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## Is the Rule of Law Cosmopolitan?

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# IS THE RULE OF LAW COSMOPOLITAN?

*By Robin West*

Aunt Sally and Huck, after a steamboat accident:

“Good gracious! anybody hurt?”

“No’m. Killed a nigger.”

“Well, it’s lucky; because sometimes people do get hurt.”<sup>†</sup>

## I. INTRODUCTION

In a short and artful essay that evoked a blaze of criticism,<sup>1</sup> Martha Nussbaum urged us a few years ago to heed the ancient call for a virtuous and humane cosmopolitanism: if we are sincere in our societal commitment to justice, and genuine in our individual quest to lead a just and good life, then we must acknowledge the moral equality—the equal worth and equal dignity—of each and all of the world’s inhabitants.<sup>2</sup> This claim, if true and if seriously regarded, would have profound consequences. Individual, national and communal choices and actions, Nussbaum and her classical authorities say, must, to be just, be undertaken in full and equal regard for the consequences they impose upon all—not just upon our community, our tribe, our nation, our neighbors, our friends, those we see or hear from on a daily basis, or those to whom we have ties forged of blood, genes, geography, affection, common boundaries or shared traditions—but upon all. It is as wrong to give greater weight to the claims of co-nationals as to give greater weight, in the arena of justice, to the claims of those who share our skin color, ethnicity, religion or surname. Although the pull of sentiment, of love, of sympathy, and even of compassion may be particularistic, partial, tribal, familial or nationalistic, the claim of *justice* is universal. When we act justly, we act in full regard of the humanity and moral worth of all the world’s citizens.

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† MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* 279 (W. Blair & V. Ficher eds., 1985).

1. See Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, in *FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM* 1 (Joshua Cohen ed., 1996).

2. See *id.* at 12-14.

I want to baldly assume for purposes of this paper that Martha Nussbaum is right about this—although I will briefly suggest one line of response to some of the criticisms made against her at the end of this paper. Primarily, though, I want to elaborate on a possible implication of her thesis. The question I want to take up is this: If Nussbaum is right to argue that justice requires ethical cosmopolitanism, and if justice is the virtue both required by and furthered by the rule of law, then doesn't the legal profession's defining ethical commitment to the rule of law in turn commit us to ethical cosmopolitanism? If justice requires cosmopolitanism, and if the rule of law promotes or is intended to promote justice, then our profession's commitment to the rule of law, if genuine, should commit us to cosmopolitanism as well. If so, then lawyers, distinctively, should be ethical cosmopolitans. Put differently, if justice requires cosmopolitanism, and the rule of law promotes justice, then lawyers, by virtue of our professional identity, are or should be constitutively committed to the egalitarianism and universalism that undergirds both cosmopolitanism and the rule of law.

It is not at all obvious, however, that the justice that arguably requires ethical cosmopolitanism is the justice furthered and required by the rule of law, or even that it bears a family resemblance to it. It may turn out, for example, that it is a social, or political, or global, or Rawlsian, or just peculiarly cosmopolitan sense of justice that requires cosmopolitanism, and that that justice, although surely connected in some way to the justice dispensed by international tribunals, is entirely unrelated to the sort of justice ideally dispensed by domestic courts and furthered by a national rule of law. It may be, in other words, that the egalitarianism and universalism required by cosmopolitanism are not in any sense connected to the recognition of the moral equality of citizens that the rule of law seems to require of lawful societies—and may even be antithetical to it. If so then lawyers qua lawyers are off the hook. If these two senses of justice are simply unrelated, then it may still be, as Martha Nussbaum insists, that all of us, by virtue of being human beings, should be ethical cosmopolitans. But then our further professional identity as lawyers adds nothing to our moral obligations to the world's citizens.

My guess, however, is to the contrary. Although they are certainly not identical, I think there is an important connection between the justice that Nussbaum and others think requires ethical cosmopolitanism, and the justice toward which law—and lawyering—aspire. It is not, though, an iron-clad connection. Rather, what I will

argue in the bulk of the paper is that whether or not the rule of law implies ethical cosmopolitanism *depends*: it depends on how we understand or interpret the legalistic sense of *justice* that law and the rule of law seemingly require. The virtue that we sometimes call legal justice, and the correlative meaning of the rule of law to which it is yoked, can plausibly be subjected to a range of different interpretations, each resting on quite different understandings of the point of law and of what the individual law is meant to protect. Some of these interpretations do, but some don't, imply some version of cosmopolitanism.

After disentangling different meanings of legal justice and of the rule of law, I then want to argue that at least one widely held interpretation of legal justice—a loosely Kantian understanding, which I will describe as both *egalitarian* and *communitarian*—does imply the ethical cosmopolitanism for which Nussbaum has argued. There is, then, at least this limited sense in which the rule of law is cosmopolitan: at least one understanding (among others) of the virtue specifically furthered by law and legal fidelity requires it. And if that is right and if the understanding of justice on which it rests is at all robust, then it is not only our status as moral beings that should compel us toward world citizenship, and the ethical cosmopolitanism for which Professor Nussbaum has argued. Our status as lawyers and legal educators—our professional sense of ourselves as partly constituted by but also committed to rule of law values, and so committed by virtue of our professional status—should do so as well.

Finally, if that is right, then something is very wrong with the way we in the United States think about and teach about law. As things currently stand, American understanding of the ideals law furthers and the virtues it promotes could not be further from such an ethic. Rather, the jurisprudential ideals that American lawyers hold out for our law, and the virtues we assume are furthered by respect for law, are almost entirely parochial, and for the most part, we teach and think about those ideals and virtues as though that is as it should be. What I want to suggest at the end of this paper is the possibility that we need to rethink that assurance. If the justice that we claim to honor and further with the rule of law is the justice we so resolutely deny in our interrelations with the world's co-citizens—co-citizens whose lives are often adversely affected by our reckless disregard of their existence, much less their interests—then we are guilty of an hypocrisy at least as great as Aunt Sally's, and, perhaps more to the point, at least as great as the hypocrisy

of the founding fathers of the Constitution in their disastrous and contradictory endorsement of natural equality and the superiority of the white race. And, our legalistic hypocrisy, like theirs, has consequences. It leaves our egalitarian ideals for law—the equality we think law guarantees; the respect for humanity we think it engenders—so riddled with exceptions that they become incoherent, and thereby easily lost and forgotten. It leaves the best possible interpretation of these treasured egalitarian legal aspirations—the majesty of the Fourteenth Amendment; the sweep of our commitments to equality, and so forth—in tatters. Like Aunt Sally’s casual asides, those legal gems—meant to express our generosity, our compassion, and our equal regard and concern for our kinfolk and neighbors—instead, unintentionally, express our reckless cruelty.

## II. THE RULE OF LAW AND LEGAL JUSTICE: CURRENT UNDERSTANDINGS

Whatever else the rule of law requires of us, virtually all judges, most lawyers and most lay people agree that it requires what jurisprudential scholars call “horizontal equity”: judges must treat like cases alike. Similar cases must be decided similarly. This only seemingly banal and simple constraint has been expressed in a number of ways. Judicial decisions must, to use Dworkin’s formulation of this basic intuition, have *integrity*.<sup>3</sup> Cases must be decided in accordance with a scheme of rights, and what that means above all else, for Dworkin, is that if case A or litigant A is like case B or litigant B in all similar respects then A must be treated like B.<sup>4</sup> According to Scalia’s formulation of the same basic point, judges cannot flip-flop, or decide cases arbitrarily, or by whim, or by personal predilection. The rule of law requires a law of rules, and a law of rules in turn requires that like cases be decided similarly, in accordance with a rule that so describes them.<sup>5</sup> According to Herbert Wechsler, to draw from an influential mid-century articulation of the same idea, decisions must be principled, and again this turns out to mean not much more than that cases that are in principle similar must be decided in the same way, regardless of the

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3. See RONALD DWORKIN, *LAW’S EMPIRE* 176-224 (1986).

4. See *id.* at 217-19.

5. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178-79 (1989).

judge's personal predilection to the contrary.<sup>6</sup> More recently, Cass Sunstein has explicitly identified analogical reasoning as the heart of law, defining it, in part, as the requirement that "judgments about specific cases must be made consistent with one another."<sup>7</sup> The requirement that like cases be treated alike, again virtually all judges and most theorists seemingly agree, is a very real and consequential limit on judgment. It limits options and it limits—in the minds of some it even eliminates—untoward discretion.

