Welcome to Cosmopolis, World of Boundless Opportunity

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Introduction

Suppose a citizen and resident of Kenya, let's call her Yasmine, is fearful of disease, drought, and ethnic violence, and knows she has only the most minimal prospects for a healthy, prosperous, and happy life if she remains at home. In a moment of naive optimism she decides to seek a better life in the United States. Perhaps she hopes to get a job and obtain an education for herself and her children. Under present U.S. immigration policy and law, she would be turned away. In the early part of the 20th century, and the late part of the 19th century, my grandparents and many of yours, had similar aspirations and, remarkably, were able to fulfill them. Those were the good old days.

Thabo Mbeki, the President of South Africa, described the present international distribution of wealth in terms of “global apartheid.” We might understand this phrase as describing a circumstance in which the

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legal system is used to lock certain people into a position of poverty, inequality, and disenfranchisement, or artificially to separate groups of people. Under apartheid, the accident of birth into a particular race radically affected one’s life opportunities. Under the present international system, the accident of birth into a particular nationality has a similar effect. Is there a difference beyond scale?

The iconic American political philosopher John Rawls would seem to accept global apartheid, with a limited duty of inter-state assistance that is not intended to lift the poor out of poverty and sharply limited rights to immigrate. Until 1993, with the publication of The Law of Peoples, Rawls seemed simply to assume closed societies, isolated from other societies, as a modeling device rather than as a normative commitment. In The Law of Peoples, Rawls sought to defend closed societies, principally on moral hazard grounds.

I am interested in the economic problems of trade, immigration, and redistribution, and how we understand our ethical duties to one another in these fields. My argument will support a position that seems intuitively appealing to me and many others, but which we must recognize is revolutionary: that borders are artificial and, therefore, should not be accepted as determinative of ethical duties or life opportunity. This argument applies differently in the diverse areas of trade, immigration, and redistribution, but these areas are systemically related.

I. Crossing Disciplinary Borders: Philosophy, Law, Politics, and Economics

The question of our ethical duty to people across political borders cannot be answered except through interdisciplinary analysis. So, in order to evaluate the ethical meaning of political borders, it is necessary to transcend disciplinary borders. The disciplines that contribute include, in alphabetical order, economics, history, law, philosophy, and politics.

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1. In using Rawls’s work as a basis and as a foil, I follow a long tradition. “Rawls’s A Theory of Justice is generally considered to be the most complete and systematic account of a rights-based justice in contemporary philosophy. It is not surprising, therefore, that the important attempts at developing a systematic theory of global justice have been attempts at 'globalizing' Rawls's theory of justice.” Kok-Chor Tan, Justice Without Borders: Cosmopolitanism, Nationalism and Patriotism 54 (2004).


3. John Rawls, A Theory of Justice 8 (1971) (“I shall be satisfied if it is possible to formulate a reasonable conception of justice for the basic structure of society conceived for the time being as a closed system isolated from other societies. . . . It is natural to conjecture that once we have a sound theory for this case, the remaining problems of justice will prove more tractable in the light of it.”); John Rawls, Political Liberalism 12 (1995).

4. “Moral hazard” is an economic concept describing a circumstance in which individuals do not bear the full adverse consequences of their decisions, and so may have perverse incentives to act in a way that diminishes social welfare.

5. For a similar perspective, see Kevin R. Johnson, Open Borders, 51 UCLA L. REV. 193 (2003).
claim expertise only in international law. This disciplinary limitation, under which we all labor to greater or lesser extents, validates the idea of this conference. Legal pragmatism and social science empiricism can help philosophers to develop more nuanced models.

Boundaries of thought may induce us to pay undue respect to territorial borders. And, in fact, once we cross boundaries of thought, we see that territorial borders are also just boundaries of thought: international lawyers, like astronauts, understand that territorial borders are historically and legally contingent constructs, albeit with important real consequences. Let us briefly map the relevant boundaries of thought.

Integration between philosophy and law in this context involves a two-way trade. Non-lawyers may be surprised to learn that lawyers are severely limited in their ability to deal with issues of justice. Law in general, and international law in particular, might be viewed as a fundamentally conservative discipline, embedding the distributive status quo in its concerns for the rule of law and in its principles about the role of the state and how law is made. The traditional, and thankfully outmoded, concerns of international law for the exclusive sovereignty and uncompromised autonomy of states might be viewed as analogous, in a domestic setting, to an exclusive concern for protecting private property in a society in which some are fabulously wealthy, while others live in misery, or to an argument against a progressive income tax in order to promote the integrity of the family.

Lurking in the background of many claims about how international law should be made or interpreted, but often lacking a discrete or even legitimate role, is a concern for distributive justice. Louis Kaplow and Steven Shavell have argued, however, that adding concerns for fairness or justice to social policy analysis necessarily (and tautologically) reduces welfare, except insofar as individual preferences include a "preference" for fairness or justice. This economic perspective may not have practical implications: Kaplow and Shavell importantly and correctly accept justice and fairness as inputs through individual preferences. Furthermore, one might extend their analysis by suggesting that individuals, in implementing their preference for fairness or justice, may delegate the task of assessing what is fair or just to judges, legislators, treaty writers, or other agents. Welfare economics would, therefore, accept the possibility that such actors may appropriately include fairness or justice in their deliberations. This allows economists to cross a border of thought.

Economists are the kings and queens of consequentialism. They have

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7. Frank Garcia and Fernando Teson have brought these concerns to the foreground in their work. See, e.g., Frank J. Garcia, Building a Just Trade Order for a New Millennium, 33 Geo. Wash. Int'l L. Rev. 1015 (2001); Fernando Teson, A Philosophy of International Law (1998).
the strongest tools—both theoretical and empirical—by which to link cause and effect. But they also refuse to tell us anything about our preferences: they believe in normative and methodological individualism. They insist that each of us is the captain of his or her own preferences. They insist on stable and exogenous preferences. As Milton Friedman conceded, this is an assumption that forms the basis for a methodological division of labor rather than a belief about human nature.¹⁰

Economic theory, including normative individualism, is hospitable to the possibility that philosophers would advise us regarding our preferences. “Preferences” is simply an economist’s word for tastes, aspirations, and felt duties. In the liberal economic model, philosophers contribute to the global justice project through preference modification: their job is to help the rest of us formulate our preferences. More specifically, their job is to help us to understand our duties. It is something of a feat of levitation that we hire them—that we have a preference to improve our own preferences. Perhaps we also hire them to improve the preferences of others, as agents of meddlesome preferences.

