.S. 466, 480-81 (2004).

172. But see *R (Bancoult) v. Sec’y 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 the United States leased the island.

173. 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.

174. See *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

175. See *Rasul*, 542 U.S. at 475-79.

176. See *id.* at 480-85. In *Rasul*, 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 restricting the statutory reach of habeas to detainees held outside the United States, see sources cited *supra* note 128, it may still be necessary for the Court to reach this issue in a further case.

177. 126 S. Ct. 2749 (2006).

captured on the battlefield in Afghanistan.¹⁷⁸ Once again, the Court rejected the government's view. It held narrowly that Common Article 3 of the Geneva Conventions did apply to the detainee in question and to others similarly situated.¹⁷⁹

What makes this view cosmopolitan, despite its reliance on U.S. laws implementing Common Article 3, is its normative suggestion that as a citizen of the world, I should always be protected by some law – in this case provisions of international law codified by U.S. statutes. This is not, or at least not necessarily, 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.

CONCLUSION

At its irreducible core, cosmopolitanism demands that general human qualities be put ahead of particular allegiances. Notwithstanding the rooted cosmopolitanisms of Nussbaum and Appiah, 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. 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 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, even our legal obligations. For the cosmopolitan, there is no weakening of legal duty when one turns away from the state because legal duty

178. See *id.* at 2794–96; see also Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep't of Def. (Jan. 22, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf> (articulating this argument in more detail).

179. See *Hamdan*, 126 S. Ct. at 2796–97.

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 argued in this Review 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 offered, 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.”¹⁸⁰ Yet at the same time, “there is no advantage in law without a city.”¹⁸¹ 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.

180. DIOGENES LAERTIUS, *supra* note 7, bk. VI, para. 72, at 75.

181. *Id.*