As is also widely acknowledged, however, at least in law schools if not on the bench, the basic coherence of this mandate that "like cases be treated alike" has been the subject of a one-hundred-year-long critical attack, in the first half of the century by the American Legal Realists and in the second half by the Critical Legal Studies Movement. Much of that criticism has been well-founded. It is certainly true, as scores of critical thinkers insist, that the judgment that two cases are alike, or that two people are alike, or that two situations are alike, logically depends upon a prior judgment, claim, premise, gestalt, gut instinct, prejudice, *Zeitgeist*, or entire world view, stated or unstated, that renders the shared characteristics noticeable, much less relevant or central to the outcome. That a menstruating woman is enough *like* a man that it is unjust to exclude her from civic, economic, or religious life simply because she is menstruating is not self-evident;<sup>8</sup> it requires a judgment that they both share in the capacity for reason or productivity despite their obvious biological differences; or it requires a judgment that menstrual blood does not pollute; or a judgment that fertile and bleeding women can engage in the work of citizenship or productivity or spirituality. That an injured hand crippled in a botched surgical proceeding is enough *like* a broken machine part and that the surgeon's broken promise to fix it is enough *like* a broken promise of a manufacturer to deliver a machine part to a factory, that justice requires that the injury to the hand be compensated through a contract rule familiar to merchants rather than a tort rule familiar to relational actors, is also not self-evident; it rests on a prior belief, or world-view, that regards surgical services as commodities and surgeons as sellers, and even more generally, that regards all of our social interactions and

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6. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 11 (1959).

7. Cass Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 782 (1993).

8. See Martha C. Nussbaum, *Human Capabilities, Female Human Beings*, in WOMEN, CULTURE AND DEVELOPMENT 64, 96-104 (Martha C. Nussbaum & Jonathan Glover eds., 1995).

relationships as fungible if idealized bargained exchanges in an industrial and post-industrial economy.<sup>9</sup> To hold that an employer who discharges without job related cause pregnant school teachers merely because they are pregnant has not violated a general prohibition against sex discrimination because the judgment that pregnant women are unlike nonpregnant men and women is unlike the impermissible judgment that women generally are unlike men, rests on a claim, or world view, committed to the proposition that the condition of pregnancy radically differentiates the pregnant woman from the general condition of humanity in a way that is in turn unlike the impermissible belief that women per se are unlike men.<sup>10</sup> For any of these decisions to be made on the bare grounds that menstruating women are the same or different from non-menstruating persons, or that an injured hand is like or unlike a broken machine part, or that pregnant schoolteachers are unlike non-pregnant persons in a way that is in turn unlike the ways in which women are wrongly perceived to be unlike men, without elucidation of the underlying claims that make these similarities and dissimilarities even noticeable, much less compelling, is, as the critics have said now for almost a hundred years, arbitrariness posing as rationality. The syllogistic claim that A is like B, and must therefore be decided like B, is simply arrogant, or at best unthinking, and it is never rational, where the case for the similarity and its normative relevance is muted or masked by appeals to logic, formalism, or rule of law virtues. Herculean, and by no means wasted, effort has gone into the century long task of forcing the judicial craftsman to come clean with these prior and often hidden judgments of fact and value: to state them clearly, defend them where need be, and to change them when they become indefensible.

This one-hundred-year critical insistence on enhanced rationality, however, has not demonstrably reduced the strength of the widely shared moral intuition that like cases must be decided alike; indeed, if anything, it rests on and enhances it. American legal realism, whatever its flaws, has driven home the point that the case for similarity must be made, and not assumed or left undefended, and critical legal scholarship, whatever its flaws, has driven home the point that the case for similarity, once made, will almost undoubtedly rest on judgments of value and not just judgments of natural fact. Nevertheless, at the end of

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9. See *Hawkins v. McGee*, 146 A. 641 (N.H. 1929).

10. See *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that pregnancy classification is not gender classification).

the day, it is as clear as it ever was that similarities and dissimilarities, once articulated and defended, and whether of fact or value, do matter: they do, once determined, drive the legal decision. Put differently, it is as true today as it was when Langdell first built his science on it, that the essence of legal reasoning is analogical. It is what we do as lawyers and judges, and what we teach as law professors, at least so long as we focus on the work of courts. If we take seriously the teachings of the realists and the critical scholars, then we will do it better, and it is perhaps the case that we will do it in a way that bears only a family resemblance to the analogical reasoning Langdell initially described: unlike Euclid's axioms, legal axioms must be defended and subject to change. But it nevertheless remains the case that analogical reasoning is what we do. It is still the heart of legal education, the heart of legal reasoning, and the rock bottom agreed upon content of the constraint on judgment imposed by the rule of law.

It is sensible to ask, then, what lies behind this extraordinarily resilient insistence that like cases be decided alike, or by rule, or in a principled manner. One plausible response—which Cass Sunstein has argued over the last few years—is that what lies behind it is a credible and creative and distinctive form of analogical reasoning that carries with it a number of virtues, the most notable of which, perhaps, is that it facilitates *muddling through*: it allows us to accomplish the work of decision-making in a complex and pluralistic society without agreement on basic principles.<sup>11</sup> I'm not at all sure this “muddling through” argument is a response, rather than capitulation, to the claims of critics but I want to suggest another sort of answer, not incompatible with Sunstein's defense of analogical reasoning but also not dependent upon it. It may be that what lies behind the durability of analogical reasoning in legal contexts is not an “idea” at all, much less a loosely felt allegiance to what is in fact, appearances notwithstanding, an intelligent, pragmatic, and even progressive way to make decisions. It may be that what lies behind the durability of analogical reasoning is an ethical imperative, and that the ethical imperative it expresses is the demand of legal justice.

Could it be that simple? Consider this: no matter how shaky, contingent, undefended, political, personalized, idiosyncratic, psychically determined, socially constructed, widely shared or foolish be the world view that sustains perceptions of sameness and difference,

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11. See Cass. R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 782 (1993).



we are nevertheless mightily offended when like cases, no matter how that likeness has come to be determined, are then decided differently. And we are mightily offended because such decisions feel, distinctively, unjust. That Bill Clinton keeps his job while Kelly Flinn gets fired seems unjust; these cases are alike in at least some ways which suggest the need for equal treatment, even if it is the case that the impeachment of Bill Clinton for a morals offense would be a constitutional travesty, as well as an unjust differentiation between him and virtually every president of this century that has preceded him. Even if women who are menstruating *are* incapable of acts of reason, productivity, spiritual purity, or citizenship, then it is unjust to admit this menstruating woman, but not that one. If there is no sustainable difference between menstruating women and non-menstruating men and women then it is unjust to exclude them. It is unjust to acquit O.J. Simpson when others have been convicted on lesser evidence; it is unjust to sentence a murderous husband to only ten months work release for killing his adulterous wife in an “act of passion,” three hours after finding her in bed with another man, as a Maryland judge did a few years ago on the expressed grounds that killing an adulterous wife should not be regarded as criminal,<sup>12</sup> when others who kill with far greater provocation (namely, they are in fear of their lives) are sentenced to much longer terms;<sup>13</sup> and it is unjust not to compensate the botched hand through a contract remedy if its true that a promise is a promise is a promise, whether it be commercial, familial, professional or relational.

The injustice in any of these cases might be felt to be even greater if one concurs wholeheartedly in the world view that motivates the claim of sameness and difference. But it is surely a sign of the importance of the basic intuition that we feel the demands of legal justice even where the background world view seems wrong-headed or bizarre. Thus, even if we wholeheartedly believe that it is a scandalous waste to engage in sexual McCarthyism, and would view the impeachment of Clinton for a moral offense as the functional equivalent of a fundamentalist religious coup, it still rankles, should Clinton survive in his job while others charged with similar and lesser offenses do not. Even if we abhor the commercialization of relational life, we see the injustice of responding to some but not others of those wrongly

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12. See Karl Vick, *Maryland Judge Taking Heat in Cuckolded Killer Case*, WASH. POST, Oct. 30, 1994, at A1.