While natural law theory may incorporate substantial concerns for broad concepts of natural justice, international lawyers have, in practice, done little to regularize (indeed to legitimate) inquiries into distributive justice. Perhaps this is because the vocation of law provides few tools with which to work on issues of distributive justice.

It is bracing for lawyers to engage perspectives from less conservative, more normatively committed, and, frankly, more imaginative disciplines such as philosophy, politics, and economics. These disciplines can be understood as addressing the normative question of what the law should be, and, as only marginally engaging, if at all, the principal responsibility of practicing lawyers: determining what the law is. Discourse about what the law should be is, indeed, not an area where lawyers have a monopoly, and it takes close analysis to identify the areas of lawyers’ contribution. Discourse on what the law should be is based on values and consequentialism: what do we want to achieve, and what is the best way to achieve it? Lawyers do not have special insights into values but can contribute to the project of consequentialism by contributing to an understanding of the actual operation and effects of laws. Philosophers and social scientists have stronger claims to advise voters and legislators on what the law should be.

Philosophers have a great responsibility in the field of distributive justice. They also need the assistance of economists and lawyers, however, because some of the philosophers’ models and arguments are based on certain understandings of formal relationships and causal relationships—areas in which the practical expertise of lawyers and the theoretical and empirical expertise of economists are critical inputs. Philosophers’ understandings of duties are surprisingly sensitive to context, and the lawyers and economists can help to describe the context. Economic models are

especially useful for showing us how the formal institutional context may come under pressure due to the possibility of increased welfare: increased welfare is corrosive of institutions that block it.\textsuperscript{11} This is why we have so many unauthorized migrants in the United States: immigration, like free trade, generally entails large welfare gains.

II. Crossing Territorial Borders: Trade, Immigration, Redistribution, and Intervention

Having divided the task among at least philosophers, lawyers and economists, I want to focus on the factual and formal contexts of trade, immigration, redistribution, and intervention. My goal is not to be comprehensive but to provide some of the details of these functions as they exist in the world today, and how they may affect the position of the poor. The most complex is trade.\textsuperscript{12}

A. Trade

To what extent is the trade law system complicit in the creation of a system of "global apartheid?" The evidence is ambivalent, and much will depend on future behavior.

Trade liberalization involves, at its core, the reduction of barriers to equal participation in commerce, so we must say at the outset that the trade law system holds promise for reducing global apartheid. Trade law can be revised to further extend the competitiveness of the market—to allow poor people to compete for better wages and better livelihoods. This would be an important component of the destruction of global apartheid, as it reduces barriers, and it can be achieved using familiar trade law tools. The Doha Ministerial Declaration refers market access and other issues of interest to poor people in poor countries. However, history suggests a degree of skepticism. As often encountered in the history of GATT and WTO, efforts to assist poor countries—even to accept more imports from poor countries—have been limited to cheap talk.

Furthermore, there are two possible ways in which the trade law system may perpetuate global apartheid. First, if we consider the trade law system not in terms of its requirements of liberalization but in terms of its permission of national barriers to movements of factors, including goods, services, labor, and capital, in both wealthy states and poor states, we may understand the trade law system as limiting the ability of the poor to trade out of poverty. Is the glass half full or half empty?

Second, turning to the requirements of liberalization, if these requirements limit the ability of poor states to choose policies that will maximize growth, and best ameliorate poverty, do they not have the effect of perpetu-


\textsuperscript{12} For an assessment of trade rules against certain principles of justice, see Darrel Moellendorf, The World Trade Organization and Egalitarian Justice, 36 METAPHILOSOPHY 145 (2005).
ating poverty? Even though the global system does not appear to have the racist basis that South African apartheid did, it may have the effect of limiting the ability of poor people to overcome poverty, inequality of life opportunities, and disenfranchisement.

Thus, there are two main areas for work to improve the position of poor people within the international trade system:

1. Market Access in Wealthy Countries. First, it is clear that opening markets to poor countries' products, including agricultural products, textiles, and tropical products, is a useful and necessary means to reduce poverty, although the magnitude of the effects of these measures is disputed. Opening developed country markets to services and labor from poor countries would also help many poor people. Of course, while there may be winners in poor countries, there may be losers among the poor in wealthy countries. We must also recall that liberalization in wealthy countries may have the effect of raising the costs of some goods to poor people in poor countries, while it reduces the costs of some goods to poor people in wealthy countries.

2. Reform in Poor Countries and the Right to Regulate. Second, as many leading trade economists have pointed out, poor countries may achieve substantial benefits from domestic reform, including trade liberalization.

Opening markets and domestic reform are motivated by efficiency. Economic analysts sometimes speak of two mythical governmental departments: a department of efficiency and a department of distribution. The department of efficiency is concerned with increasing the size of the pie: in the present context, it is concerned with free trade. The department of distribution is then tasked with distributing the surplus from free trade. One of the wonderful things about economic efficiency in this context is that it requires each individual to compete on equal terms, with benevolent distributive results compared to a world in which the poor are artificially prevented from competing on an equal basis. So the department of efficiency is at least somewhat supportive of the department of distribution.

A limited but useful way of reducing "global apartheid", therefore, would be to enhance free trade, beginning with allowing poor people to send their goods and services to wealthy countries.

B. Immigration

Let us focus on trade in labor. Joseph Carens observes that "[c]itizenship in Western liberal democracies is the modern equivalent of feudal privilege—an inherited status that greatly enhances one's life


15. A recent World Bank Independent Evaluation Group report criticized the Bank for failing to pay sufficient attention to distributional effects in connection with its advice to borrowers to liberalize trade. Id.
Thus, another way of reducing "global apartheid" would be to allow workers from poor countries to take jobs in wealthier countries—the current global system of restricted migration may be understood in at least one dimension as a macrocosm of the internal passport system that was used under apartheid. Many economists have pointed out that substantial global benefit could be derived from liberalization of immigration to allow greater mobility of labor.

