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# LEGAL DUTY BEYOND BORDERS: VALUE PLURALISM AND THE POSSIBILITY OF COSMOPOLITAN LAW

WILLIAM F. HELMKEN\*

## INTRODUCTION

In a globalized world, the United States has moved toward a legal framework that sanctions a variety of extraterritorial grants of jurisdiction. National security law and political and legal theory have become increasingly focused on whether the United States can, absent obvious Constitutional considerations,<sup>1</sup> theoretically justify its increasing expansion of extraterritorial jurisdiction. For example, the United States has expanded extraterritorial jurisdiction to individuals at Guantanamo Bay and Bagram Theater Internment Facility,<sup>2</sup> as well as to individuals seeking redress in U.S. courts under the Alien Torts Statute (“ATS”),<sup>3</sup> the Torture Protection Act (“TPA”),<sup>4</sup> or the Foreign Sovereign Immunities Act (“FSIA”).<sup>5</sup> Despite this trend towards extraterritorial jurisdiction and the increasing prominence of international law, the United States has

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1. See generally Marc D. Falkoff & Robert Knowles, *Bagram, Boumediene, and Limited Government*, 59 DEPAUL L. REV. 851 (2010) (arguing that U.S. courts must determine whether Congress has been authorized by the Constitution to abrogate the fundamental right to judicial review of the legality of a detention as a condition precedent to discussing applicable rights of detainees under the balancing test articulated by Justice Stevens in *Boumediene*).

2. Bagram Theater Internment Facility is a detention facility in Afghanistan similar to the one at Guantanamo Bay. JONATHAN HAFTEZ, *HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA’S NEW GLOBAL DETENTION SYSTEM* 48 (2011).

3. The Alien Tort Statute provides that: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350 (2000)

4. 28 U.S.C. § 1350 (1991).

5. 28 U.S.C. §§ 1602–1611 (1976). Section 1605 provides for exceptions to grants of sovereign immunity, permitting jurisdiction against a foreign state, for example, “upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes direct effect in the United States.” 28 U.S.C. § 1605. Section 1605 also provides for exceptions to grants of sovereign immunity, permitting jurisdiction against a foreign state

for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such an act . . . is engaged in by an official, employee, or agent of such a foreign state while acting within the scope of his or her office, employment or agency.

28 U.S.C. § 1605(A).

historically relied on a political concept of legal duty, which maintains that moral and legal duties are defined by political association.<sup>6</sup> Under this concept of duty, extraterritorial jurisdiction is based on consent. Thus, a tension exists between our political reality and moral and political theory, calling for reconciliation on a theoretical level. Cosmopolitans, in contrast to those espousing the political conception of legal duty, advocate an expansive notion of moral and legal duty, a notion which transcends political boundaries irrespective of consent. This Note serves two goals. First, it demonstrates that both cosmopolitan and value pluralist theory offer compelling critiques of the political concept of duty founded on the liberal principles of John Rawls and John Locke. Second, it analyzes compatibility of these alternative theories of political morality and their implications for our understanding of extraterritorial jurisdiction.

Cosmopolitan theory and value pluralism both challenge the assumptions of Lockean and Rawlsian liberalism by arguing that the political concept of legal duty offered by liberals is theoretically flawed and fails to comport with the current state of positive law. Cosmopolitans are critical of the political conception of the law because it implies that where there is no consent, and thus political association there can be no *justified* legal duty.<sup>7</sup> Cosmopolitans argue that political borders are morally arbitrary, and that moral and legal duties transcend political associations. Value pluralists go further and claim that not only is the political concept of a legal duty flawed, but liberalism itself is problematic.<sup>8</sup> While value pluralism as a theory of value does not offer an explicit alternative account of positive law or international law,

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6. This Note addresses whether states have moral *and* legal obligations irrespective of their respective treaty or other consent-based obligations such that they can justify extending domestic law to govern conduct by non-citizens abroad. While international law embraces the concept of customary international law including *jus cogens* norms, this Note emphasizes the potential problems in using extraterritorial jurisdiction as means of unilaterally enforcing violations of norms of international law, and particularly, civil, political, economic and social norms that lack the same degree of consensus in the international community. *See, e.g.*, Vienna Convention on the Law of Treaties, art. 53, 1155 UNTS 331, 344 (May 23, 1969) [hereinafter VCLT] (“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”).

7. I use the term political association narrowly, including only those states that appear to have a working legal system that seeks to guard against arbitrary conduct. This concept, therefore, excludes failed or failing states where there is, *de facto*, no meaningful system of positive law.

8. The majority of cosmopolitan theory endorses comprehensive liberal political values. The value pluralists critique of cosmopolitans is primarily targeted at what it perceives to be an unjustified claim that liberal political values enjoy superiority over non-western political moralities.

cosmopolitanism raises the possibility of an alternative account of moral and legal duty through the view called minimalist legal cosmopolitanism. Minimalist legal cosmopolitanism is “the normative view that some law must apply to every person as well as to every action”<sup>9</sup> such that “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.”<sup>10</sup> Cosmopolitan theorists argue that coercion is justified in limited circumstances against certain heinous conduct wherever it may occur: if each legal system rests on the assumption that the law’s purpose is to guard individuals from arbitrary acts, then in order for the total set of global legal systems to be legitimate, they are collectively required to ensure all individuals against arbitrary treatment.<sup>11</sup>

Minimalist legal cosmopolitanism suggests that conduct beyond United States’ borders may not only create a right for coercive state action against certain conduct, but may equally create an obligation for action in limited cases.<sup>12</sup> Nonetheless, this position suggests that issues such as torture, genocide, and potentially the detention of alleged violent extremists may be required when such activity falls “off the legal radar” of any country because (1) the inadequate enforcement of local laws or (2) the lack of a minimally justifiable legal framework where individuals are treated in an arbitrary fashion. Therefore, while *Boumediene v. Bush* held that the writ of *habeas corpus* could reach non-citizens who are beyond United States’ territory,<sup>13</sup> a minimalist legal cosmopolitan or pluralist may nonetheless warrant various extraterritorial legal action to detain<sup>14</sup> or aid non-citizens, or provide for sanctions against corporations,<sup>15</sup> on cosmopolitan grounds

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9. Noah Feldman, *Cosmopolitan Law?*, 116 YALE L.J. 1022, 1066 (2007).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Boumediene v. Bush*, 553 U.S. 723, 796–97 (2008).

14. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 731–32. While denying a private right of action under the Alien Tort Statute for arbitrary arrest, Justice Souter together with six members of the Supreme Court cautiously accepted the possibility of the recognizing new violations of the Alien Tort Statute besides those recognized by the drafter of the statute when such violations are specific, obligatory and universal. In this case, however, Justice Souter was “persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations that the historical paradigms familiar with § 1350 was enacted.” *Id.* at 732 (internal citations omitted).

15. *See, e.g., Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017 (7th Cir. 2011); *accord Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 40–41 (D.C. Cir. 2011); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (“The text of the Alien Tort Statute provides no express exception for corporations, and the law of this Circuit is that this statute grants jurisdiction from complaints of torture against corporate defendants.”). *But see Kiobel v. Royal Dutch Petroleum Co.*,

of not treating conduct arbitrarily merely because of where it occurs.<sup>16</sup>

I argue, first, that while cosmopolitanism conflicts with the thesis of value pluralism, a “minimalist” moral cosmopolitanism, properly circumscribed, can be construed as consistent with value pluralism.<sup>17</sup> Second, I argue that despite their theoretical affinities, value pluralism offers a compelling critique of both liberalism and cosmopolitanism, and their respective attempts to justify an extraterritorial legal, as opposed to a moral, duty to sanction conduct beyond our borders in the absence of substantial consensus on norms of conduct. For pluralists, the cosmopolitan’s attempt to derive an extraterritorial legal duty creates significant dangers, and is likely to result in the prioritization and imposition of one culture’s norms and laws on another culture. In Part I, I provide an account of the political concept of legal duty, cosmopolitanism, and minimalist legal cosmopolitanism. In Part II, I illustrate the subversive implications of value pluralism for the political concept of duty and for liberal political morality generally. In Part III, I demonstrate that despite the merits and similarities of minimalist legal cosmopolitanism, value pluralism provides a compelling challenge to any coherent account of extraterritorial legal duties absent traditional mechanisms of consent such as treaties, and in doing so, embraces a diverse moral world where borders are becoming increasingly anachronistic and duties more difficult to discern.