13. See Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1331-32 (1997).

commercialized relations—of enforcing contracts for personal services, but not for reproductive or sexual services, for example.<sup>14</sup> Even if we oppose punitive incarceration across the board, it nevertheless feels unjust that O.J. Simpson is free. Even if we passionately oppose the death penalty, it nevertheless is and feels unjust that those who kill black rather than white victims rarely receive it.<sup>15</sup> It may be, in other words, that it is legal justice that requires that like cases be decided alike, and that it is because it is *justice* that so requires, and not just an outmoded formalism, or a hobgoblinish demand for consistency, or a fetishistic attraction to the comforts of authority, or, more sympathetically, a justified allegiance to a muddling pragmatic mode of reasoning, that our insistence that like cases be decided alike has survived the one-hundred-year long critical assault on the idea's basic coherence.

But if so, this does not end the matter, it only pushes the question in a different direction: What is the ethical *content* of a legal justice that so demands? There is, I think, surprisingly little scholarship in law directed to this inquiry, but, nevertheless, one can discern at least three different accounts, each of which corresponds, roughly, with a fairly distinct and well-developed understanding of the point of law, and of the human being, or the “individual,” that law is designed to protect. The first of these three is traditionalist, the second, libertarian, and the third, communitarian and egalitarian. It is this last understanding, and *only* this last understanding, which demands of us an ethical cosmopolitanism like the one Martha Nussbaum defends in her essay. Let me quickly rehearse the first two, which I think are familiar, and then focus on the last, which, although perhaps the most familiar to philosophers, is the least well developed of the three in legal scholarship. The reason for that neglect, I hope, should become clear.

The first possible account of legal justice—for the insistence that like cases be treated alike—is traditionalist and has received its strongest modern defense in an important article on stare decisis by Dean Anthony Kronman.<sup>16</sup> On Kronman's account, judges should treat like cases alike, because to do so preserves the legal structures of the

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14. See Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 209 (1982).

15. See Randall L. Kennedy, *McKlesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1395-1402 (1988).

16. See Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1041 (1990).

past, and preservation of the legal structures of the past is itself a very good thing “for its own sake.” Of course, everyone might agree that preserving the legal structure of the past is a good thing to whatever degree those legal structures are good structures that rest on sound judgments. But this hardly justifies a strong sense of *stare decisis* or of legal justice; it justifies following precedent only so long as the particular precedent is sound. Rather, Kronman argues, the case for *stare decisis* must rest on the goodness of preserving the legal structures of the past *regardless* of their content. That, he argues, is a good thing to do, basically because preservation of all socially constructed structures of the past is a good thing: it is good to maintain continuity with past generations and past traditions.<sup>17</sup> The preservationist instinct is essential to the work of creating and maintaining a distinctive (and distinctively human) culture. Preservation of our cultural past—including our legal past—gives us both communal and individual identity.

It is both the culture preserved and the act of preserving it, Kronman goes on to argue, that distinguish us from the mass of bulbous, pulsating, biological, lived-in-the-moment forms of animal life. And—it is also the preserved culture that distinguishes us from the mass of undifferentiated human life on the rest of the globe as well. We recreate ourselves generationally by declaring and redeclaring our loyalty and even our identity with our ancestors, with their “way of life,” and with the legal structures they have in turn inherited, valued and preserved. By yoking ourselves to our past, we create by reaffirming our identity. The implicitly conservative moral impulse behind the mandate of legal justice, on this view, is the legal equivalent of the conservative moral impulse behind the museum curator’s mandate to preserve a society’s high art. In both cases, the society’s present inhabitants are served and its ancestors are honored by forging bonds between them, and the bonds consist of the preserved and treasured cultural and legal artifacts that define the shared society. The mandate of legal justice is a mandated respect for the legal traditions of the past.

This traditional understanding of the impulse of legal justice is obviously compatible with a traditional, “status-oriented,” or “pre-contract” conception of the point of law itself. Indeed Kronman’s account has the distinct virtue of first articulating and then defending the deeply conservative nature of adjudicated law: adjudication, conceived

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17. See *id.* at 1036-37, 1065-68.

as the task of deciding like cases alike, *must* proceed from and then respect and preserve given intuitions, traditions, or convictions, if it is to be just, and thus unquestionably runs the risk of unduly valorizing the status quo. This conservatism, however, Kronman makes quite clear, is precisely why we should value *stare decisis*, not run from it. The law shelters tradition, and to honor the law, we must preserve those traditions. The structures and statuses and relationships they define and the law protects—whether they be structures of master and servant, innkeeper and traveler, husband and wife, parent and child, or merchant and buyer—define social life and individual identity both. We protect those structures, statuses, and relationships, by treating likes alike: by treating servants alike, masters alike, merchants alike, husbands alike, etc, we preserve the relationships themselves as social entities that survive particular instantiations across time. The rule of precedent preserves the traditions, and preserving the traditions in turn reaffirms a conception of human identity defined by those traditions. Honoring the rule of precedent thus honors a traditionalist account of law, of society, and of legal justice.

This traditional account of the rule of precedent, of legal justice and the rule of law, is not simply non-cosmopolitan; it is anti-cosmopolitan. The very point of precedent, and of law, so understood, is to forge a cultural or national identity separate and distinct from undifferentiated humanity; it is to create and maintain bonds of civic obligation distinctively grounded in particularistic tradition rather than in universal essence. We treat likes alike—masters like masters, servants like servants, one promise backed by consideration like another promise backed by consideration—because by doing so we create, affirm and differentiate particular and shared identities, and by doing so, we create, affirm and differentiate our culture from all others. We do all of this, in part, through law. Law should be valued, then, not only and not primarily because it handily insures order, safety, a less brutal, longer, and possibly freer life for all, but precisely because it wards off the danger of a creeping cosmopolitan universalism—a universalism that threatens our national identity, and hence our human and cultural identity, profoundly.

The second possible understanding of the moral constraint of formal justice that undergirds the insistence that likes be treated alike, Kronman call “utilitarian,” but I think is better labeled libertarian: on this view, like cases must be decided alike because to do so increases

the decisional liberty of the choosing individual.<sup>18</sup> A rational body of law is more predictable than an irrational body of law, and a predictable sanction leaves the individual with more freedom than an unpredictable one: law is a net increase in liberty over the chaos of the state of nature only if and to the extent that it is law according to rule. The rule that likes be treated alike, then, is at the heart of the rule of law, because for the rule of law to be conducive to liberty it must be both predictable and rational. Obviously, the point of law, so understood, and of the rule of law, is not to maintain bonds with the traditions of the past, but rather, to increase the liberty of willful individuals. The moral point of legal justice is to increase liberty through rendering the law and the imposition of the legal sanction more consistent and hence predictable, and the moral point of the rule of law is likewise to increase liberty as well.

This libertarian understanding in turn suggests a distinctive account of the human individual at the center of law's protection, different from the traditionalist's. The individual for whom law exists gains identity, meaning, and value, according to the libertarian, not through legally preserved and differentiating traditional structures, but through freely willed decisions facilitated by universal norms of freedom and constraint. As is widely noted, his individuality distinguishes him from the individual whose identity is forged through traditions: his willed decisions, rather than social role, determine a unique, rather than social, identity. Less noted, however, but perhaps more important, is that it is by virtue of traits shared universally—his capacity to choose, his desire and competence to do so—that this is so. The individual the chooser decides to become defies tradition because of his unique particularity. But the individual who so chooses defies tradition because of his universalism: his individual and natural capacity for choice. What we are, naturally, is free to utterly individuate, and we share that capacity for utter individuation, universally.

This libertarian understanding of the rule of law, unlike the traditional, does seemingly imply cosmopolitanism: the capacity for choice which defines human life, on this account, and which necessitates the rule of law, does not presumably stop at the borders. It is, after all, *human* nature, not *American* nature, which confers upon us our choosing, individualistic ways, and which prompts within us a craving for the certainty and predictability which a stable rule of law

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18. See, e.g., Scalia, *supra* note 5, at 1178-79.

promotes. There is, then, nothing to gain and much of value—indeed, precisely, much surplus value—to lose, when this understanding of law and of the individual is coupled with a nationalist rather than a cosmopolitan understanding of law. Not just the commercial merchants of antiquity, but modern consumers, employers and laborers as well stand to profit from a universalized rule of law, if they are by nature rational and choosing individuals and if the rule of law means, basically, that individuals should be free and secure in their contracts. If the point of law is contractual, the individual is a natural bargain hunter, and the purpose of the rule of law is to provide liberty to such individuals through order, then there is no good reason to understand the rule of law as tied to national borders. On this view, the rule of law simply *is* the rule of commerce which is by nature cosmopolitan—anti-traditionalist and anti-nationalist both. The rule of law exists as an anti-traditionalist force; as a weapon or tool of the choosing and free individual over the stultifying and overly determining traditions of particularized culture. Nationalism is just another traditional obstacle standing in the path of the creation of both individual and worldly value, which the rule of law in turn exists to facilitate.