For millennia, human migration was unconstrained, and people and peoples often moved to seek a better life. While migration was a mechanism of social and biological evolution, by which stronger societies and cultures supervened weaker ones, and human society expanded its geographic scope, it was also a mechanism of integration, forming multi-cultural societies. The U.S., which was once a nation of immigrants, only began to restrict immigration in the 1870s. Migration has been an important path to human improvement. With the advent of national borders and legal restrictions on immigration, this path has been formally constrained.

During the past century, global society has made important strides the free movement of goods, money, and even some types of services. Yet, human migration for economic and non-economic reasons remains broadly constrained.

While the global department of efficiency has done reasonably well in trade in goods, it has lagged in relation to immigration. There is little international law that commits states to liberalize immigration: to open their borders to immigrants. Outside special arrangements such as the European Union, states generally remain unbound and determine their immigration policy unilaterally. This is especially strange today, when wide differences in the global price of labor indicate that there are great welfare gains to be made from liberalization of immigration. Given these gains, combined with the demographic pressures in many developed countries, we can expect increasing liberalization of immigration.

The General Agreement on Trade in Services (GATS) focused on services in which wealthier countries are more competitive—financial services, telecommunications, professional services, etc. —and concentrated

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17. Howard Chang makes an explicit comparison between apartheid and restrictions on immigration: "Just as we condemn segregation at the local level for undermining equality of opportunity in the domestic context, I suggest, we should condemn immigration restrictions for undermining global equality of opportunity." Howard Chang, Cultural Communities in a Global Labor Market: Immigration Restrictions as Residential Segregation, working paper dated 2006, at 10, available at http://lsr.nellco.org/upenn/wps/papers/90.


on modes of delivery of services other than those that require immigration. 21 By contrast, poor countries have tremendous advantages in unskilled and semi-skilled services, which largely were excluded from GATS, both because their subject matter was not covered, and because the mode of exchange for these services is physical movement of the service provider. "Mode 4" of GATS covers services provided through the presence of natural persons of one state in the territory of another. Within Mode 4 of GATS, our discussion of trade and labor converges. Commitments in this area explicitly exclude formal immigration arrangements, but it is also clear that commitments in this area would be meaningless if immigration were barred.

C. Redistribution and Intervention

If we compare the domestic sphere in wealthier states to the international system, we see that domestic politics include a substantially greater formal capacity for redistribution than do international politics. By formal capacity, I mean that there is a centralized national government, with the power to legislate and enforce redistribution. It generally does not happen to the extent some might wish, or to the extent that Rawls advocated. Furthermore, given the greater domestic homogeneity than international homogeneity, there is less need and scope for domestic redistribution than for international redistribution.

As part of the Millennium Development Goals of the Monterrey Consensus, wealthy countries have agreed to urge one another to "make concrete efforts towards the target of 0.7 per cent of their GNP as [official development assistance] to developing countries and 0.15 to 0.20 per cent of GNP of developed countries to least developed countries . . . ." 22 Obviously, this is an intergovernmental and loose institutional structure—the most modest department of redistribution. The proposals of the 1970s for a Deep Seabed Authority to reap the harvest of manganese nodules and other seabed resources as a common trust for development may serve as a more transnational and institutionalized precedent. The European Community funds its operations, including its redistribution, through customs duties, levies on agricultural imports, a portion of each member state's value added tax, and an additional resource based on member state GNP. There have been proposals recently to impose a "Tobin Tax" on foreign exchange transactions and an air ticket tax in order to fund redistribution.

But simple intergovernmental redistribution would not be sufficient to alleviate poverty. To ensure that resources, including redistributed resources, are not misapplied under circumstances of weak governance in many poor countries, some international institutional monitoring and con-


22. Monterrey Consensus, UN Doc A/Conf.198/3, 22 Mar. 2002, para. 42. Even these minimal goals are not being met.
ditionality arrangements seem necessary. Well-crafted conditionality can have the beneficial effect of causing governments seriously to examine their development policy, and can reduce moral hazard problems. I will say more about this in a moment.

D. A Systemic Perspective

Of course, there is a systemic relationship among trade, immigration, and redistribution, as each serves as a partial substitute for the other. That is, fewer people would emigrate if trade in goods and services were sufficiently liberalized to reduce the gap in incomes between home states and receiving states, and if assistance were provided in education and other areas that would increase the productivity of the poor. Less international redistribution would be needed under circumstances of free trade or free immigration, although more domestic redistribution may well be required. These economic facts have important ramifications for ethical theory.

III. Crossing Imaginary Borders: A Critique of Territorial Borders in the Law of Peoples

My discussion so far provides a background against which to pose three questions. First, is there an ethical duty to open wealthy country markets to the goods and services of poor countries? Second, is there an ethical duty to open wealthy countries to immigration from poor countries? Third, is there an ethical duty to engage in redistribution from wealthy persons to the poor in other countries? Given the systemic relationship that I have outlined among trade, immigration, and redistribution, it is notable that ethical theory treats these areas differently.

Let us begin with the Rawlsian analysis of the ethical responsibility to assist the poor. As you know, Rawls argues that his two principles of justice only apply within a domestic society. For Rawls, the factual reality of political borders, which are territorial borders, is decisive.

John Rawls's work has been intensely criticized by other philosophers. I will not advance a comprehensive, detailed, or original critique. But I will describe a critique, tailored to the contexts of trade, immigration, and redistribution, and to their systemic interrelation, drawing on the work of Rawls's cosmopolitan critics.

This critique has more than an academic purpose. Nothing less is at stake than the question of whether individuals in wealthy countries and their governments have an ethical duty to open their markets to goods and services produced by poor persons abroad and to immigration by poor persons abroad.

23. As discussed below, Rawls believes that the "duty of assistance" is limited to the promotion of good governance. See generally Rawls, supra note 2.

persons, and whether these wealthy country citizens have a duty of redistribution to poor persons abroad. If we find no duty, there will be less basis to build the political will for change.