### I. COSMOPOLITANISM AND THE POLITICAL CONCEPT OF LEGAL DUTY

In his famous jurisprudential puzzle of the case of the speluncean explorers, Lon L. Fuller framed the problem of extraterritorial moral and legal duties succinctly:<sup>18</sup> a group of five men trapped in a cave receive news via radio that physicians have determined they will starve before they can be rescued. The men agree that one is to be killed to ensure the

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621 F.3d 111 (2d Cir. 2010), pet. for reh’g denied, 642 F.3d 268 (2d Cir. 2011), pet. for reh’g en banc denied, 642 F.3d 379 (2d Cir. 2011), cert. granted (U.S. Sup. Ct. No. 10-1491 Oct. 7, 2011).

16. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Sosa*, 542 U.S. at 724–25, 732 (quoting approvingly *Filartiga* and identifying that case as the “birth of the modern line of [ATS] cases”).

17. Value pluralism is the theory that there are objective moral values, but they are plural and incommensurable such that they are constitutively non-combinable. Value pluralists insist on a baseline of consent on norms to determine the validity of extraterritorial jurisdiction to cover third parties, but unlike many positivist theories, do not require formal treaty-like consent. Value pluralism is discussed in detail in Part II.

18. See generally Lon L. Fuller, *The Case of the Speluncean Explorers*, 64 HARV. L. REV. 616 (1949).

survival of the other four. Subsequently, the four are tried for the murder of the fifth man. Are these men outside the purview of a moral or legal framework because of the morally arbitrary fact that they were “outside” a political association, or are they subject to positive law against murder?

In the contemporary context, extraterritorial moral and legal problems abound. The operation of terror training camps inside Waziristan in northwest Pakistan are not immune from some legal system, yet the terrorist acts appear to be *de facto* outside the scope of any law. In the case of torture, international law,<sup>19</sup> treaties,<sup>20</sup> and the laws of nearly every state prohibit torture. The ATS and TPA also create a cause of action for extraterritorial torture. Absent a treaty or political necessity, is the United States under a *legal* obligation to punish torture abroad? Government-backed militias in Sudan have committed atrocious campaigns of terror, murder, and rape of southern Sudanese in the Darfur region, eventually leading to the formation of the Republic of South Sudan by plebiscite.<sup>21</sup> Are the acts of the militiamen in southern Sudan, either pre- or post-secession “off the legal radar”? Are they under the authority of Sudanese law? Is the global set of legal systems under a legal duty to ensure that no act falls outside of some law? The traditional cosmopolitan answer is that moral *and* legal duties extend beyond political borders. While against arbitrary violence and torture, value pluralists insist when it comes to less compelling areas such as civil and political rights, local values should be given substantial deference. For the pluralist, well-being is linked to local communal forms of life. Creating a legal duty to remedy certain anti-western, unsavory activity often creates an unjustifiable ranking of one set of values over another.<sup>22</sup> Pluralists are thus less willing to extend

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19. *See, e.g., Filartiga*, 630 F.2d at 876, 884 (“Having examined the sources from which customary international law is derived—the usage of nations, judicial opinions, and works of jurists—we conclude that the official torture is now prohibited. The prohibition is clear and unambiguous, and admits of no distinction between the treatment of aliens and citizens.”) (footnote omitted).

20. *See, e.g., United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, art. 2(2), Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, 114 (1988) (“No exceptional circumstances whatsoever . . . may be invoked as a justification of torture.”).

21. Jeffery Gettleman, *After Years of Struggle, Southern Sudan Becomes a New Nation*, N.Y. TIMES, July, 10, 2011, at A6.

22. Pluralists vigorously oppose torture, war crimes, and crimes against humanity on the grounds that they are acts of arbitrary violence. While pluralists insist that *legal* action against these crimes may be justified, they argue that it is problematic to extend jurisdiction to cover international violations of distinctly western political morality such as civil and political rights, which may be legitimately rejected by local governments.

jurisdiction to cover activity abroad unless it concerns violating certain minimal norms, specifically those against arbitrary violence.<sup>23</sup>

Cosmopolitanism can be seen as either an attempt to supplement or supplant contractarian theories of justice, and particularly Rawlsian moral constructivism.<sup>24</sup> Martha Nussbaum proposes a cosmopolitan theory that seeks to ground moral obligations in the fact of living as social animals with certain capabilities irrespective of our political association. Noah Feldman offers a radical, and as I argue, problematic, extension of Nussbaum's and other cosmopolitan theories by attempting to justify cosmopolitan law through the idea of minimalist legal cosmopolitanism.

#### A. *Contract Theory and Justification of the Modern Liberal State*

In *The Law of Peoples*, John Rawls attempts to provide a basis for global justice based on moral constructivism. I suggest that Rawls's hypothetical consent model fails to support or contemplate limited assertions of extraterritorial jurisdiction. The dual ideas that animate Rawls's moral constructivism, and thus his theory of justice as fairness, are the original position and the veil of ignorance. In order to reach a just or fair organization of society, it is necessary to imagine what principles would be agreed to by people who have no knowledge of certain facts about themselves.<sup>25</sup> For Rawls, principles of justice serve to "govern the assignment of rights and duties and to regulate the distribution of social and economic advantages."<sup>26</sup> They are to be understood as the principles that would emerge as a hypothetical contract or agreement reached by people ignorant of facts about their particular circumstances including beliefs and capabilities.<sup>27</sup>

The principles that emerge in Rawls's original position depends on what people are ignorant of in the original position and on what information they possess behind the veil of ignorance. Most crudely, Rawls denies that people in the original position will know their position in society and their natural endowments because the distribution of these

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23. While a pluralist conception of minimal moral norms would be substantially similar to international norms that have *jus cogens* status, the precise relationship between pluralist morality and *jus cogens* norms is beyond the scope of this Note.

24. I focus almost exclusively on Martha Nussbaum's cosmopolitan argument and Noah Feldman's proposal to extend her argument as a basis for conceiving of a legal duty absent any political association. My arguments, however, apply equally to other theories of cosmopolitanism.

25. JOHN RAWLS, A THEORY OF JUSTICE 53 (1971).

26. *Id.*

27. STEPHEN MULHALL & ADAM SWIFT, LIBERALS & COMMUNITARIANS 3 (1992).

attributes are “arbitrary from a moral point of view.”<sup>28</sup> Moreover, Rawls proposes that in the original position, behind the veil of ignorance, people lack any concept of the good, of what makes certain forms of life more valuable than others.<sup>29</sup> Equally critical, is an appreciation of the substantive claims about justice that are embodied by the conception of the veil of ignorance.<sup>30</sup> Implicit in the denial of knowledge of any concept of the good is a concept of liberty that does not prize any particular concept of the good (or form of life) over another, but which prizes the freedom to act upon, change, and revise their own particular concept of the good.<sup>31</sup>

The concept of rationality that exists behind the veil of ignorance is framed as a proto-Kantian vision of mutually disinterested rationality.<sup>32</sup> Rawls claims, “since differences among parties are unknown to them, and everyone is equally rational and similarly situated, each is convinced by the same arguments.”<sup>33</sup> Mutually disinterested rationality leads to the recognition that individuals should promote “the highest index of primary social goods, since this enables them to promote their conception of the good whatever it turns out to be.”<sup>34</sup> In an analogy to sports, Rawls contends that parties “strive for as high and absolute score as possible. They do not wish a high or low score for their opponents.”<sup>35</sup>

For Rawls, people in the original position, denied of knowledge, talents and endowments, and not animated by any concept of the good, but sharing in a common rationality that prizes autonomous decision making, would arrive at agreement that a society should be regulated by two principles, lexically ranked.<sup>36</sup> First, “each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.”<sup>37</sup> Second, “social and economic inequalities are to be arranged so that they are both (a) to the greatest

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28. RAWLS, *supra* note 25, at 14.

29. There has been significant criticism of this point. The most prominent criticism is that, by purportedly denying concepts of the good to people in the original position while prizing autonomous decision-making, Rawls is taking a substantive moral position in which autonomy places a central role.

30. *Id.* at 4.

31. The original position therefore stands for the substantive moral position that, to justify a theory of justice, one must *value* liberty defined as freedom to make choice, of autonomy as self-authorship.

32. RAWLS, *supra* note 25, at 120.

33. *Id.*

34. *Id.* at 125.

35. *Id.*

36. *Id.* at 266.