It is, however, only a thin cosmopolitanism that this libertarian understanding of the rule of law that it serves, sustains. Legal justice understood as a condition of liberty demands of us a respect for the universality of whatever human traits lead us to value and sustain a robust rule of law—that is the sense in which a libertarian understanding of the rule of law is cosmopolitan. But it then identifies only one trait—a propensity to choose rather than inherit one’s identity—as universal. When we view ourselves and all other world inhabitants as essentially choosers, and hence potential contractors, and sovereign producers and consumers, we not only ignore, repress, or deny the degree to which we are—all of us—constituted by particular traditional identities. We also deny the degree to which we are constituted by traits or characteristics other than a capacity for choice that are also universally shared: to name a few, our physical survival needs for food and shelter, our sentient nature, our capacity for pain as well as pleasure, our awareness of our own mortality, our vulnerability to grief caused by the loss of those near and dear, our delight in aesthetic experience, our capacity and desire to create a shared culture, our experience, peculiar among mammals, of an extended period of infantile dependence upon adults, and our shared adult experience of comparably extended periods of nurturing the young. This is the sense in which libertarian justice implies a “thin”

cosmopolitanism. When we identify only our propensity to bargain as universal and natural, and all else as cultural and constructed and particular, and then ground our respect for and understanding of law in that which is universal in our nature, then we wed law and the values on which it stands to contract and pit it against all else. Not only contract, commerce and capitalism, but *law itself*—the idea of law—becomes committed to the denial of limits, derived from our material, sentient, universal and essential human nature, on the domain of contract, and on the sovereignty of consumer and producer choice.

This reduction of our nature to our capacity for choice, of law to contract, of the rule of law to the craving for ordered liberty, and of legal justice to a mandate of predictability, has arguably inhumane consequences, and the thin cosmopolitanism it implies expands the reach of that consequential inhumanity globally. When we identify law, in essence, with contract, identify the rule of law and the mandate of legal justice with the consistency and order needed to render contracts reliable and the use of force predictable, and identify our universal nature with our shared propensity to bargain, and then tie the rule of law so understood to cosmopolitanism, then we pit law and respect for law, both domestic and international, against whatever cultural or social constructs—national, familial, communal or individual—that might be created to respond to or serve these other aspects of our shared nature. If our domestic environmental law, for example, is grounded not in a recognition of a species-wide need for clean air and water, but in a particular cultural and traditional preference, no more or less arbitrary than another culture's preference for cliterodectomy or foot-binding or dirty air and water, while our internationalized law of commerce is grounded in a universal human trait, then eventually environmental law itself, as well as the human needs it protects, will come to be perceived as just as parochial and arbitrary and oppressive an obstacle to the full lawful recognition and respect that ought be accorded our free, rational, willful, and universal selves. Examples could be multiplied. If domestic constraints on the permissible range of labor contracts are grounded not in a recognition of species-wide needs, but in parochial preferences of momentarily empowered groups, then those laws as well, from a cosmopolitan perspective, are indefensible obstacles to a fully realized legal order, rather than expressive of any aspect of law's distinctive virtue. To generalize the point: if the virtue expressed by the rule of law is our respect for universally shared human traits, which is then identified exclusively with our capacity for willful choice, then the

cosmopolitanism that the rule of law so understood implies, will be one which runs rough shod not only over particular cultural traditions, but also over legal regimes, either domestic or international, responsive to and protective of other needs or traits or aspirations of the species. In short order, it will be a cosmopolitanism that respects and serves the interests of commerce, capital and markets, and one that is neglectful of or hostile to not only particular cultural traditions, but non-commercial universal needs and aspirations as well.

The difference between a traditional and libertarian understanding of the rule of law, and of the human being ideally protected or constituted by law, now dominates jurisprudential debate. It finds its echo in the difference between nationalist particularity and economic globalism that has come to dominate debate in international law and political theory. These debates are logically linked. Traditional understandings of the rule of law are rooted in a commitment to particular and particularizing culture, and accordingly imply a strong anti-cosmopolitanism, while libertarian conceptions of the rule of law are rooted in an economic cosmopolitanism openly hostile to the value of particularized traditions that impede individual choice. Such libertarian conceptions are also, however, although less often noted, equally hostile to legal or cultural constructs responsive to or protective of universal traits, needs or ambitions, other than the essential human capacity for choice. As the implications of this libertarian conception of law are made explicit, and then reflected in the positive international law that governs commercial transactions across borders, it has become clear that the thin cosmopolitanism on which it rests—that humans, qua humans, choose—is not the ethical cosmopolitanism that Nussbaum has called for; indeed it is in many ways its antithesis. But so is the traditional understanding of law—and the deep national and cultural relativism it seemingly implies. The rule of law, and the virtue of justice peculiar to it, if we look no further, is either hostile to ethical cosmopolitanism or conducive to only an economic form of it that proves in practice equally corrosive. We need to ask whether there is an understanding of the rule of law that is supportive of rather than hostile to Nussbaum's ethical cosmopolitan vision.

There surely is, although it is relatively undeveloped in contemporary legal scholarship. The third response might be this: the moral constraint imposed upon judgment by the mandate of legal justice is neither a directive to preserve tradition, nor to ensure liberty, but rather, it is a mandatory affirmation of the essential humanity of every



individual embroiled in every case so decided. To treat like cases alike is to treat the individuals involved as co-members of a community of equals. To treat like cases differently, in effect, excommunicates the differently treated: you are like us, but you can be treated differently, because you are not one of us. That different treatment, in turn, creates a dissonance that must be resolved: your different treatment must in turn imply that in spite of surface similarities, in some deep way you are not “like” us after all—you are not fully human. You are not one of the “people” that can be hurt by steamboat collisions after all, in spite of the fact that like us, you are obviously mortal and vulnerable to injury. Once that point is reached, there is no longer a felt contradiction: likes are being treated alike and unlikes are being treated differently and appropriately so. But the dissolution of the dissonance has come at the cost of excommunicating, and then de-humanizing, some sizeable portion of the human community.

If this is the logic and consequence of injustice—if this is the morally problematic heart of the different treatment of likes—then it may be that the ethical content of the mandate of legal justice is to affirm the opposite: by treating likes alike we affirm specifically egalitarian and communitarian commitments. The mandate to treat likes alike reminds us of the injustice of treating some persons as not one of us because it serves our interest to do so, and then justifying the different treatment, over time, on the dehumanizing grounds that the excommunicated is somehow less than human—he is less than human because he is not one of us. The insistence on legal justice and horizontal equity might be, in part, one way, among others, we guard against the sentiment expressed by Aunt Sally: the casual excommunicating sentiment that “lucky for us only a nigger was killed, because sometimes people do get hurt.” Formal or legal justice can be—although again, it doesn’t have to be—understood as an insistence that the circle of community—the community to whom we owe duties of equal concern and respect—not be drawn narrowly.

So, to return to my examples, when we insist that the acquittal of O.J. Simpson was unjust because likes were not treated alike, we may be asserting that his acquittal dehumanized his victims and dehumanized other less well off defendants charged with comparably violent crimes. When we fear that the relative reluctance to sentence the killers of black victims, as contrasted with the killers of white victims, to death is unjust, we may be protesting the dehumanization of the black victims—not advocating a broader use of the death penalty. When we argue that

surrogacy contracts should be enforced, or that prostitution should be legalized, or that housekeeping should be compensated, or that the value of domestic services should be taxed, we may be urging that the failure to do so has rested on a refusal to treat the providers of those services as fully human—not that it is or would be a terrific thing to commodify all aspects of human affairs. In each case, it is the apparent refusal to include the outsider in the sphere of humanity that creates first the unlike treatment of likes and then the taste of injustice. And, it is that refusal to define community expansively, the departure, in other words, from egalitarian and communitarian commitments—and not the departure from tradition, or the diminution of individual liberty—that drives our revulsion from the inconsistent judgment. It is unjust to devalue the life of Nicole Brown, or the black victims of violent crime, or providers of household, reproductive or sexual services. The injustice rests, in each case, on the too narrow drawing of the circle of humanity. In each case, likes have not been treated alike, and in each case, what we mean when we say that, at root, is that someone has been used and then excommunicated by our community of equals, eventually perceived as less than human, and their differential treatment accordingly justified by precisely the dehumanization and then the differentiation that excommunication wrought.