A. Goal and Background Assumptions Regarding the Appropriate Political Unit

All social scientists, perhaps especially economists, must be careful to ensure that their methodological assumptions do not insinuate themselves into normative positions. Rawls's goal in his monumental *Theory of Justice* was to articulate principles of justice for a national society, and so it made sense, as a methodological convenience and first approximation, in ideal theory, to assume closed borders.

If a closed system were all that were required, however, he could have described a global theory of justice, using *that* closed system. Thus, in this sense the particular selection of the state or people as the salient vertical unit of society is largely arbitrary and, therefore, like gender, race, and other arbitrary categories, has no moral force for our purposes. If one defends Rawls's choice as part of ideal theory, as Beitz does, then the "people" would be a mere variable rather than a substantive concept related to the world as it exists today.

Another defense of Rawls' choice is that the principles of justice that he articulated in *A Theory of Justice* are applicable only within politically liberal societies and peoples. Thus, one argument for focusing on the state, or the people, is that it may support an assumption of consensus around political liberalism, which is a predicate for Rawls's domestic theory of justice. However, this assumption is just as problematic in a real domestic society as it is in global society. After all, today it is as implausible to assume consensus regarding political liberalism within a society as it is across societies.

Rawls's main topic is the basic structure of society, defined as "a cooperative venture for mutual advantage." In his later work, responding to skepticism expressed by Brian Barry regarding the determinacy of the concept of mutual advantage, Rawls focused on reciprocity based on a "benchmark of equality." This reference to reciprocity based on a bench-

28. The distinction between "peoples" and states need not concern us, as Rawls's intent is (i) to emphasize the responsibility of states to their individual constituents—the people, and (ii) to avoid implicit acceptance of some of the powers he understands states to have at traditional international law. Rawls, supra note 2, at 23-30.
mark of equality also fails to achieve the intended goal of distinguishing domestic society from international society.

As many have now pointed out, globalization has at least raised a question regarding the salience, or exclusive salience, of the state under this definition of society.\(^{31}\) Again, lawyers can point to scores of international cooperative ventures for mutual advantage: all international law may fit this description, and international law is a rapidly growing body.\(^{32}\) WTO law is replete with references to reciprocity\(^{33}\) and is understood by many as a system of reciprocal economic liberalization. The arbitrary selection of the state cannot withstand much factual pressure.

International lawyers can exert pressure on the essential differences between the national state and other subdivisions, or other supranational organizations, and it is impossible to specify a sharp substantive distinction. Is a Swiss canton the right unit? What about a member state of the EU? When in U.S. federal history did the states of the union stop being the salient unit? The rise of the national state and the increasing globalization of concerns and governance structures demonstrate the historical contingency of the state. Mathias Risse has used this data to show that even those who are not reflexively cosmopolitan can no longer take the normative role of the state for granted.\(^{34}\)

It is strange for a moral theory to depend so much on such incompletely specified categories. Again, mere assumptions cannot be permitted to have normative consequences.

B. Whose Original Position, With What Results?

Rawls begins with his well-known original position, in which each representative operates under a veil of ignorance as to his principal's actual position in society. This original position is a heuristic, designed to generate principles that would be acceptable to each person without knowing his or her actual position.

Importantly, in order to develop the law of peoples—which we might recognize as strongly resembling existing international law—Rawls articu-

31. This question seems to have been asked in Charles Beitz, Political Theory and International Relations (1979).
33. The third preambular statement of the WTO Charter may be cited as evidence of the existence of a reciprocal cooperative venture for mutual advantage: Being desirous of contributing to these objectives [raising standards of living, full employment, expanded production, sustainable development] by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce (emphasis added: the italicized language suggests that the draftsmen were aware of the international justice debate).
lates a second original position among diplomats representing "peoples." Rawls thereby takes for granted an international, as opposed to a global, world. He does so because he wishes to take the world "as we see it" and work out a foreign policy for a "liberal people."

Furthermore, Rawls's analytical goal is sharply and arbitrarily inconsistent with his method in developing the rules of justice among individuals, in which he does not take society "as we see it" but rather takes social rules as wholly contingent and subject to formulation ab initio in the original position.

Rawls argues that in the domestic original position, representatives of individuals would select two principles of justice. The first principle of justice holds that "each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all." The second principle of justice holds that "[s]ocial and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society." These two principles of justice would be implemented differently in different societies.

According to Rawls, none of these principles would be selected in the second original position among representatives of peoples, and therefore they would not apply across national borders. In fact, Rawls appears to subscribe to a Westphalian concept of international law, with ruggedly independent states, and most importantly, where rights and obligations, even relating to human rights, appear to be available only to states. This is definitely, and intentionally, not a cosmopolitan vision. Rawls concludes that his approach in *The Law of Peoples* is concerned not with individual welfare but rather with the justice and stability of liberal and decent societies. So, under Rawls's law of peoples model, the kind of broad equality of liberty, opportunity, and redistribution available at home would be unavailable to foreigners.

Yet we might ask why the representatives of peoples would choose different principles of justice than those selected by the representatives of individuals. At least from a normative individualist perspective, peoples are merely aggregates of individuals. Would not true diplomatic repre-

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35. The distinction between "peoples" and states need not concern us, as Rawls's intent is (i) to emphasize the responsibility of states to their individual constituents—the people, and (ii) avoid implicit acceptance of some of the powers he understands states to have at traditional international law. Rawls, supra note 2, at 23-30.

36. *Id.* at 83.


39. *Id.* at 6.


42. For a criticism of the use of "peoples" from both an empirical and methodological perspective, see Benhabib, *supra* note 32.
sentatives of aggregates of individuals select exactly the same safeguards as
the individuals themselves selected in the first original position? If, as I
have suggested, the "peoples" unit is arbitrary, why would the principles
chosen within a people be different from those chosen by multiple peoples
together? In order to posit a different selection of principles of justice, it is
necessary to assume a different set of concerns.43

Thus, even if we imagine, as Rawls does, an original position among
representatives of peoples, we must understand the two-level original posi-
tion as an integrated original position. That is, the representatives of states
should be assumed to represent their principals with perfect fairness and
accuracy,44 not with the public choice and other agency problems that are
endemic in the real world. This integrated two-level original position, then,
should not be assumed to be different from a single global original posi-
tion. Under perfect representation, a federal original position is not differ-
ent than a unitary original position.