37. RAWLS, *supra* note 25, at 53.

benefit of the least advantaged, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.”<sup>38</sup>

For Rawls, people in the original position will rationally decide that the first principle will have lexical priority over the second,<sup>39</sup> and that within the second principle, the fair equality of opportunity embodied in (b) will have priority over (a).<sup>40</sup> The equality and liberty principles of Rawls theory relate to aspects of the original position in that individuals will be principally concerned with restrictions on liberty, and only secondarily with the egalitarian concerns.<sup>41</sup> Therefore, Rawls claims that, in the original position, behind the veil of ignorance, individual members of society would rationally agree to a system of welfare or redistribution that would ensure that the worst-off person was at least as comfortable as he would have been under conditions of strict egalitarian redistribution. Rawls’ argument in *A Theory of Justice* is premised on the level of a single political association, leaving those outside the distributive arrangement subject to different moral and legal duties than those inside it.

In *The Law of Peoples*, Rawls extends his moral constructivism from the domestic to the international sphere in an attempt to provide foundation for a theory of international justice.<sup>42</sup> In doing so, Rawls makes the domestic consensus a condition precedent to an international bargain between *peoples*, in a second original position.<sup>43</sup> By conditioning global justice on a domestic agreement on principles of justice, Rawls retains the statist paradigm in moral theory, which takes political agreement as fundamental. After the consensus is reached on the domestic level, various kinds of regimes or *people* reach agreement on first principles of justice to

38. *Id.*

39. MULHALL & SWIFT, *supra* note 27, at 7–8.

40. *Id.* at 8.

41. *Id.* at 7–8. Mulhall and Swift explain the relation of the principles generated by the original position as follows:

The principle of equal basic liberty derives directly from the people in the original position’s ignorance of, and concern to protect their freedom to choose, change and pursue their own conceptions of the good, while the second principle, and especially the difference principle, derives from their ignorance of their own likely position in the distribution of social and economic advantage. . . . [Therefore] it is rational for them to maximin, to ensure that the worst is as good as it can be, and this leads them to support equality unless inequality will actually help the worse-off position.

*Id.* at 8.

42. Rawls later work expanded his heuristic device of hypothetical, rational agreement to a global scale, effectively making Rawlsian redistribution akin to a global contractarianism. I do not attempt to address Rawls’s argument for global justice on this occasion. See generally JOHN RAWLS, *THE LAW OF PEOPLES* 32 (1999).

43. *Id.*

guide a global citizenry based on what peoples would agree to in the original position.<sup>44</sup> Thomas Pogge has also elaborated on this approach in attempting to create a theory of global mutual obligation based on the heuristic device of hypothetical, rational consensus.<sup>45</sup> Pogge accomplished the cosmopolitan goal of conferring rights and obligations on people everywhere irrespective of their state or type of political association based on the Rawlsian heuristic of the original position.<sup>46</sup> For the cosmopolitans, moral duties are discernible from the fact that humans possess certain fundamental rights or capabilities and not from a global hypothetical consensus.<sup>47</sup>

### *B. The Cosmopolitan Response: A World Without Strangers*

Cosmopolitanism generally flows from the premise that every human being's life is equally valuable irrespective of membership in any political association.<sup>48</sup> In political and legal theory, cosmopolitanism is an explication of Diogenes the Cynic's famous maxim. When Diogenes, a stranger and not an Athenian citizen, was asked where he came from, he replied that he was a citizen of the world.<sup>49</sup> Diogenes' cryptic remark has been interpreted as implying that the boundaries of the polis—indeed any political boundary—are morally arbitrary, and thus to be a citizen is to *feel* the common bond between humans as inhabitants of the world.<sup>50</sup> Thomas Pogge defines cosmopolitanism as follows:

Three elements are shared by all cosmopolitans positions. First, *individualism*: the ultimate unit of concern are human beings, or persons—rather than, say, family lines, tribes, ethnic, cultural, or religious communities, nations or states. . . . Second, *universality*: the status of ultimate unit of concern attaches to every living human being equally—not merely to some subset as men, aristocrats,

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44. See, e.g., THOMAS W. POGGE, *REALIZING RAWLS* (1989).

45. Feldman, *supra* note 9, at 1029.

46. *Id.* at 1030. For Rawls, however, the moral duty to others is derived from the hypothetical agreement between peoples. RAWLS, *supra* note 42.

47. See, e.g., MARTHA NUSSBAUM, *FRONTIERS OF JUSTICE* (2006); KWAME A. APPIAH, *ETHICS OF IDENTITY* (2005). While Nussbaum does not use the word cosmopolitan, her capabilities approach can clearly be characterized as cosmopolitan in view of its goals and implications.

48. Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 *STAN. L. REV.* 1667, 1670 (2003). There is considerable variety in the approaches taken under the banner of cosmopolitan theory of which moral cosmopolitanism is the most prevalent in contemporary theory.

49. Martha Nussbaum, *Patriotism and Cosmopolitanism* *BOSTON REV.* (Oct./Nov., 1994), available at <http://bostonreview.net/BR19.5/nussbaum.php>.

50. *Id.*

Aryans, whites, or Muslims. Third, *generality*: this special status has global force. Persons are ultimate units of concern for *everyone*—not only for their compatriots, fellow religionists, or such like.<sup>51</sup>

By rooting morality in the commonality of humanity (or sociability and concerns over well-being, for Nussbaum), cosmopolitans<sup>52</sup> enhance the moral burden (either of individuals or states) toward strangers and attenuate the attachment of duties dictated by the nation or state's positive law.<sup>53</sup>

Two strands of cosmopolitan theory are prevalent in political and legal theory: (1) Nussbaum's capabilities approach, embodied in her institutional cosmopolitanism; and (2) that of individualist moral cosmopolitans such as Simon Caney. Moral and institutional cosmopolitanism represents a challenge to Rawlsian contractarianism as a theory for moral obligations.<sup>54</sup> For a moral cosmopolitan, a moral duty to others typically vests on an individual level, not the level of peoples, and thus reflects the commitment to the individualist, generality and equality conditions identified by Pogge.<sup>55</sup> Nussbaum's institutional cosmopolitanism, however, is distinct from most cosmopolitan theories in that she argues that the duty to others is derived from concerns over well-being (as opposed to individual rights) and that such a duty vests not on individuals but in the domestic institutions of a political association such as a national government because there are a variety of "plausibility limitations" on individual action that preclude these duties from being the duties of individuals.<sup>56</sup> For Nussbaum, individuals are not capable of establishing "a just global order through human psychology alone"<sup>57</sup> because humans are imperfect, selfish, plagued by misinformation, and

51. SIMON CANEY, *JUSTICE BEYOND BORDERS* 3–4 (2006) (footnotes omitted) (citation omitted) (quoting Pogge). Cultural cosmopolitanism does not share the premises espoused by Pogge, and are in many respects similar to value pluralists. Nonetheless, this definition captures the essence of the cosmopolitan position.

52. I focus mainly on Nussbaum's version of cosmopolitanism because I take it to be the most compelling account of the cosmopolitan thesis.

53. Goldsmith, *supra* note 48, at 1670.

54. MARTHA NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY AND SPECIES MEMBERSHIP* 37 (2006).

55. CANEY, *supra* note 51. Caney's position provides a compelling argument in favor of human rights based on the individual as the relevant unit—a position that comports with the current understanding of human rights under international law.

56. Goldsmith, *supra* note 48, at 1671.

57. *Id.* at 1670 (quoting Martha Nussbaum, *Toward a Viable Cosmopolitanism*, Castle Lecture 4 at Yale University 2 (Mar. 1, 2000)).

“assigning responsibilities to people one by one is a recipe for a massive collective action problem.”<sup>58</sup> Nussbaum concludes that a just global order can only be secured through institutions because “political institutions that embody a moral ideal can coerce morally adequate results in the absence of even a single perfect human being”<sup>59</sup> and thus secure a fair distribution of the burdens required to strangers through international institutions.<sup>60</sup>

First, Nussbaum’s cosmopolitan approach does not start with the philosophical anthropology of mutual advantage or selfishness that is the foundation of the liberalism of Locke, Hobbes, and Rawls. Rather, following Grotius, Nussbaum insists that the fact of human sociability suggests that advantage is not the only motivation for humans to act justly.<sup>61</sup> Nussbaum proposes the idea that justice is grounded in what she famously refers to as *human capabilities*, which are universal capacities that everyone in the world shares and without which one cannot live a life worthy of any basic concept of human flourishing or dignity.<sup>62</sup> Moreover, Nussbaum’s capabilities approach is explicitly consequentialist in that “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.”<sup>63</sup> Insofar as capabilities establish conditions of justice for all people, and that national boundaries are morally arbitrary because they do not adequately address capabilities of strangers, Nussbaum’s account of justice is distinctly cosmopolitan and differs from deontological rights-based theories.<sup>64</sup>

58. *Id.* at 1671 (quoting Martha Nussbaum, *Toward a Viable Cosmopolitanism*, Castle Lecture, 15–16).