The felt ethical mandate to treat likes alike, if this is right, may stem neither from a desire to preserve tradition (either because they are good traditions, or because such preservation is simply a good thing) nor from a desire to maximize liberty by securing order, but rather, from an egalitarian and communitarian commitment to the shared humanity of all persons. It may not always have been so, but it may well be so here, in this country, and today, at this time. Surely, the greatest injustice that we have come to fear in ourselves, and the greatest injustice that we see with shame in our history, and the greatest injustice that we seek to guard against in our institutions, is the wrongheaded insistence that some human beings are to be *used by*, rather than be an equal part of, our community. Because they are not part of our community of equals, they can be treated differently in spite of apparent similarities, and because they can be so treated, it must then be the case that appearances to the contrary notwithstanding, they actually do not share in precisely those universal shared traits that make us human and that mandate *our*, as opposed to their, equal treatment: they may share superficially our human form, but they do not share our desire to be free, or our vulnerability to grief, or our sensitivity to pain, or our love

of family, or our maternal bonds with our children, or our delight in higher mental pleasures, or our capacity for reason, civic deliberation, or productivity. They are, accordingly, *legitimately* outside the community of equals—not just because we want to oppress them—and hence can be treated differently even in the face of their apparent likeness, and without contradiction after all. Thus, their interests, desires and preferences can be discounted even by an interest and desire driven economy that purports to respect all interests and desires equally. They can be disenfranchised even in a democratic polity the justification of which rests on the free participation by all. Their lives can be casually expended in a fight against global terrorism, the justification of which rests on a need to counter the politically driven extermination of civilian lives. And, all this unlike treatment of likes can happen without hypocrisy or contradiction because those so unequally treated are simply not members of the community of equals, hence not the same as us, and hence not fully human. If that moral logic—drawing the circle of our community of equals too tightly, precisely so as preserve the usability, and hence the dissimilar treatment, of the lives of outsiders without contradiction, while making judgments of egalitarian sameness within it—is the greatest source of legal injustice, then the moral mandate of legal justice might consist largely of the felt ethical imperative that we not make such an error: that we not excommunicate some lives, so as to put them toward the end of improving the quality of those lives within the community of equals. We should be suspicious, then, not only of claims that some but not others are members of our community of equals. We should also be suspicious of the deadening logic to which it leads: to claims of difference themselves traceable to the need to excommunicate and use, rather than equally regard, the lives or services of others. To guard against this, we should assume, and insist, and reaffirm, that those whose lives are affected by our actions are fundamentally, essentially and in material, emotional and biological ways *like us*, and act accordingly. The rule of law, and the mandate of legal justice it implies, might be best understood today as a bulwark—institutional, to be sure, but also deeply ingrained in our nature—against our human tendency to self-servingly do otherwise.

The point of law presupposed by this egalitarian and communitarian understanding of the rule of law, is neither to preserve tradition, nor to maximize individual freedom, but rather, to ensure the preconditions for a community of equal individuals. Law itself exists to ensure that we draw the circle of our civic concern broadly—not just

around those human beings we would be naturally inclined to defend in any event in a state of nature, whether defined by reference to family, neighborhood, or nationalist ties. It exists to ensure that we act on our capacity for recognizing the equal entitlements of all persons to our considerate regard rather than act on our natural predisposition to discredit those obligations. Law exists so as to ensure a civic fraternity even when, or especially when, the obligations of such a fraternity impose burdens on our differentiated, particularized, natural loyalties, and whether or not those differentiated and particularized natural loyalties find expression in past traditions—cultural, legal or constitutional. It exists so as to institutionalize our egalitarian and communitarian conviction that the excommunication and then differential treatment of some for the exploitative use of others is not justified, and can never be justified by the perceived or actual differences which that excommunication and exploitation eventually create.

A human being protected by the rule of law so conceived, is neither the creature of tradition nor the stark potential for free will presupposed and protected by traditional and libertarian accounts of the rule of law respectively. A human being protected by a law that exists so as to ensure the conditions of a community of equal individuals is a human being *in need*, specifically of that law's protection. It is the human being with material needs, emotional ties, cultural ambitions, and intellectual aspirations that are frustrated, denied, threatened, or annihilated by not only the natural wilderness, but also by the flow of the unchecked antipathies and sympathies of extra- or pre-legal human nature. It is the human being whose needs for survival are going to be denied or unmet by an unregulated market economy that presupposes only the universalizability, and hence rationality, of will, rather than need. It is the human being whose maternalism is denied or crushed by an unregulated social order hostile to the dependency and neediness of mothers and children. It is the human being whose materiality and mortality are ignored by a technologically advanced warrior society that shields the eyes and hearts of its citizens from the evidence of the bodily suffering and death that its aggression engenders. It is the human being, with needs, capacities, ambitions, connections to others, and aspirations, that is left outside of natural, societal, or traditional circles of concern that in turn define that person, or that person's needs, as lesser, or as of lesser moment. The "outsider," no matter what makes her such, simply *is* the human being for whom the rule of law, understood as the

guarantor of those conditions that sustain a community of equal individuals, exists.

This egalitarian and communitarian understanding of the rule of law strongly implies an ethical, rather than economic cosmopolitanism. If we should treat likes alike because justice requires it, and if justice requires it because doing so reaffirms our conviction that, by virtue of a shared humanity, all humans should be equally regarded, and if we sustain that conviction and institutionalize it in law precisely because of our temptation to draw our circle of communitarian concern more narrowly, then such a mandate obviously does not stop at our borders. The mandate exists as an injunction to question both the coherence and motivation of borders of exclusion, whether national or cultural. If we should “treat likes alike” in law, because by so doing we create and affirm a community of equal persons, then we obviously should be as concerned with the justice or injustice of a dropped bomb in the Sudan to fight international terrorism as we are concerned with the injustice of a dropped bomb in Philadelphia to fight the domestic equivalent. These are like cases. We should be as concerned with the lack of an economic safety net around the globe in those regions making rocky transitions to market economies as we are concerned with the lack of a safety net in this country that might cope with the same economic trauma experienced by American families. These are like cases. We should be as outraged by the environmental costs and the lack of rights for laborers entailed by the internationalization of contract law as we are by the miseries entailed by a deregulated laissez faire regime in our own. These are like cases. In all of these cases, our relative nonchalance in the face of the evil visited on distant others, when contrasted with the outrage we feel when the same evil strikes close to home, is an instance of failing to treat likes alike. In all of these cases we reap the benefits of the state policy in question by drawing a narrow circle of egalitarian concern. Furthermore, in all of these cases of injustice, we profit. Like Sally, we celebrate as well as enjoy the profits of industry and commerce, while expressing the admirable concern that sometimes people get hurt, and like Sally, we are secure in our knowledge that it is other and distant and lesser lives, rather than real people, that pay the price of our comforts.

Finally, this egalitarian and communitarian understanding of legal justice, law, and the rule of law is thick, not thin. The individual who is the proper object of the law’s protection is not just a profit center contingently attached to a biological brain and body that in turn contains

a will to bargain. She participates in a universal nature both more subtle and supple. She not only chooses, she also suckles, toddles, develops, bleeds, menstruates, bears babies, lactates, nurtures her young, forges ties with others, creates and preserves culture, sickens and dies. She *needs* not only options from which to exercise her capacity for choice, but also food, shelter, love, safe intimacy, and her community's support. She not only becomes more individuated with every choice she makes, she also becomes, with every passing day, older and sicker. She progresses through life not toward a point of pure individuated will, but toward death. A rule of law that accords her equal respect does not simply honor her choices and the individual she becomes by virtue of them. It honors her needs, interests, pleasures, pains, ties to others, and passionate desires as well. It reflects and respects her particularity, both cultural and individual, as well as her universality, rationality, and potential freedom. It is mindful of her universal needs—needs that are neither individually chosen nor traditionally or culturally constructed—for a clean environment, a supportive culture, loving and safe intimacy, and respectful institutions. The equal person, regarded and protected by an egalitarian and communitarian rule of law, is neither abstracted to nor reduced to her capacity for rational choice. She is whole and material, with needs and desires that include that contractual capacity that go beyond and grow beneath it as well.