Rawls's heuristic assumption regarding the participants in the interna-
tional original position results in the inapplicability of the principles of
justice, including the difference principle, the core redistributive compo-
nent of Rawls's theory of justice. This is because, strangely, arbitrarily,
and counterfactually, Rawls assumes that states (or peoples) do not have
interests in the distribution of wealth.45 Therefore, instead of requiring
conformity with the difference principle, the law of peoples prescribes at
the global level only a modest "duty of assistance," which does not have
any redistributive goal.46 The recipient state may remain "relatively
poor."47

Rawls's position is contradicted, however, by the consistent behavior
of states: no one can study the international economic system without rec-
ognizing that states seek wealth (among other things). Actually, the states
that fail to seek wealth are generally failed states: the states where dictators
are able to enrich themselves the most by declining to seek broad wealth for
their constituents. Shall we construct a theory of justice based on the pref-
ferences of failed states? Here again, philosophers need greater input from
economists and lawyers to develop a more plausible response of represent-
atives to the original position.

43. Even assuming an illiberal people, it seems subversive of Rawls's domestic prin-
ciples of justice to assume that individuals in the domestic original position would select
an illiberal political culture.
44. Rawls makes the assumption of fair representation in the domestic original posi-
45. Their interest is to live in a well-ordered (liberal or decent) society. This society is
one that can provide basic goods. See Leif Wenar, Contractualism and Global Economic
Justice, in GLOBAL JUSTICE 76, 84 (Thomas W. Pogge ed., 2001), citing Rawls, supra note
2, at 24, 34.
46. Rawls, supra note 2, at 105-20.
47. This duty is limited to an amount sufficient "to help burdened societies to be
able to manage their own affairs reasonably and rationally and eventually to become
members of the Society of well-ordered Peoples." Id. at 111.
There are important arguments that Rawls's separation between national and international society—that is, his particular conception of a two-part original position, one for international and one for domestic principles—is artificial.\textsuperscript{48} Political philosophers, including Charles Beitz\textsuperscript{49} and Thomas Pogge,\textsuperscript{50} argue for a cosmopolitan approach, in which each individual, regardless of borders, enters into a global original position. Of course, under this global original position, individuals (or their representatives), fearing that they might in the real world be among the poorest persons, would almost certainly decide on a difference principle, in the same way that they would in a domestic original position.\textsuperscript{51} As the risks are the same, or even greater, the principles would be the same.

Moving to more specific concerns, under the law of peoples, Rawls would expect the establishment of a trade organization, like the WTO, among liberal peoples in order to establish "fair standards of trade to keep the market free and competitive."\textsuperscript{52} While Rawls does not discuss the detailed political, economic and legal issues involved, this speculation seems quite plausible. Why would representatives of peoples decline to select global free trade, given that it is superior from a global welfare standpoint? Perhaps they would have some concerns regarding distributive effects, but then they could agree to a formula for reallocating wealth. So, regardless of the application of Rawls's domestic principles of justice, under the law of peoples, representatives might agree to free trade.

On the other hand, under the law of peoples, Rawls seems to believe that "a people has at least a qualified right to limit immigration."\textsuperscript{53} He articulates two reasons for this "right." The first reason is rooted in efficiency. For Rawls, restrictions on immigration serve to avoid moral hazard in the form of failure to husband territorial resources. I discuss the efficiency, or moral hazard argument, in detail below.

Second, Rawls refers to Walzer's argument based on a desire to protect


\textsuperscript{49} See Charles R. Beitz, Review Essay: International Liberalism and Distributive Justice: A Survey of Recent Thought, 51 World Pol. 269, 290 (1999), stating that "I believe that the philosophical weakness most characteristic of cosmopolitan theories - although not found equally in all of them - is a failure to take seriously enough the associative relationships that individuals do and almost certainly must develop to live successful and rewarding lives." However, Beitz accepts a federal possibility: "it is hardly clear that a sophisticated cosmopolitanism cannot explain how local affiliations might give rise to special responsibilities. Such a view would recognize the value to individuals of their associations with domestic or local communities and argue that ethically significant properties of these associations justify internal distributive arrangements that are different from, although not inconsistent with, what is required by global principles." Id. (citations omitted) (emphasis in original).

\textsuperscript{50} THOMAS W. POGGE, REALIZING RAWLS (1989).

\textsuperscript{51} See Carens, supra note 16, at 257-58.

\textsuperscript{52} Rawls, supra note 2, at 43.

\textsuperscript{53} Rawls, supra note 2, at 39, n.48.
a people's political culture. However, this argument seems susceptible to an economic critique. Howard Chang shows that rational people would be willing to sacrifice the purity of their national political culture in exchange for the welfare benefits of international mobility. Furthermore, it is clear that distinctive culture (including political culture) can survive free immigration, as we have found in the European Union.

Walzer's argument, as adopted by Rawls, would seem artificially to insulate existing cultures from challenge, although Walzer concedes that "the collective version of mutual aid might require a limited and complex redistribution of membership and/or territory." Indeed, Walzer would go farther than Rawls. Sidgwick proposed that immigration might be restricted in order to maintain an adequately high standard of life among the members of the community generally—especially the poorer classes. Walzer cites Sidgwick's proposal as a "primitive and parochial version of Rawls's difference principle . . ." The important point is that it is a domestic difference principle that conflicts with an international difference principle. This economic concern is real but may be addressed through domestic redistribution.

We must fear that concerns for culture may be a disguise for irredentism. It is worth noting the argument made by Jean Hampton that "in most of the world the concept of nationality is intimately connected to the ethnicity or race (narrowly defined) of the members of that society." Irredentism is morally questionable, and it raises important issues for the "encompassing group" concept advanced by Raz and Margalit. As Carens points out, ideal theory does not require the elimination of all linguistic, cultural and historical differences. But nor does it mean that all differences are to be preserved, or that all existing features of state sovereignty are justified.