59. *Id.* (quoting Martha Nussbaum, *Toward a Viable Cosmopolitanism*, Castle Lecture, 3). Nussbaum suggests that national governments should create international institutions to ensure that certain international issues are adequately remedied. According to Nussbaum, international institutions would include the following:

[A] world court that would deal with grave human rights violations; a set of world environmental regulations, plus a tax on industrial nations of the North to support development of pollution controls of the South; a set of global trade regulations that would try to harness the juggernaut of globalization to a set of moral goals for human development . . . ; a set of global labor standards . . . ; and, finally, various forms of global taxation that would effect wealth transfers from richer to poorer nations.

*Id.* (alterations in original) (quoting Martha Nussbaum, *Toward a Viable Cosmopolitanism*, Castle Lecture, 16).

60. *Id.*

61. Feldman, *supra* note 9, at 1035–36 (“Grotius argues explicitly that we must not 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 humans beings act justly.”) (quoting MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 37 (2006)).

62. Feldman, *supra* note 9, at 1036.

63. *Id.*

64. *Id.* at 1037.

As to the well-being justification, Nussbaum defends civil and political rights as necessary only because they are integral to human flourishing, which she insists is the overarching or primary interest of a person.<sup>65</sup> A theory of justice premised on well-being must, at least for Nussbaum, recognize persons' equal moral standing, a moral status accorded to them by being human. A second step in her argument, and one shared by value pluralists, is that human "rights" are informed or dictated by a person's interests; in this case, an interest in a derivative concern for well-being such as basic sustenance can dictate a right to be free from hunger. A "right" ultimately rests on protecting an aspect of a persons' well-being (or interest).<sup>66</sup>

This leads Nussbaum to identify ten human goods or capabilities necessary for any account of the good life, including (1) "life"; (2) "bodily health"; (3) "bodily integrity"; (4) "senses, imagination and thought"; (5) "emotions"; (6) "practical reason"; (7) "affiliation," comprising "friendship" and "respect"; (8) "other species"; (9) "play"; and (10) "control over one's environment," including both political and material environment.<sup>67</sup> The justification of liberal civil and political rights is premised on her argument, which is arguably nothing more than a wager—that well-being is best served by a set of liberal civil and political rights.<sup>68</sup>

Nussbaum's cosmopolitanism of capabilities seeks to establish a minimal system of global governance with limited coercive powers in order to ensure that capabilities<sup>69</sup> are respected both inside and outside the boundaries of the *polis*. Through securing basic capabilities through institutions, global welfare and individual well-being will be enhanced as a consequence not of any utilitarian motivation, but by according equal dignity to everyone as possessing capabilities as human beings worthy of some threshold of basic dignity.<sup>70</sup> This flows from her concern that justice

65. Martha Nussbaum, *Capabilities of Human Rights*, in GLOBAL JUSTICE AND TRANSNATIONAL POLITICS: ESSAYS ON THE MORAL AND POLITICAL CHALLENGES OF GLOBALIZATION 117, 136, 138–39 (Pablo De Greidd & Ciaran Cronin eds., 2002).

66. CANEY, *supra* note 51, at 73.

67. *Id.*

68. *Id.*

69. Nussbaum's capabilities or substantial freedoms are essential primary preconditions for well-being. For a summary of her theory of capabilities, *See, e.g.*, Jan Garrett, *Martha Nussbaum on Capabilities and Human Rights* (Dec. 2, 2003), <http://people.wku.edu/jan.garrett/nussbaum.htm>.

70. *See generally* Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 STAN. L. REV. 1667 (2003) (arguing that Nussbaum's institutional turn—establishing moral obligations to strangers that inhere in institutions and not individuals—is subject to a significant feasibility limitations given the current state of the international system).

should focus on the unchosen fact of being human—possessing certain capabilities—over the Lockean or Rawlsian notion of moral duties premised on hypothetical consent between diverse liberal and decent peoples. While Nussbaum’s argument provides a compelling account of why we have a moral duty to ensure a threshold of capabilities (akin to Rawls’s concept of primary goods), it does not necessarily create a *justified* legal duty on all third party legal systems to protect such capabilities.

### C. *The Political Conception of Law and Cosmopolitan Law*

Feldman notes that, in order to properly appreciate the possibility of cosmopolitan law, it is critical to appreciate how we think a law is justified within the polis.<sup>71</sup> To repeat, the liberal view frames moral duty as a product of consent—explicitly or tacitly (the Lockean view), or hypothetically between Peoples (the Kantian or Rawlsian view).<sup>72</sup> On either theory of consent, liberal theory “makes entrance into political agreement a condition precedent for the imposition of justifiable legal duty.”<sup>73</sup> Cosmopolitans are critical of the political conception of the law because it implies that where there is no political membership, there can be no *justified* legal duty.<sup>74</sup> Therefore, the political concept of legal duty of Rawlsian or Lockean liberalism cannot adequately justify extraterritorial grants of jurisdiction because this amounts to a selective extension of law only to certain strangers and not others.<sup>75</sup>

Feldman brings the later point into focus by demonstrating the theoretical lacunae in the political concept of legal duty and certain legislative grants of extraterritorial jurisdiction.<sup>76</sup> For example, the Restatement (Third) of the Foreign Relations Law of the United States § 402<sup>77</sup> articulates principles that permit extraterritorial grants of jurisdiction on individuals acting outside the United States with no

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71. Feldman, *supra* note 9, at 1049.

72. *Id.*

73. *Id.* (footnote omitted).

74. *Id.*

75. *Id.* at 1053. Feldman argues that the Foreign Relation Law of the United States does not comport with a purely political conception of legal duty because it contemplates enforcing U.S. law on foreign activity. For Feldman, these anomalies are theoretically more consistent with his notion of minimalist legal cosmopolitanism than traditional political concept of legal duty. *Id.*

76. Feldman, *supra* note 9, at 1054.

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

cognizable contact with the United States.<sup>78</sup> How can extraterritorial jurisdiction be explained in a coherent way by the political concept of legal duty? For example, the ATS<sup>79</sup> confers subject matter jurisdiction on certain acts that constitute a tort irrespective of where they occurred and the TPA<sup>80</sup> equally creates liability in U.S. courts against anyone who engages in “extra judicial torture or killing outside the United States under color of law.”<sup>81</sup>

One answer is that the international community—or an international body formed by treaty, such as the International Court of Justice—is a sufficiently compelling political association to make international norms legal duties. While this may be the case, Feldman argues more radically that the most philosophically compelling way to explain ATS and the TPA is by departing from the political concept of legal duty and instead demonstrating that association with the United States or an international institution is unnecessary to find a justified legal duty. If association with a political entity, however abstractly conceived, is unnecessary to justify legal duties, then legal duties *may* extend beyond political boundaries to all conduct at any place or time.

Feldman maintains that a cosmopolitan conception of the law is capable of reaching all people everywhere, regardless of political association.<sup>82</sup> First, Feldman argues that:

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.<sup>83</sup>

Next, Feldman identifies a fallacy that leads to the adoption of the political concept of legal duty. According to this view, laws are considered just when they are promulgated by a political organization. Thus, the character

78. *Id.*

79. 28 U.S.C. § 1350 (2000). Dolly Filártiga brought the first ATS case on behalf of her seventeen-year-old brother, who was tortured and killed by Paraguayan police. *Filartiga*, 630 F.2d at 878.

80. 28 U.S.C. § 1350 (1991).

81. Feldman, *supra* note 9, at 1054 (footnote omitted).

82. *Id.* at 1056–57. While Feldman concedes that political associations *may* create justifiable laws—potentially Rawlsian liberal constructivism, for example—he nonetheless suggests that “[p]erhaps the coercive imposition of legal duty could be justified on the basis of some other principle that would extend to people and places everywhere, regardless of whether they had ever been in a political association.” *Id.* Feldman’s claim appears to rely on an endorsement of natural law theory to justify extraterritorial or universal jurisdiction. The argument he advances, however, does not address the relation between natural law and universal jurisdiction.