So to sum up so far, to whatever degree we can sensibly understand our appreciation of legal justice as resting on egalitarian and communitarian impulses rather than libertarian or traditional ones, then our commitments to law, the rule of law and legal justice, entail a commitment to universal cosmopolitanism as well. This should not be a surprising result. The mandate of cosmopolitan justice does not, after all, presuppose world government. It presupposes consequential acts of power, and our national and individual acts vis-à-vis citizens in other countries and are indeed consequential acts of power. When we exercise power, we should do so mindfully and respectfully of the equal worth of those we affect. This is the essence of the cosmopolitan case for universalism. When we urge respect *for law*, we do so in order to ensure that this moral constraint of equal regard on our actions inures to the benefit of precisely those persons to whom we are not easily predisposed to grant it. If we fail to universalize this legalistic respect for all, if we find in law an expression of our communitarian and egalitarian commitments—but only with regard to those people we include within our circle of concern—we sound like a virtual chorus of

Aunt Sallies. Our legal texts that arguably commit us to the project of making good on this ideal, for example, that no state shall deny any person the equal protection of the law, does little but echo Sally's cruel, albeit sentimental, bromide.

### III. COSMOPOLITANISM, LEGAL EDUCATION, AND THE RULE OF LAW

Let me sum up. In her essay, Nussbaum argues that we should all, by virtue of our identity as moral beings, embrace ethical cosmopolitanism. We should, she suggests further, embrace this ethic as a part of our cultural heritage, and we should reinforce the teaching of it in schools. We should educate at least the next generation of citizens to embrace its worldly obligations, even if we don't come naturally to it ourselves. If what I have argued above is correct, then it follows that the legal profession, to whatever extent it views the rule of law as grounded in an equal regard for the moral worth of all human beings, should embrace cosmopolitanism as part of its specific moral or ethical identity as well. Are there any pragmatic reasons why this might be wise? Is there any reason to think that lawyers might have a distinctive and valuable contribution to make to a cosmopolitan ethic? Is there any reason to think that lawyers might in turn have something to gain by embracing cosmopolitanism as a part of their identity?

I think the answer is yes to these questions. Let me take them in reverse order. First, lawyers should attend to the argument for cosmopolitanism and should embrace its basic ethic primarily because the internal moral logic of the legal profession demands it. The egalitarian ideals we routinely express for the rule of law, in law day speeches, commencement addresses, and catalogue copy—that the rule of law respects the essential dignity, equality, and worth of all human beings—are not borne out in practice, as is widely lamented. The utter inapplicability of those ideals to human beings beyond our borders is simply the most glaring and consequential lapse. In fact, it is a lapse that is *so* glaring and consequential that it stretches cognitive dissonance to its schizophrenic limit. We cope with the dissonance by rendering those distant lives we use and then excommunicate invisible. We refuse to see or reckon the maimed bodies and dead children brought on by the bombs dropped in our name. We refuse to see or reckon the poverty and misery directly occasioned by both our average standard of living and our shared commitment to the patently absurd proposition that unlimited, exorbitant and obscene wealth invariably enriches, and is invariably constitutionally protected. But these injuries do not

disappear, nor do their traces in our legal consciousness. The contradictions to which the jurisdictional limits we willfully impose upon the reach of our egalitarian ideals lead, infect our law and our relation to it both. There is neither nobility nor honor nor compassion in Aunt Sally's sentimental concern for the people hurt by industry, since her understanding of people excludes most of the human race. Comparably, there is neither justice nor idealism in our expressed concern for equality, nor for equal protection of the law where that concern and the protection to which it leads extends to our kinfolk and to nobody else.

And, what can law and lawyering bring to a cosmopolitan ethic? Well, lawyers, for better or worse, are a powerful bunch of people, and that is true no matter how much—and it is a lot—individual lawyers deny it. The ideals lawyers hold and profess do in one form or another find expression eventually in legislated, adjudicated or administrative law. That law, it is now clichéd but true to say, will, over the next century, be increasingly global as our lives on this planet become increasingly interconnected. What will be the consequence of our failure to develop an understanding of the egalitarian root of our basic legal commitments that resonate with Nussbaum's call for ethical cosmopolitanism? Well, this much stands to reason: if we interpret, understand and teach law as embodying, at best, traditional forms of life and traditional understandings of justice, then the norms of international law that will eventually emerge from such a consciousness will carry with them *at best* a respect for traditional cultures—a tolerance, the value of which is utterly dependent upon the goodness or harmfulness of the traditional culture thereby protected. If we interpret, understand and teach law as embodying libertarian understandings of justice, then the international law that emerges will further the interests of capital, wealth, and profit. If we forego entirely the responsibility to connect our claim that there lies at the heart of law and legal justice a distinctively egalitarian commitment, which in turn implies a cosmopolitan appreciation of the moral worth of all of the world's citizens, then the two polar opposites posited above—a relativistic respect for cultural difference and a universal insistence on the leveling sweep of contract and capital—will exhaust our alternatives, in international law and in legal philosophy both. The result could be catastrophic—for all the world's citizens.

Finally, the task implied by this argument—the work of elaborating the connection between egalitarian understandings of justice and calls



for ethical cosmopolitanism—should not be all that hard to do, for two reasons. First, a good number of aspiring lawyers do view themselves as egalitarians and ethical cosmopolitans both, or would, were the nature of the beast made plain. Students come to law school for a host of reasons, but many come because they care about justice, equality, and the worth of our human community. And of the students so motivated, only a very few, I would guess, think of justice as something owed only to co-nationals, or of equality as something which characterizes only the regard owed insiders, or of the community as defined by geographic borders. That justice is something owed only to co-nationals, I believe, is a lesson learned in law schools. It is not a prejudice brought to the law school door.

Second, and more importantly, a large number of working lawyers—in fact, the vast majority of the elite of the profession—already think and act as cosmopolitan citizens of the world, in either the economic or ethical sense, and already view that worldly identity as fully integrated with their legal identity. Private international lawyers employed by transnational corporations or trade organizations, as well as public human rights lawyers employed by human rights organizations, nations, governments, or individuals, circle the globe, dressed in their American Express cards, as they quite explicitly seek to create a world without borders, united by legal ties of either commerce or of a universal regard for human rights. If the rule of law implies ethical cosmopolitanism, we need to democratize that integrated identity, both within the legal profession and law schools, and to do so, we need to integrate it into our core legal ideals as expressed by both our jurisprudential understandings and our basic pedagogic curriculum.

We presently have spectacularly failed to do so. First, we have no developed body of jurisprudential scholarship devoted to the task of understanding the nature of legal justice, and of the scholarship that does address the nature of the justice dispensed by courts, virtually none of it develops a communitarian, egalitarian, and universalist conception. This is shocking in its own right. But more pervasively, our curricular choices also reflect a professional neglect that goes beyond the confines of contemporary jurisprudential interests. Neither public nor private international law is required at any United States law school, or taught in the definitive first year program. Public law courses, such as constitutional law, never begin with even a cursory examination of international treaties, laws, or courts. The law of war is not taught in any form at many law schools, nor is it widely recognized as a

substantive area of scholarship. The law of citizenship and immigration law are increasingly although belatedly, recognized as important, but nowhere are they regarded as central components of the law school curriculum. Needless to say, nowhere do courses in *legal ethics* or *professional ethics* include a sense of the ethical responsibility of lawyers, qua lawyers, to non-citizens: those courses only very recently have contained even a hint of a suggestion that lawyers owe anything to anyone other than clients. Jurisprudence courses are even more parochial at the turn of this century than they were at the turn of the last one, as any examination of textbooks will reveal: increasingly, jurisprudence courses are simply surveys of what we know best, and that is American and twentieth century thought, from legal formalism and realism, to legal process, to current debates surrounding postmodernism and identity law and politics. Typically, no examination is given to theories of law—usually but not always continental—that explicitly theorize international legal obligations and organizations as hierarchically superior to domestic. Even courses on the law of equality, the Fourteenth Amendment, or civil rights rarely consider the claims that might be based on a recognition of the moral equality of all human beings, including non-citizens. These curricular choices, taken cumulatively, go a long way toward defining the American lawyer's distinctively parochial professional and moral identity. They are all, if we take the egalitarian interpretation of the rule of law seriously, seemingly indefensible.