Furthermore, most of the arguments for free immigration parallel the arguments for free trade, which Rawls seems to endorse. It may be that some states are hurt and some are helped by free immigration, and that some individuals are hurt and some are helped. For example, states with high quality public education systems may undesirably confer a positive externality on other states through emigration. States that provide strong support for handicapped persons may find that immigration imposes undesirable costs on their systems. Therefore, we would expect representa-

55. Chang, supra note 17.
56. See the interesting argument by Kok-Chor Tan that nationalism can be reconciled with cosmopolitanism. Tan, supra note 1.
57. WALZER, supra note 54, at 47.
58. HENRY SIDGWICK, ELEMENTS OF POLITICS 296-97 (1881).
tives in the original position to agree to free immigration accompanied by a redistributive mechanism in order to compensate those that are hurt by free immigration.

C. Liberty or Distribution?

I have been focusing on distribution, but, from a very practical standpoint, international borders restrict liberty. They restrict the liberty to move, the liberty to engage in commerce, and the liberty to accept employment. It is worth noting from the outset that, at some level, these liberties are included in Rawls's list of basic (domestic) liberties, protected by his first principle of justice. However, Rawls also stipulates that "[w]hile some principle of opportunity is surely [a constitutional] essential, for example, a principle requiring at least freedom of movement and free choice of occupation, fair equality of opportunity . . . goes beyond that and is not such an essential." While this distinction may make sense in Rawls's framework, in a practical sense, freedom of movement and free choice of occupation go a long way toward achieving equality of opportunity. So, we must recognize that Rawls's first principle of justice is supportive of free trade and free immigration to the benefit of poor persons.

But does the first principle of justice apply to foreign persons? Can it be restricted to exercise by foreign persons from politically liberal states? It would seem an artificial constraint on freedom of movement and free choice of occupation to say that "you can have all the freedom you want, so long as you exercise it at home." It would seem sensible and likely that diplomats in the original position would reciprocally agree to extend these liberties to one another's citizens.

Once we leave the assumption of closed societies, restraints on immigration seem to interfere with liberty in a way that violates the domestic principles of justice. However, in The Law of Peoples, Rawls supports restrictions on immigration. How should we distinguish between immigration and the freedom of movement and occupation? One way is to use a guest worker category. However, guest worker categories, as second-class citizenships, may be deeply problematic, if they do not convert into first-class citizenship over some reasonable period of time.

Only after appreciating that these liberties have distributive effects, do we find that international borders also have distributive consequences. These consequences are indirect but quite significant. In that broadened and indirect sense, international borders are also addressed by Rawls's second principle of justice.

There is a conflict between the domestic and international principles of justice in the context of international immigration and trade. When applied globally to the immigration context, the principles of justice would suggest freedom to emigrate. However, when applied domestically in a

62. RAWLS, POLITICAL LIBERALISM, supra note 3, at 335 (including freedom of movement and occupation as "basic liberties").
63. Id. at 228.
poor state, the second principle of justice requires that constitutional arrangements be structured to benefit the poorest. It may be that brain drain of the middle class would confer a detriment on the poorest, and so a domestic difference principle would limit migration.

As Sidgwick pointed out, there may be settings in which free immigration and free trade, as well as foreign assistance, would be detrimental to the poorest members of domestic society. Under these circumstances, the operation of the domestic difference principle would either prevent these cosmopolitan acts or require domestic compensation sufficient to balance the damage done to the poorest. (Recall that the first principle is lexically prior to the second.) So, in order to comply with a global difference principle, or even a global first principle of justice, it may be necessary to compensate those who are poor at home. There is a systemic relationship between domestic and global justice.

D. Moral Hazard and Regulatory Competition

Rawls derives a border of thought from a territorial border. It is important to emphasize that his border of thought is largely based on a behavioural assumption and seems more pragmatic than philosophical. Philosophers need to engage with economists in order to validate behavioural assumptions, such as the moral hazard assumption made by Rawls. He assumes that people will only act responsibly in connection with the stewardship of their physical territory if they are confined to it, in perpetuity. Importantly, this incentive-based rationale is not sufficient even for Rawls, as he argues that the problem of immigration is not simply left aside but is eliminated by virtue of the establishment of social justice in a realistic utopia—within each state. Under a realistic utopia, Rawls suggests, people simply would not have any motivation to migrate. While this is not completely true, there certainly would be less incentive to do so.

Will national societies have appropriate incentives to become prosperous if outsiders can simply invite themselves to the table, or if they can simply call for a redistributive bailout when lack of industry has its inevitable results? If citizens could rely on unconditional global redistribution, they would lack appropriate incentives to cause their own state efficiently to achieve their goals—in economic terms, there would be “moral hazard” or a “soft market constraint.” Rawls and other philosophers reject global redistribution largely because they do not believe this soft market constraint can be overcome. So the moral hazard argument stands in the way of both free immigration and international redistribution.

Rawls’s argument, which Pogge calls “explanatory nationalism,”

64. There is no clear evidence that free immigration, or free trade, would generally prove detrimental to domestic workers. For discussions of immigration, see George J. Borjas, The Economics of Immigration, 32 J. ECON. LIT. 1667 (1994).
66. Rawls, supra note 2, at 8, 39.
67. Rawls makes this argument explicitly at Rawls, supra note 2, at 8.
68. Thomas Pogge, World Poverty and Human Rights 139-144 (2002).
assumes first that differences in position result from governance choices, and second that citizens are responsible for governance choices. Thus, explanatory nationalism argues that if citizens could rely on global redistribution, they would lack appropriate incentives to cause their own state to achieve their goals efficiently; in economic terms, there would be a "soft market constraint" or "moral hazard." The argument is that because the apparatus of the state exists and has responsibilities, the consequences of failure must be felt by those who control the state.69

While the underlying assumptions are suspect,70 there is a sense in which states and their citizens should bear the consequences of their choices. Under ideal circumstances, we might assume that states are accountable to citizens, and it seems that Rawls's duty of assistance is designed to develop some level of accountability. However, in the non-ideal world, governments are often not accountable. Furthermore, there are other ways to make governments accountable than to leave their citizens in misery. Three important mechanisms of accountability are regulatory competition, international legal requirements, and conditionality.