83. *Id.* at 1059.

of justice is borrowed from the institution that promulgates the law. Feldman notes that this depends “on the idea that laws properly so called always come into existence from the top down”<sup>84</sup> because “assurance of cooperation is a key feature of justice,”<sup>85</sup> which in turn can only be provided if the number of institutions addressing the problem are limited. For Feldman, however, a *just* law, and consequently an entire legal system, can be built piecemeal even in the absence of an overarching state serving to ensure cooperation with the norms being promulgated as just laws; legal duties and their enforcement need not be top-down. Even in the absence of coercive power there may be just laws that are worthy of obedience. Feldman characterizes this proposition as follows:

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 a condition of law. In brief, a norm only modestly and incompetently enforced can be just, and it can be law. . . .

. . . .

. . . Certain asserted international laws could be just, and there could be a natural duty to obey them, not because they derive from a 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.<sup>86</sup>

The salience of Feldman’s proposition lies mainly in his justification for extraterritorial, and potentially universal, jurisdiction through the idea of a minimalist legal cosmopolitanism as a way of justifying coercion for “laws” or norms that transcend the realm of political association.<sup>87</sup>

### 1. *Minimalist Legal Cosmopolitanism*

Minimalist legal cosmopolitanism is “the normative view that *some* law must apply to every person as well as to every action”<sup>88</sup> such that “no conduct or person should be deemed ‘off the grid,’ legally speaking,

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84. *Id.* at 1060.

85. *Id.*

86. Feldman, *supra* note 9, at 1061.

87. *Id.* at 1065–70. An alternative proposal for Feldman may be that the law or norm is just because it provides adequate security, promotes the fundamental capabilities or rests on an understanding of ethical theory in which well-being is primordial such as value pluralism.

88. *Id.* at 1066.

because of the morally arbitrary accident of where the person is or where the conduct occurs.”<sup>89</sup> A corollary is that “we are justified in applying coercive law to particular persons in order to achieve the overall goal of rendering legitimate the entire set of global legal systems.”<sup>90</sup> Feldman’s justification of minimalist legal cosmopolitanism requires the following propositions: (1) that treating acts as arbitrary conflicts with any purportedly moral concept of a “legal” system; (2) that “the summed set of legal institutions, taken as a whole, must satisfy some basic moral standards,”<sup>91</sup> not because these institutions are in any political association with each other such as a treaty, but “simply that they coexist within a world and their moral legitimacy cannot adequately be assessed in isolation;”<sup>92</sup> and (3) that “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 arbitrary distinctions among persons.”<sup>93</sup>

For Feldman, to say that the act of torture or terrorism is illegal in one country, but legal or permissible across a nearby border, is morally arbitrary. Such a result fails to appreciate the cosmopolitan emphasis on individuals as rights-bearers (individualist moral cosmopolitanism), or, alternatively, species members possessing certain human capabilities (capabilities cosmopolitanism), as the fundament of moral obligations. More importantly, it fails to hold the *entire system of legal systems* to the duty to not make morally arbitrary distinctions among persons, which is arguably essential to a code of law. Feldman’s argument proceeds from a view of legal systems as subject to internal and external legitimacy constraints that generate moral duties: a legal system may be *internally* illegitimate by sanctioning arbitrary treatment or the entire system of legal systems may be illegitimate if they treat strangers arbitrarily by failing to ensure that *some* law covers their actions. Feldman argues that “[n]ot all law must reach everywhere, but every place and person must be subject to some law.”<sup>94</sup> Thus, he does not claim that all laws that are deemed legitimate apply globally, but that some legitimate local law covers all actions and persons.<sup>95</sup>

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89. *Id.*

90. *Id.*

91. *Id.*

92. Feldman, *supra* note 9, at 1066.

93. *Id.* at 1063 (emphasis added).

94. *Id.* at 1066.

95. This distinction is meant to carve out what would be the difference between extraterritorial

Feldman's attempts to derive a legal duty from a set of moral universals or norms, which, in his view, trump culturally defined ethical norms. This perspective appears to rest on some fundamental natural law understanding that there are discernible "just" laws, which generate an obligation of enforcement of these laws on those that have fallen off the moral and legal grid. Feldman's argument for a system-derived duty requires initial acceptance of these problematic premises. The practical difficulty is that such a thin set of moral universals—for instance, the legal recognition of crimes against humanity under current international law, would require both interpretation and enforcement by strangers. Preventative wars against dictatorial regimes resembling the United States's war against Iraq under George W. Bush as well as extraordinary rendition could be viewed as the fulfillment of some "just" law or obligation. Likewise, many so-called terrorists or revolutionaries claim to have access to divine "just" law that they claim create obligations on them to perform acts considered heinously unjust. Who in the international community is going to interpret and arbitrate between competing conceptions of "just" laws? Feldman's intuitions may comport to our understanding of *some* norms of international law, but it would ultimately cause more harm than good, particularly if he intends to enforce norms that do not enjoy a high degree of consensus; further, they fail to refute the claim that legal duties are derived from political association or consent.

## II. VALUE PLURALISM AND LIBERAL POLITICAL MORALITY

Value pluralism offers another critique of the legal concept of a political duty as well as a challenge to both moral and legal cosmopolitanism. This critique has two main themes: (1) the practical deficiencies of arbitrating between competing notions of "just" laws, and (2) the pluralist emphasis on communal well-being—and not the individual—as fundamental, requiring an ethical theory be more inclusive of local, nonliberal forms of life that enhances well-being, but offend liberal political values.

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application of one state's laws and a grant of universal jurisdiction. This distinction proves untenable, in my view, under Feldman's theory.

A. *The Thesis of Value Pluralism*

Pluralism is a species of moral realism that rejects both monism<sup>96</sup> and ranks among values. Isaiah Berlin's thesis of value pluralism is premised on the rejection of monistic conceptions of value, which either reduce goods to a common metric (utilitarianism, for example) or create comprehensive hierarchies of goods and the commitment that human well-being or flourishing is primordial to ethical reasoning.<sup>97</sup> In riposte to monistic conceptions of value, Berlin suggested that there are plurality of substantive values or goods that often conflict with each other.

Berlinian pluralism functions on three levels. First, Berlin claims that within any given ethical framework or morality there will arise conflicts between equally ultimate values, conflicts which cannot be resolved by theoretical or practical reason.<sup>98</sup> For example, the United States' political and judicial system is constantly faced with issues where the demands of security and liberty or the substantive value represented by due process rights are in conflict with one another. Secondly, there are conflicts within a single, internally complex value. Thirdly, there are whole forms of life that generate certain moral virtues that cannot be combined within the same culture at the same time.<sup>99</sup> John Gray captures this point, claiming that "there are goods that have as their matrices social structures that are uncombinable; these goods, when they are incommensurables, are also constitutively uncombinable."<sup>100</sup>

Berlin's denial of a unitary rational standard for comparison between conflicting values demonstrates that Berlin's pluralism moves beyond traditional Western Enlightenment commitments. It is essential, however, that pluralism is construed as a species of moral realism and *not* moral relativism: it is a central feature of pluralism that there *are* objective values, and that distinctions between good and evil can be rationally defensible. However, pluralists insist that values cannot be fully ranked or ordered in anything other than a particularistic manner. While moral relativism, in its most robust form, asserts that all values are ultimately contingent products of local practices,<sup>101</sup> value pluralism affirms the

96. Monism is the moral position that posits that goods are objective and can be either ranked in terms of priority or can be valued according to a common metric.

97. The heterogeneity of value does not, however, permit provisional lexical rankings of goods given the structure of a given situation.

98. JOHN GRAY, ISIAH BERLIN 43–44 (1995).

99. *Id.*

100. *Id.* at 44.

101. *See, e.g.*, RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY (1989).

presence of objective moral goods at a high level of generality, and as such is a form of realism. Berlin's notion of conflicts of value *presupposes* the existence of values, not their relativity.

In life there are moral, political and legal dilemmas in which individuals, legislatures and courts must choose between two or more goods that are not rationally comparable. In *The Prince*, Machiavelli illustrated this notion by arguing that it is impossible to combine the virtues of duty to one's government or country with the general demands of morality.<sup>102</sup> Functionally, the reality of choice between conflicting values implies that there are moral risks that cannot be avoided:<sup>103</sup> all that can be done is to ensure that all the relevant factors in a dilemma are sufficiently appreciated. While a constitution or a system of judicial procedure may enable resolution of particular conflicts of value, on a theoretical level Berlin insists that people must decide without ever reconciling the relevant goods in conflict in a particular situation. The element of voluntarism that Berlin commits himself to is not, for him at least, a product of skepticism, incomplete information or anything that could be resolved more successfully by continued deliberations. There are instances where one simply has to choose between incompatible, or incommensurable, ends. In such situations, choice between goods is somewhat underdetermined by reason, rendering choice a function of a groundless commitment.<sup>104</sup>

### 1. *The Concept of Incommensurability*

If values are qualitatively heterogeneous, as Berlin claims, then it follows that their qualitative distinctness prohibits the possibility of judging forms of life or goods along a singular metric or scale. Joseph Raz describes the denial of a unitary metric for valuation as value incommensurability. Raz defines value incommensurability as a failure in transitivity: two valuable options are "incommensurable if (1) neither is better than the other, and (2) there is (or could be) another option, which is better than one but is not better than the other."<sup>105</sup> To say that values are incommensurable is to say that they cannot be rationally compared.<sup>106</sup> The

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102. See, e.g., NICCOLI MACCHIARELLI, *THE PRINCE* (W.K. Marriot trans., 2006) (1532).