They are also, however, changeable. We ought to change them, and with all deliberative speed. The longer we fail to do so, the more our high-minded egalitarian pronouncements—pronouncements on the mandate of equality, the moral equality of all persons, the equal dignity of all humans, the equal respect to which all persons are entitled, and the equal protection which no state may deny—particularly when coupled with our sincere thanks for our collective national good fortune—the sheer luckiness of not being born in a part of the globe ravaged by American industry or aggression—resemble the sentimental prattle of Huckleberry's beloved Aunt Sally. That similarity, sameness, and likeness ought to give us pause. It ought to make us change.

#### IV. OBJECTIONS: THE PERILOUS COMMUNITY OF EQUALS

Let me conclude by briefly addressing what I think are the most salient objections that might be posed to my main thesis, to wit, that an egalitarian and communitarian understanding of legal justice should

commit us to ethical cosmopolitanism as well. To some degree these objections overlap with traditional and by now well-rehearsed objections to cosmopolitanism itself. Nevertheless, thinking directly about the former may shed further light on the more well-developed arguments surrounding the latter. There are four such objections that warrant consideration.

The first objection goes to the nature of communitarianism. The communitarian convictions, that I have argued ground an egalitarian interpretation of legal justice, do not in practice, and might not even in theory, engender a universal and equal regard for all. Communitarianism often, maybe usually, and maybe by definition, engenders a compassionate and egalitarian regard for a community's *insiders*, but at the cost of those left out. And—this may be true in theory as well as practice because of brute facts of human existence: the altruism required to sustain community may only be possible when accompanied by a disregard of or hostility toward outsiders. The communal bonds of a family, after all, seem to bear this out: parenting is altruistic and communitarian work indeed vis-à-vis the *insiders* in the familial community, but vis-à-vis *outsiders*, it is profoundly selfish, as evolutionary biologists tirelessly point out. Likewise, perhaps, communities do seemingly gain their identity as well as mutual comfort through the accentuation and exclusion of difference. It is only, then, this limited and decidedly non-universal compassion and egalitarianism that might be codified in a community's positive law. A community's internal and self-regarding rule of law might well be egalitarian and communitarian. But it is an egalitarianism and communitarianism that is the very antithesis of cosmopolitanism.

This argument, if right, suggests a powerful objection to cosmopolitanism as well. If communitarianism at heart divides the world into us and them, then not just a communitarian rule of law, but communitarianism itself, is the antithesis of a universal cosmopolitanism. It may, however, be the only form of communitarianism of which people are capable. Universal communitarianism—or alternatively spaceship earth or the world community, or any other formulation of the basic cosmopolitan ideal—may be oxymoronic. In sum, a rule of law grounded in communitarianism cannot possibly sustain cosmopolitanism, and it is doubtful the latter can be sustained in any event.

The second objection to an egalitarian conception of legal justice is that it inevitably dissolves into a libertarian one, and that coupling that

conception with cosmopolitanism will accordingly do little but pave the way for global capitalism. If we identify the heart of legal justice as an ethical mandate to accord an equal moral regard to all, and then identify the grounds of that mandate as the *nature we all share*, but then cling to the belief that what we share, essentially, is *nothing* but our capacity for creating value through choice—a belief seemingly held by both the libertarian right and the relativistic postmodern left—and we then urge a cosmopolitan ethic that respects that universalism, we will have done little but fuel an economic globalism that runs roughshod over both particularistic tradition and universal human need. Similarly, if the only consequence we see or care about, when evaluating the consequential worth of a law or legal decision, is the economic value created or diminished, then our domestic law, as well as our international, will reflect the poverty of that self-understanding. We may create a world of riches, but it might be a filthy one, as human needs for all but wealth go unmet, and human aspirations for all but accumulation of satisfactions go unfulfilled.

Libertarian conceptions of justice and the economic cosmopolitanism they ground, the objection might proceed, do more harm than good: they do harm both to valued traditions, and to non-economic universal traits, needs, and aspirations as well. True ethical cosmopolitans, then, might be wise to seek to reinforce those aspects of our domestic law that do respect non-economic universal traits by *insisting* on nation-state sovereignty against the encroachments of global capitalism, even if that means aligning with a rigorously traditionalist understanding of the rule of law. An egalitarian understanding of legal justice, like ethical cosmopolitanism itself, invites the slippery slope into libertarianism. The flame is not worth the candle, and is clearly not worth the fire the lit candle will ignite.

The third objection to an egalitarian understanding of legal justice, and the ethical cosmopolitanism it might imply, is the objection put by Dean Kronman: any such universalist view, Kantian or utilitarian, denies that the moral imperative of law stems from law's organic root in local geography and history, and hence denies the moral force of the culture's distinctive legal identity. Our sense of law's obligatory moral nature, then, is no longer attached to time, place, or history, and our sense of ourselves, to whatever degree it is tied to our felt possession of our own law, may then become similarly abstracted. To take a domestic example: if equality demands that we integrate the schools, then children will have to be bused, and we lose the organic root and comfort

of the neighborhood school. Similarly, if the justice that law demands of us requires an egalitarian global concern, then we will lose the organic comfort of a law responsive to, pertaining to, and constituted by our national neighborhood. We lose our attached, particularistic, legal identity, and hence an important mainstay of our individual identity as well. If we globalize our commitment to equality-based justice—if we ground it in the shared human nature of all human beings, rather than in the shared human nature of all Americans—we lose our understanding of our own American law of equality as derived from and constituted by our own American historical struggles. We lose our sense of ourselves, then, as well as our law, as constituted by those struggles. The Fourteenth Amendment and Mark Twain's masterpieces both, in some important way, can no longer be claimed as binding upon us because they are ours. We have disowned whatever normative force law has, by virtue of being our law, and to that degree we have set ourselves dangerously adrift.

The fourth objection, finally, is that raised by postmodernists, identity theorists, and scholars of culture: if we identify the moral imperative of the rule of law with our shared humanity rather than our shared nationality, we run the risk, paradoxically, of *under-inclusiveness*: we run the risk of embracing a wrongly static definition of the human being and then only admitting the outsider to the extent that she conforms to that static definition. We then run the serious risk of undervaluing those traits we have excluded, leaving us wedded to a purportedly universal but, in fact, impoverished conception of our own essential humanity. If we identify the nature of the human being with, in part, each individual's essential separateness, for example, and insist that women, like men, are separate individuals, we run the risk of excluding women who are not so demonstrably separate from other human life because they are pregnant, and when we do that, we run a high risk of undervaluing (to say nothing of under-compensating) the work that accompanies reproductive labor. If we identify the human being with purity or cleanliness, similarly, even if we acknowledge that women are sometimes capable of achieving such a state, we may feel utterly justified in excluding women who are menstruating, or lactating, so long as we include them when they are not. In all of these cases, we will have achieved the admirable goal of recognizing that women too are rational, and that women might labor, pray, or deliberate even though they do from time to time menstruate, or lactate, or give birth, but we will have also defined as out of the reach of our concern the

experiences of pregnancy, menstruation, and lactation, to say nothing of childbirth itself. We will have achieved our gain in legal justice and communitarian inclusion at the not-so-inconsiderable cost of postponing for another day the work of both accommodating such persons, and understanding the value of what is excluded: the biologic and reproductive value of a human pregnancy, the symbolic, as well as social, value of menstrual cycles and natural lactation. If we identify the moral force of the rule of law with the value we place on traits or capacities we all seemingly share, we blind ourselves to, and then undervalue, the human experiences thereby excluded.