Actually, free trade and free immigration may, under certain conditions, have beneficial competitive effects on governments, as well as on producers of goods and services. In fact, the very mobility that Rawls would restrict is a critical assumption within the literature of competition among governments.71

It is entirely plausible that in a global original position, representatives would not agree to closed states but rather to states open to immigration and trade, in order to enhance regulatory competition. I do not want to assert this argument too strongly, as I have substantial questions regarding the mechanism and effectiveness of regulatory competition,72 but I do want to highlight this additional reason why, in an original position, openness might be selected. The critical question is how we can maximize incentives for good government while minimizing punishment of innocent citizens. This question has much in common with the sanctions debate with respect to so-called rogue states, such as pre-war Iraq.

Furthermore, economists and lawyers have much experience with moral hazard in the fields of bank regulation and insurance. There may be ways to obtain the benefits of appropriate incentives for good governance without giving up the possibility of "bailout." If this possibility exists, why would representatives in the original position give it up?

69. It is also worth noting the "flip side" of this argument: that states would have reduced incentives to become wealthy due to the prospect that they would be taxed to help the poor. Of course, this argument has no more impact internationally than it would in domestic society; the difference principle seems to survive this concern.

70. Tan makes an important argument that Rawls seems to accept collective responsibility for governmental choices, in a manner inconsistent with his domestic focus on normative individualism. Tan, supra note 1, at 74-76.

71. See Albert Breton, Competitive Governments 259 (1996).

A host of failed states have demonstrated that letting citizens absorb the consequences of their governments' failures does not necessarily result in governmental reform. The predatory state seems to benefit from a vicious cycle of predation of its citizens, giving rise to further concentration of power and wealth that, in turn, allows further predation. Government officials may find that policies that reduce total welfare maximize their individual welfare. Although conditionality as applied by the World Bank and IMF has many critics, it is an example of externally applied discipline on the state—of a constraint that might reduce the problem of moral hazard and disrupt the cycle of predation.

Conditionality is a form of intervention, and some call it a form of neo-colonialism. Conditionality certainly reduces the bundle of autonomous state rights known as "sovereignty." But sovereignty, in the form of absolute state control over its own affairs, has been oversold to poor small states, and more specifically to citizens. Local control does not benefit individuals when it is in the hands of predatory or incompetent governments—we must be open to a post-post-colonial possibility of intervention in cases of failed domestic governance. If predatory governments can be disciplined, through a regime of analysis, transparency, and conditionality, it is possible to improve the lot of their citizens.

It may seem strange to be advancing greater international intervention and conditionality, at a time when the policies underlying World Bank and IMF conditionality have been hotly criticized. While international governance is quite imperfect, to the extent that it can engage in a policy dialogue with poor countries, it is possible that useful measures will result and will prove less imperfect than the alternatives. Mechanisms need to be created to ensure and facilitate reasoned dialogue based on agreed principles, rather than diktat.

Even within a state-based original position, diplomats faithful to their constituents might agree that if they empower states, there should be restrictions on the authority of states and a possibility of international intervention under certain circumstances—specifically, in order to provide the constituents a minimum level of security and welfare. This is the role of international law. Such an agreement might be compared to a form of federalism in that the individuals would be authorizing a central, supranational government to intervene—to exercise jurisdiction—in particular areas. Certainly diplomats faithful to individual constituents would adhere to contingent intervention under some conditions.

IV. Welcome to Cosmopolis

Gosepath reminds us that "[i]n its basic tendency, global justice seems to lead—as Kant was afraid it would—towards a world state or—if that possibility can somehow be excluded—at least towards a kind of cosmopol-

International lawyers know that allocations of authority are complex, subtle, and fluid. International lawyers also know that international law itself is the first step toward a world state or, at least, that each incremental international legal obligation is, by definition, a step away from the national state.

The correct question to ask is not where sovereignty lies, but how best to allocate each component of authority, recognizing the values of pluralism. Under a liberal, normative individualist, ethical framework, each of us would enter into society to maximize the achievement of our preferences. Given variations in economies of scale, externalities, and preferences, it is natural that we would work together in different horizontal and vertical frameworks. It is also natural, as mentioned a moment ago, that in an original position as to each of our social structures, we would be concerned with distributive justice. Furthermore, it is natural that we would link our various horizontal and vertical social structures to maximize the achievement of our preferences.

So, welcome to Cosmopolis. Imagine a global cosmopolitan original position. It would begin with representatives not of peoples but of individuals. These individuals would pay no regard to political borders in formulating exactly the two principles of justice that Rawls derives from the domestic original position. But they might also agree to establish subunits called states, or peoples. As Rawls anticipated, principles of justice would need to be worked out for different social units.

Considering the vertical structure of society, whether the sequence of pyramidal original positions is top-down, from global to domestic, or bottom-up would not make any difference. Either way, the cosmopolitan nature of the original position would draw on individual perspectives. Either way, the deliberations would be recursive, and so would draw together lower and higher levels of organization. In fact, participants in a domestic original position, aware of global society, would choose precisely the same principles that would be chosen in a global original position.

Similarly, participants in the global original position, without cultures and without histories, would also stipulate some rules of permitted diversity. In this ideal context, there is no path dependence and so the participants can choose any unit of organization. But they would wish to establish units that allow individuals to maximize the achievement of their somewhat diverse preferences. This wish would give rise to a rule of constitutional subsidiarity, determining allocations of authority and responsibility to sub-global units based on preference maximization. Of course, preferences here include preferences for cultural diversity, as well as all of the rights to influence government, and to be protected from excesses of government, that people would wish for in establishing sub-global units.

75. See Rawls, supra note 65, at 166 (applying the principles of political justice to all domains).
And, provided that doing so did not leave any of us in Yasmine's position, we would allow for some degree of national autonomy. Of course, my proviso can be understood as a basis for a rule of conditionality or of conditional intervention, including possibly military intervention. There is no doubt that in the original position, we would approve a rule of military intervention to halt a holocaust. As we have learned recently, the difficult aspect of this decision is not moral but institutional: to establish institutions that can reliably and legitimately judge the need for intervention. It is an implementation problem to be assigned to lawyers rather than philosophers.