103. ISAIAH BERLIN, *THE PROPER STUDY OF MANKIND* 15 (1998).

104. *Id.* This does not foreclose, for example, members of a legislature or judiciary from engaging in reason giving, only that such a process is incapable of being determinative in resolving conflicts of value.

105. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 325 (1986) (emphasis omitted).

106. There are other interpretations of incommensurability that do not deny the possibility of

life of a nun and the life of a mother embody substantive values that may be fundamental ingredients in well-being for different individuals, but they are incommensurable.<sup>107</sup> Incommensurability thus explicates a feature of Berlinian pluralism to explain how moral reasoning can be indeterminate.

### *B. The Tension Between Pluralism and Liberal Political Morality*

While there is much dispute as to whether liberal political morality is consistent with value pluralism, it is generally accepted that “[i]t is not unreasonable to fear that once value pluralism is publically acknowledged as legitimate, it may unleash centrifugal forces that make a decently ordered public life impossible.”<sup>108</sup> John Gray contrasts Berlinian pluralism with the dominant theories of liberalism in a number of ways.<sup>109</sup> First, he posits that pluralism undermines rational choice:

All the dominant liberalisms of our time, whether they be variations on Hobbesian or Lockean, Kantian or Millian themes, have a conception of rational choice at their heart which Berlin’s value pluralism subverts. . . . Whereas all conventional liberalisms are varieties of moral and political rationalism for which apparently undecidable dilemmas arise from imperfections in our knowledge, understanding or reasoning that are in principle removable, Berlin’s liberalism takes its stand on our experience of moral and political life, with all its radical choices.<sup>110</sup>

The crux of Gray’s argument is that values of justice or equality, or liberty and security, for example, cannot be “insulated from the force of value-incommensurability.”<sup>111</sup>

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rational comparison as Raz does. *See generally* INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON (Ruth Chang et al. eds., Harvard University Press) (1997) (discussing the alleged failures in Razian incommensurability in Chang’s introduction). Other papers in the collection serve to highlight the controversial nature of Raz’s thesis on incommensurability. *Id.*

107. There is no metric upon which the goods of, for example, the experience of white-water rafting and the experience of getting a bonus for work performance can be compared or assessed. One is conceivably neither better nor worse than the other, but there may be a third value, for example, success in learning a new language, which may be better than the later, but not the former. The values embodied in each choice cannot be made commensurate or ranked without doing violence to at least one of the goods in question.

108. William Galston, *What Value Pluralism Means for Legal-Constitutional Orders*, 46 SAN DIEGO L. REV. 803, 806 (2009).

109. *See, e.g.*, Daniel Weinstock, *The Graying of Berlin*, 11 CRITICAL REV. 481 (1997). Weinstock has divided Gray’s pluralism into three categories, which I adopt on this occasion.

110. GRAY, *supra* note 98, at 145–46.

111. *Id.* at 147.

Second, modern political liberalism cleaves from “traditional liberalism by separating juridical questions from more fundamental issues of value.”<sup>112</sup> As a result, political liberals fail to recognize that all possible justifications of rights rest on the human interests they protect, which are themselves plural and incommensurable.<sup>113</sup> This point relates to the first. Enumeration of a definitive list of human rights is incoherent because “rights gain determinacy only from their contribution to human interests whose contents are themselves complex and variable and which may encompass conflicts that are not rationally arbitrable.”<sup>114</sup> Both the Rawlsian attempt to generate lexical orderings of principles in justice as fairness and the cosmopolitan capabilities approach to justify action to secure a set of capabilities are thus arguably undermined. Prioritization and exclusive lists are inherently indeterminate absent a concrete human interest. If values are irreducibly diverse and conflicting, then, *ex hypothesi*, so are the human interests they protect. This need not imply that there are no limits to the range of possible human interests worthy of protection as “human rights.” It merely elucidates the fact that any scheme of basic rights cannot cover the range of diverse human interests that those rights protect, and, therefore, no regulative principles can solve conflicts of value once and for all—though both Rawls and the capabilities cosmopolitans try to do just that.

Third, Gray claims that liberal rationalism’s focus on achieving consensus over the norms appropriate in politics must be abandoned. Instead parties embodying different and even incommensurable concepts of the good should establish a *modus vivendi*. The Rawlsian search for consensus on principles of the institutions of government based on a generated value hierarchy, for example, is doomed to fail because no consensus is possible on the level of value. Only pragmatic political settlements are consonant with value plurality and incommensurability, especially when understood in terms of conflicts of whole ways of life, which involve substantive goods.

Finally, value pluralism entails as a matter of logic that political justification be contingent.<sup>115</sup> Accordingly, Gray claims that “if value-pluralism is true, the range of forms of genuine human flourishing is considerably larger than can be accommodated within liberal forms of life.

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112. Weinstock, *supra* note 109, at 482.

113. *Id.*

114. GRAY, *supra* note 98, at 148. See also Raz, *supra* note 105. Joseph Raz advances a similar characterization of rights in *The Morality of Freedom*, chapters 7 and 8.

115. Weinstock, *supra* note 109, at 482.

. . . [V]alue-pluralism cannot mandate liberalism, where that is taken to be a theory or set of principles claiming universal authority.”<sup>116</sup>

But is Gray correct to say that, as a matter of logic, value pluralism undermines liberalism even on historicist grounds? It remains to be seen as to whether liberalism has as little appeal politically as Gray claims once it has abandoned its pretense to universality or a definite list of human rights or capabilities. Nonetheless, in supporting his argument against liberalism, Gray argues that what follows from the pluralist thesis is “that liberal institutions can have no universal authority.”<sup>117</sup> According to Gray, “[w]here liberal values come into conflict with others which depend for their existence on non-liberal social or political structures . . . and where values are truly incommensurable, there can . . . be no argument according universal authority to liberal values.”<sup>118</sup> Therefore, Gray concludes that “the relation we have to liberal practices is in the nature of a groundless commitment.”<sup>119</sup>

Value pluralism provides a compelling critique of liberal political morality and leaves open the possibility of an alternative concept of legal duty to that offered by Rawls and Locke. Because well-being is primordial for the value pluralism view, political association, and thus consent, is secondary from the standpoint of moral and legal duties. Since value pluralism clearly rejects the political concept of legal duty as arbitrary and focuses on well-being, the extent of moral or legal duty depends on its relation to a form of life or value and its ability to facilitate human flourishing, not on limitations provided by hypothetical consent.

### III. THE IMPLICATIONS OF VALUE PLURALISM FOR COSMOPOLITANISM LAW

#### A. *Minimalist Legal Cosmopolitanism Revisited*

Recall that the idea of minimalist legal cosmopolitanism is “the normative view that some law must apply to every person as well as to every action”<sup>120</sup> such that “no conduct or person should be deemed ‘off the

116. JOHN GRAY, ENLIGHTENMENT’S WAKE 199–200 (1995).

117. GRAY, *supra* note 98, at 155.

118. *Id.* Gray’s argument, however, may be problematic in so far as he takes the fact that pluralism does not mandate liberal political neutrality embodied in liberal ideals of autonomy as self-authorship with a historicist justification of liberalism based on the conditions of modern society. It is unclear why a “liberal” or supporter of autonomy denies the universal authority of liberal values, then she avoids the fallacy of presuming that liberal values are uniquely privileged values.

119. *Id.* at 165.

120. Feldman, *supra* note 9, at 1066.

grid,' legally speaking, because of the morally arbitrary accident of where the person is or where the conduct occurs."<sup>121</sup> Minimalist legal cosmopolitanism is a response to the political concept of legal duty, which maintains that there is no legal duty where there is no political association, where such an association is viewed as legitimate on the basis of hypothetical or tacit consent.

Minimalist legal cosmopolitanism proposes that coercion is justified in limited circumstances due to a legal duty that emerges on the basis of species membership, and is justified in part by the moral legitimacy of the total set of legal systems around the world that support a legal duty against arbitrary treatment.<sup>122</sup> In sum, if a local legal system fails to enforce a legitimate duty to an individual either because (1) the legal system is substantively deficient and lacks laws covering certain egregious conduct or (2) otherwise lacks practical resources of enforcement of a legitimate right against arbitrary treatment, then *all* legal systems have an obligation to ensure coercion is applied to the conduct in question. Minimalist legal cosmopolitans argue that coercion is justified by the moral legitimacy of the total set of legal systems around the world that support a legal duty against arbitrary treatment.<sup>123</sup>

The ultimate goal is thus to bind national or international legal bodies to act where the failure to do so would violate the basic concept of a legal system—protection against arbitrary treatment. The sum set of legal institutions would be correspondingly illegitimate if they permitted certain morally illegitimate conduct, creating voids in the international legal system. The goal of extraterritorial assertions of jurisdiction based on a duty incumbent upon all legal systems to avoid arbitrary treatment is to render "legitimate the entire global set of legal systems."<sup>124</sup> The fundamental nature of the norm against torture, as in *Filartiga v. Pena-Irala*, can translate into binding law (under the ATS in this case) on such conduct even when it occurs in a foreign country.<sup>125</sup>

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121. *Id.*

122. *Id.*

123. *Id.* at 1066. Many aspects of my argument in support of minimalist legal cosmopolitanism can be seen as logical extensions of Feldman's basic argument in favor of minimalist legal cosmopolitanism.

124. *Id.*

125. *Filartiga*, 630 F.2d at 884. Even when norms are pervasive such as the norm against torture, there will inevitably be some variation on what conduct is defined as illegal torture as opposed to enhanced interrogation. The problem of interpretation becomes more acute when cosmopolitans attempt to establish legal duties in areas that lack the same degree of consensus as torture, war crimes or crimes against humanity.

On a practical level, minimalist legal cosmopolitanism wants equally to (1) avoid the alleged cosmopolitan pitfall of requiring utopian notions of world government to police national legal systems and (2) avoid universal jurisdiction where each system of law would have a duty to cure the deficiencies of alleged injustices to strangers by unilaterally granting jurisdiction to acts outside a state, thereby overriding not only jurisdictional boundaries, but international norms of sovereignty. To avoid these concerns, the minimalist legal cosmopolitan would distinguish itself from universal jurisdiction in the following manner:

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 jurisdiction to fill the apparent gap. Indeed, there would exist a general moral duty that at least one legal system extend itself to fill, 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 . . . . [in order to] preclude the possibility of legal vacuum. . . .<sup>126</sup>

Feldman concedes that the Rome Statute of the International Criminal Court (“ICC”) “arguably enacts a version of this sort of minimalist legal cosmopolitanism.”<sup>127</sup> The ICC avoids universal jurisdiction because 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).”<sup>128</sup> The practical difficulties of distinguishing under what circumstances such a stopgap would kick in to fill the legal void in the global system, however, may hinge on value imposition or prioritization that fails to comport with value pluralism. Equally problematic is Feldman’s implicit reliance on natural law arguments to justify what conduct will be unjust, and thus trigger some jurisdiction to apply its law extraterritorially.

### *B. Value Pluralism and Human Interests*

If the thesis of pluralism is accepted, then what bearing does it have on contemporary understanding of human rights, particularly extraterritorial

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126. Feldman, *supra* note 9, at 1067.

127. *Id.* (footnote omitted).

128. *Id.*

jurisdiction over human rights violations? Recall that for a pluralist, and the capabilities cosmopolitan, diverse forms of political association and moral codes are justified *because and to the extent that* they each protect distinct forms of life that contribute to the well-being of their members. Pluralism raises questions as to how such diverse forms of political association (and legal systems) are to be assessed in terms of their legitimacy, and thus be subject to potential extraterritorial jurisdiction. If no universal comparisons of well-being are possible between forms of life, then pluralism as explicated by Gray is indistinguishable from relativism, rendering his pluralism potentially unnecessary and unjustified.

To allay these fears, Gray shares a thin, though by no means identical, universalism with cosmopolitans in which well-being is in part an objective matter. Political legitimacy therefore depends fundamentally on well-being, which must include some notion of basic “rights” based on universal interests. For instance, Gray argues that “[t]here are some rights that all regimes must meet if they are to be reasonably legitimate in contemporary conditions; but the rights that such regimes protect are not all the same.”<sup>129</sup> Moreover, human rights are “not immutable truths. . . . [t]hey are conventions, whose content vary as circumstances and human interests vary.”<sup>130</sup> While rights will differ from society to society, this still commits Gray to some notion of shared fundamental rights protecting generically human interests. Gray elaborates on the notion of legitimacy in the following way by claiming that in “contemporary circumstances, all reasonably legitimate regimes require a rule of law and the capacity to maintain peace, effective representative institutions, and a government that is removable by its citizens without recourse to violence.”<sup>131</sup>

The legitimacy of a regime hinges in part on the satisfaction of these factors. Gray, however, is quick to note that it is “impossible to specify necessary and sufficient conditions of legitimacy which apply in all circumstances, even those of the late modern world.”<sup>132</sup> Nonetheless, Gray recognizes that there is a certain limit to what is legitimate. Certain practices, such as genocide, torture, and suppression of minorities, render

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129. JOHN GRAY, TWO FACES OF LIBERALISM 106 (2000).

130. *Id.*

131. *Id.* at 106–07. Gray continues by claiming, “In addition, [legitimate regimes] require the capacity to assure the satisfaction of *basic needs* to all and to protect minorities from disadvantage. Last, thought by no means least, they need to reflect the ways of life and common identities of their citizens” *Id.* (emphasis added).

132. GRAY, *supra* note 129, at 107.

regimes manifestly illegitimate.<sup>133</sup> The test of legitimacy, backed by the existence of *real* universal evils that frustrate even basic well-being, supports the view that how people are treated and the extent to which they are well off is not self-defined or relative. Cultural standards of well-being will differ, but there is ultimately a horizon of basic conditions that must be met by any regime whether based on liberal or communal values, if it is to be legitimate. The thin test of legitimacy that Gray offers seeks to demonstrate that there are “minimal standards of decency and legitimacy that apply to all *contemporary regimes*, but they are not liberal values writ large.”<sup>134</sup> In this sense, Gray’s horizon of basic conditions is extremely flexible, even more so than Nussbaum’s ten goods, because it need not honor many liberal civil and political rights and is subject to historical change. The concept of a human interest—a “right” or condition worthy of protection—is, at bottom, a historical concept subject to change with global conditions.

### 1. *Modus Vivendi and the Conditions of Legitimacy*

As a result, it is crucial for Gray that satisfying the basic conditions of legitimacy will in no way lead to a convergence on the best form of government, and, still less, on the best way to resolve conflicts of values. This amounts to the rejection of the search for consensus discussed earlier in the Part II, which animates liberalisms of Rawls and Dworkin. The test of good governance is accordingly rather low: *the effective resolution of conflicts of values* consistent with the minimal standards of legitimacy. But there is no algorithmic way of resolving conflicts of value in advance. Gray argues that the shape of “a pluralist *modus vivendi* . . . cannot be specified independently of the circumstances that occasion a need for it. The terms of political settlement may vary from context to context,”<sup>135</sup> which suggests that theory cannot provide independent foundations for

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133. Gray’s thin universalism based on well-being is characterized as follows:

Regimes in which genocide is practised, or torture institutionalized, that depend for their continuing existence on the suppression of minorities, or of the majority, which humiliate their citizens or those who coexist with them in society, which destroy the common environment, which sanction religious persecution, which fail to meet basic human needs in circumstances where that is practically feasible or which render impossible the search for peace among different ways of life—such regimes are obstacles to the well-being of those whom they govern. Because their power depends on the infliction of the worst universal evils, they are illegitimate, however long-lived they may be.

*Id.*

134. *Id.* at 109 (emphasis added) (footnote omitted).