As within the U.S. and the EU, Cosmopolis would seek to institute free movement of labor. From a practical standpoint, as Rawls suggested, free movement of labor puts some pressure on welfare states and may perpetuate failed states. Therefore, it may give rise to some need for contingent intervention or harmonization. As within the U.S. and the EU, Cosmopolis would likely have free trade in goods and services. At some level, it would be necessary to compensate those harmed by these measures.

This federal Cosmopolis would entail some difficult allocation decisions. But the decision whether to help a compatriot to obtain goods above basic goods, while foreigners suffered without basic goods, would always be unacceptable, just as the decision to give one's child a luxury before taking care of the basic needs of a neighbor's child would always be unacceptable.

Perhaps a federal Cosmopolis would have some degree of proximity-based tiering after basic needs are met, or more properly some reflection of the human tendency to compare ourselves with those nearby. Perhaps it would also have a kind of extended purchasing power parity concept, which would accept that different integrated baskets of goods are needed for a good life in different contexts. In the end, it seems clear that borders, as part of the basic structure of society, must be structured—including features of permeability—in order to advance the position of the least fortunate.

My basic premise is cosmopolitan in the sense of individual duty, as well as individual rights, so we need to begin with the duty of individuals as opposed to the duty of states or peoples. Should I really feel, like Clare Booth Luce,\(^\text{76}\) that I owe duties to those near but not those far? Certainly

\(^\text{76}\) It is fitting to refer to the horrifying, albeit presumably honest, statement of Clare Booth Luce:

"Americans identify with America, and increasingly there are people—Poles, Italians, Israelis—who identify with two countries. But I do not know of any other identification that I can make, say, with the condition of the people of the Sahara. I repeatedly see pictures in the papers of a starving mother with her child holding out its hand. I think it would be hypocritical if I didn't say that I would feel a little more compassion if one of my pet birds had broken a leg in its cage in my own house."

Quoted in William Raspberry, "Mrs. Luce: An Awful Interview," \textit{Washington Post}, Sept. 15, 1982. Louis Michael Seidman finds Mrs. Luce infuriating but right: "Anyone in this country who spends money on a pet bird or, for that matter, on dinner at a good restau-
the idea of the original position is to identify ideal duties, as opposed to narrowly reciprocal real obligations. So the fact that a compatriot is behaviorally more likely to reciprocate should not, in the original position, make a difference. And in the original position, distance should count for little.

V. Slowly Moving Forward

Could it be that Rawls declined to apply the principles of justice developed for domestic society to international society because of the tremendously disruptive, even revolutionary, redistributive effect of applying these principles in an international context?\(^7\) If we consider Rawls's formulation of the lexically prior first principle of justice, we see that even its liberties can be constrained in favor of public order.\(^8\) As Carens points out, even in a global original position, participants would approve restrictions on immigration in order to avoid chaos and the breakdown of order.\(^9\)

An instantaneous move to global free trade, free immigration, and broad redistribution would be impractical. Individuals need time to adjust and might agree in the original position to make some changes gradually. Over time, complex factors may provide natural and beneficial limits on emigration that would not be able to operate instantly. It is easy to understand how one might back away from recommending—indeed, calling for—these disruptive changes, but it is striking that the position Rawls takes on this matter calls for little change and seems difficult to justify within his own framework.

An alternative approach seems consistent with Rawls's methodology and could avoid sudden revolutionary disruption. Modeled on the experience of trade liberalization over the past 60 years, a gradual approach combined with adjustment seems intuitively appealing within a global original position. "You are not required to finish the task, but neither are you free to abstain from it."\(^8\) Such an approach would address at least all three parameters that I have discussed: liberalization of trade, liberalization of immigration, and redistribution. It would recognize the systemic relationship among these three parameters and synchronize transition in order to minimize disruption. So it may be that most of the front-end work would be on trade liberalization, international transfers of resources, and conditionality. These measures would be consistent, to some extent, with Rawls's duty of assistance and his approach to trade. These measures would have the effect of reducing the demand to emigrate from failed states.

\(^7\) This issue is touched upon in Simon Caney, *Cosmopolitan Justice and Equalizing Opportunities*, in *GLOBAL JUSTICE* (Thomas W. Pogge ed., 2001).
\(^9\) Carens, supra note 16, at 259.
\(^8\) Pirke Avot (The Ethics of Fathers) 2:21.
Conclusion

Thus, we might understand Rawls’s duty of assistance as a starting point. Free trade in the products produced by poor people could also be implemented quickly, provided that adequate adjustment assistance is implemented in parallel, in order to assist poor people at home and abroad who are harmed by this change. Expanded immigration could be introduced gradually in order to avoid disorder and allow adjustment, and in order to provide time for the other parameters to have an effect that reduces the desire to emigrate.

In the end, philosophers must take the lead in advising us as to our duties, but they must accept the practical and empirical input offered by lawyers and social scientists, and we all must recognize that globalization has changed the factual context in which we work.

Once we understand our duties and commit to their realization, social science and law may again be brought to bear to implement them in domestic and international law and institutions. Social scientists can help to evaluate the potential effects of alternative paths, and lawyers can help to design and implement the social rules to effect desired policy changes. These interdisciplinary problems are difficult and recursive, and so require continued dialogues such as this one.

So, what about Yasmine? Of course, those of us who are well-off feel a duty to her. Geographic distance, political borders, and the vagaries of media coverage cannot be allowed to prevent us from recognizing and carrying out the duties that we would feel if she were near. We feel this in our hearts, but in order to precipitate resolve and action, we must know it in our minds as well. Rawls suggested a process of comparing our instincts to our theory.81

According to the theory I have described, our duty is consistent with our instincts. Our duty is to allow Yasmine to stay at home and sell her products in our society, to allow her to join our society if she wishes, to assist her in achieving good government at home, to help her to become more productive, and to ensure that material resources are distributed in a way that maximizes the resources available to her. In the long-run, we all live under a veil of ignorance regarding our prospects and those of our children. The story of our ancestors highlights this. Under this veil of ignorance, empathy and reciprocity are joint and several motivations.