135. Pratap Mehta, *Pluralism After Liberalism?*, 11 *CRITICAL REV.* 503, 511 (1997).

settling conflicts in advance. If this conclusion follows from the thesis of value pluralism, as I believe it does, then there are limits to what theory can accomplish absent the particulars of a given political situation.<sup>136</sup> This echoes Berlin's insight that in politics, and the life and law of any society, "principles may cut across too much human need . . . [so that] the concrete situation is almost everything."<sup>137</sup>

Gray's endorsement of *modus vivendi* is broadly pragmatic and avowedly particularistic. If the thesis of value pluralism is embraced, as many liberal theorists purportedly do, the search for consensus on the right as well as the good is not actually incoherent in all contexts, as Gray seems to argue. But it is likely to be impossible to find such a consensus in the contemporary world. The task of *modus vivendi* politics is thus the humble project of staying afloat and avoiding the rocks. It demands a search for accommodation between parties who have divergent, and even incommensurable, concepts of the good. I would suggest, however, that the search for the *terms* of agreement is not vitiated by incommensurable ethical codes and forms of reasoning. On the contrary, as Gray argues, communities based on divergent principles with little in common often reach *modus vivendi*, and that this is desirable in politics. Summarily, the two loose requirements on *modus vivendi* are that they establish some modicum of peace and allow distinct cultures or forms of life to flourish uninhibited.

At first glance, it seems that letting parties accept agreement on pragmatic terms consistent with the minimum content of morality based on contingent circumstances is admirably pluralistic. It permits various forms of cultural life to determine the significance of a given context without reference to any substantial concepts of the good. A provincial tribe or religion may be granted exclusive jurisdiction over religious matters but simultaneously be subject to laws of a nation-state embodying the minimum content of legitimacy. However, *modus vivendi* has been criticized on a number of levels. It has been argued that the "notion of the good implicit in Gray's *modus vivendi* amounts either to an unstable and reductionist reliance on self-interest on the one hand, or a narrow and unqualified appeal to peace and stability"<sup>138</sup> on the other. It has also been

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136. It is noteworthy that the capabilities approach argued for by Nussbaum could be framed in a context-dependent manner, enabling it to avoid the pitfalls of other liberalisms and the value pluralist critique. Pluralists view the capabilities approach and its pretense to universality as tantamount to prioritizing certain "rights" over others in an unjustifiable manner.

137. BERLIN, *supra* note 103, at 15.

138. GEORGE CROWDER, LIBERALISM & VALUE PLURALISM 122 (2002) (emphasis added).

argued that it cannot adequately deal with diversity and demands of reasonable justification ubiquitous in modern political life.<sup>139</sup> Nonetheless, pluralism, like cosmopolitanism, provides an argument for justifying moral, as opposed to legal, duties to strangers through ensuring well-being and the legitimacy of certain regimes.

### *C. The Search for Common Ground*

The value pluralist maintains that some values are constitutively incommensurable because no metric or standard can determine a value's priority without doing violence to the underlying values at stake. However, because value pluralism takes well-being as primordial, it recognizes that there are conditions that are so undignified that human flourishing is impossible—such as under certain regimes mentioned above. The critical issue between pluralists and cosmopolitans, therefore, is that pluralists permit an arguably wider range of communal life forms, of laws and religious practices, which do not correspond to the political morality of liberalism such as comprehensive civil, political, economic and social rights.

The divergence between value pluralists and cosmopolitans is largely over what is a human “right” or “interest” and the extent to which liberal values can justifiably be imposed on strangers through extraterritorial state action. Recall that for the value pluralist there are no human rights outside the interests they protect, which are extremely variable. As mentioned in Part II, the values embodied in various forms of life, for example, in religions or other communal forms of existence that deny liberty any priority or individuals certain rights is compatible with value pluralism, but not cosmopolitans. In sum, value pluralists do not accept any prioritization of liberal autonomy over a communal value such as contribution to a tribe or family. To the extent that cosmopolitans endorse an expansive vision of human rights that includes liberal civil and political rights, pluralists will see such an approach as flawed because it protects highly specific and variable human interests and not fundamental rights necessary for well-being.

Nonetheless, the gap between cosmopolitans and pluralists is narrow in part because they share a consequentialist approach to ethical duties that relies on human well-being. Thus, neither theory thinks that torture can be morally justified. First, both value pluralism and Nussbaum's

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139. Mehta, *supra* note 135, at 513–17.

cosmopolitanism argue that the political concept of legal duty is based on an arbitrary moral fact: what political association you belong to or where you live. Second, both cosmopolitans and pluralists share a commitment to well-being that trumps justification of a moral or political theory based on rational choice or consent.

Minimal legal cosmopolitanism is based on a concept of law that has as its goal the legitimacy of the sum set of legal systems based on the concept of filling jurisdictional gaps only for the particularly heinous crimes. The problem with minimalist legal cosmopolitanism is twofold: first, a global legal duty does not necessarily flow from a global moral duty, as Feldman suggests, and second, it creates significant practical dangers that would result in different legal regimes intervening under their interpretation of what is the “just” law to govern conduct beyond its borders. Despite minimalist legal cosmopolitanism’s primary objective is preventing arbitrary treatment and protecting human rights, it is practically dangerous because it is easily subject to capture by powerful states. A fuller exposition of the conditions under which a state or international institution may act to prevent arbitrary treatment and human rights abuses outside its jurisdiction is critical for the international system, and value pluralism provides a cautious reminder of the need to be sensitive to local values that conflict with liberal political morality.

#### CONCLUSION

In practice, extraterritorial jurisdiction is grounded in political, as opposed to legal, considerations, which arise out of complex national interests including the promotion of certain values or norms that transcend any political associations or treaty. The presumption against extraterritoriality in the United States is in part born from the insight that it is hard to justify selective extensions to non-citizens however politically expedient it may seem. Nonetheless, states may see extraterritorial jurisdiction as a way of using law to promoting various political goals such as advancing international law and human rights. With the increasing prominence of international human rights law, extraterritorial statutes such as the ATS have enabled human rights plaintiffs to seek a tort remedy against both individuals and corporations<sup>140</sup> for violations of the law of

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140. *Flomo*, 643 F.3d at 1019–20 (emphasizing that “the distinction between a principle of [customary international] law, which is a matter of substance, and the means of enforcing it, which is a matter of procedure or remedy” is critical to appreciating that international law imposes obligations and the “individual nations must decide how to enforce them” whether it is against individuals or corporations).

nations. The increasing amount of ATS litigation in the Circuits courts and Supreme Court decisions, such as *Boumediene v. Bush*,<sup>141</sup> also demonstrate that the importance of extraterritorial jurisdiction is only increasing. While an increase in ATS litigation has advanced the cause of international human rights, selective application of national law to the conduct of non-citizens could be extremely problematic if used to serve less praiseworthy ends. From this theoretical perspective, minimalist legal cosmopolitanism is problematic at best.

Recall that cosmopolitanism attempts to develop an international system based on moral and legal duties that extend beyond political boundaries. Cosmopolitan law is based on the idea that there is a duty to obey certain laws, which arises out of a common minimal conception of justice. The legal obligation of the cosmopolitan is based on the requirement that the sum set of legal institutions can be legitimate only by action to prevent arbitrary treatment in places where the law ceases to exist or is severely deficient. Both cosmopolitanism and value pluralism demonstrate that the political concept of legal duty is deeply problematic and fails to comport with the current international system. Nonetheless, value pluralism offers a critique of liberal political morality that applies equally to cosmopolitanism: the thesis of value pluralism, if accepted, demonstrates that liberal values do not deserve priority over other values or forms of life that reject the liberal commitment to autonomy as self-authorship and the litany of civil, political, economic and social values that flow from such a commitment.

Minimalist legal cosmopolitanism is also profoundly dangerous because its application will depend on the interpretation and exercise of legal authority by one community over another. More powerful states will be more capable of exploiting less powerful states by using extraterritorial or universal jurisdiction to reach activity that it finds unjust. Political morality is invariably more pluralist internationally than domestically, making value judgments on when there exists a legal obligation to extend law abroad all the more problematic. Such a pronounced divergence in political morality does not mean that gross human rights violations should not be met with some form of legal or political sanction, but, more modestly, that cosmopolitanism may lead to violations of local political morality. Such violations could do more damage than good by fostering resentment by those whose law, norms or tradition is being displaced. In this respect, cosmopolitan law is perhaps most problematic when it

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141. *Boumediene*, 553 U.S. 723.

extends to civil, political, economic and social rights that do not enjoy the same degree of consensus as other norms codified in international law. In a world where borders are becoming increasingly anachronistic, value pluralism provides reason for caution not only in assessing when a norm is of fundamental importance to the international community, but equally in determining under what conditions a norm or value can justify a grant of extraterritorial jurisdiction to cure a moral harm abroad in the absence of any overarching agreement.