Much of Martha Nussbaum's scholarship, in my view, can be sensibly read as detailed attempts to articulate how these objections or related objections to egalitarianism and cosmopolitanism might be overcome. Her work on cultural relativism, for example, defends ethical cosmopolitanism against the complaint that it overly abstracts and rarefies the human being, while her utilitarian critiques of preference-based normative economics address the need for a thick rather than thin understanding of the human being to whom we owe due regard. Her engagement with the classics, in part, seems animated by a desire to re-instill in our modern understanding of our particular cultural heritage an appreciation of its universalist and egalitarian ethical ambitions. By so doing, she goes a long way toward addressing the complaint that universalism detaches us from our particular cultural identity. I don't want to rehearse or expand upon any of those arguments here, in part because I don't have the space, and in part because I have tried to do so elsewhere. What I want quickly to suggest instead, by way of closing, is that all four of these objections share a common root: they abstract away from or simply ignore embodied human beings, and their physical and emotional needs, cares and ambitions, in favor of an identification of the human being law ought to respect with disembodied traits. They all, for related reasons, eschew narrativity as a method of achieving justice, and deny the importance of what Martha Nussbaum calls our moral emotions to our moral sentiments. They all, accordingly, invite a similar response. It may be that the response to all four of these objections, in part, is that we must not do that. If we want to insist upon a robust, healthy, and embodied egalitarianism, it may be that what we need to do is keep our focus where it ought to be, and that is on the embodied human beings, their needs, their mortality, their vulnerability, and their sentient nature, rather than on the mind, the will, or the potential for free choice, that it

houses. And, it may be that the way to do so is through listening very carefully to the stories people tell about their own and others' lived experiences. Finally, it may be that only by doing so (and by doing much else besides—of course) can we hope to approximate the moral generosity that a universal egalitarianism and communitarianism requires of us. But again, none of this should be surprising. It is, of course, precisely that moral generosity that we must hope to instill in others, if not in ourselves, if we have any chance of making real, instead of dreamlike, the ethical cosmopolitanism that Martha Nussbaum has urged. Now, let me re-examine the four objections I have raised above, with these guidelines in mind.

First, does communitarianism really force a distinction between insiders and outsiders, as its detractors claim, which, in turn, permits egalitarian law within the community only by mandating unequal treatment for outsiders? It might, but it might not—the objection may rest on an overdrawn and overly-cramped pessimistic understanding of the roots of altruism. The outsiders that an egalitarian conception of justice might tempt us to exclude do, after all, share the same propensity to bleed, hurt, please us, pain us, and shrivel and die as the insiders, and they share as well their material separateness and physical differentness from each other. Our bodies, unlike our cultures, remind us of what we share, as well as of our uniqueness, our distinctiveness and our material separateness from others. Listening attentively to the narratives of and about these outsiders might quicken in us a moral and sympathetic response to these shared sentient experiences. If so, the outsiders might no longer be perceived as quite so far outside our circle of concern.

Admittedly, much else must happen besides for a universalistic cosmopolitanism or an egalitarian understanding of law to become a reality. But it would surely be a mistake to dismiss the possibility of such a transformation on the grounds that our moral-psychological nature precludes it, if there is no firm reason to so believe. Our capacity for sympathy is, of course, openly and notoriously dependent upon the degrees of separation between the sympathizer and the person needing help. It is simply question-begging, however, to resist exploring our capacity for universal cosmopolitanism or egalitarian justice on that ground: those degrees of separation may themselves be a function of the cultural markers that permit us to discern them. It may be that the more direct our perception of pain, and the less culturally demarcated the person suffering, the less likely as well we are to discount it by

reference to temporal or geographic markers of distance. When we see a picture of a starving child, a dying soldier, or a grieving mother, if we have no cultural indicators of that person's identity, our sympathetic response is much less likely to be filtered through nationalist identification. That sympathetic response, occasioned by narrative, is certainly not sufficient to sustain a robust universalist communitarianism, and the cosmopolitanism it implies. But it is necessary, and since it is necessary, we should look with extreme skepticism at the blithe and unsupported assumption that it is beyond our psychic ability.

More generally, and as Professor Nussbaum briefly argues in her response to critics,<sup>19</sup> it may be adult acculturation, and nothing essential to our capacity for moral action, that prompts us to differentiate between objects of sympathetic response along nationalist lines. Children flinch sympathetically at pain experienced by sentient creatures. We unquestionably learn as we grow to act on that sympathetic response in a moral manner—we would not do it otherwise. But we also learn as we grow to channel the flinch response itself. We learn, for example, to channel it into directions compatible with the dictates of positive authority—as the Milgrim experiments show. We also learn to narrow our circle of concern, and to narrow it, eventually, as we absorb lessons of citizenship, to our co-citizens. But we do not lose the ability to respond in a universalistic manner to the suffering of those at a distance. It can surely be squelched, but it can obviously be rekindled as well. There is, in short, nothing in our nature that undermines the possibility of a universalistic and egalitarian understanding of the reach of the rule of law. That we currently tailor our moral sympathies to the dictates of nationalism hardly shows that such a cribbed response is central to our nature.

What of the dangerous ambiguity between libertarian and egalitarian understandings of justice? Here too, the danger can only be forestalled by insisting that it is the embodied human being, sympathetically engaged, and not the value creating will, that is the beneficiary of an egalitarian rule of law's protective reach. It is, for example, our bodies' needs for sustenance, shelter, clean air and water, and parental and companionate love that puts the lie to the simple assertion that the commodification and exchange of labor for money is always and invariably an exercise of freedom. Our bodies' maternal

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19. See Nussbaum, *supra* note 1, at 17.



attachments prompt emotional bonds, and it is because of that fact that contracts for the sale of reproductive labor seem so dehumanizing, or at least ill-advised. Injuries to our bodies instill lasting and non-quantifiable trauma as well as uncompensable grief in those who love us, and it is because of the distinctiveness, of that physical pain and the emotional harms it leaves in its wake, that those injuries are so resistant to commodification and compensation. Our bodies' sexualities and sexual pleasures are deeply interwoven with our distinctive histories and identities, and it is because of that tapestry of sex and sexual response with personal history and physical identity that the commodification of our sexuality seems suspiciously akin to the commodification of our very selves. It is, in part, because of the irreducibility of our purest pleasures to benefits, profits, and satisfaction, that we sense that exchange, choice and the satiation of willed preference do not exhaust the ways in which we create, or experience, value in life. More to the point, it is because of the distinctively incommensurate and non-quantifiable nature of our experience of pain that we know that the frustration of preferences among market options, whether packages of convenience and risk, or packages of insurance, does not exhaust, or even approximate, our capacity for suffering.<sup>20</sup> A focus on bodies underscores the universality of this incommensurability. The body defines the limit of the will, and a focus on its pains and pleasures, its anguish and ecstasies, underscores the limits of the value reaped from willed exchange. If we pay attention to the embodied human beings affected by commercial exchange, we may be less inclined to encapsulate (and then discount) their suffering as costs, to be measured against the value enjoyed by the consumers of the industry and technology that delivers their misery.<sup>21</sup>

A sympathetic engagement with the needs and attachments of human beings might as well ward off the danger that egalitarian justice and the ethical cosmopolitanism it implies will lead us to an overly abstract or detached sense of self and law. Real people, unlike choice, preference, and free will, are material and earthy, and come with needs for connection to other like-bodied creatures: appreciation of their needs requires appreciation of the sub-communities in which those needs are met. We may abstractly value the individual's free and independent

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20. See Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567, 1573 (1997).

21. See Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981, 2052 (1998).

will, but if the individual we value is an infant sucking its mother's breast, we will value the mother, and the connection between them, as well. And, if we value the connected mother and child, and understand their dependence upon others, we will value their community, and the connection between them, likewise. Our bodies' needs, through infancy, parenthood and sickness, impress upon us, as our individuated wills do not, the moral importance of acknowledging these natural webs of interdependencies. A cosmopolitanism and a rule of law that keep the focus on embodied human beings will not stray far from that impression.

Finally, a sympathetic engagement with embodied human beings, rather than an abstract regard for their universal essence, might help us guard against the seductive attraction of an overly static and rarified understanding of the human being that claims our just allegiance. It is actual, physical human beings, with their differing propensities, shapes, sizes, interests, pleasures, pains, degrees of connection, forms of community, and plans of life, and not the abstract idea of the *human*, or of the *rational*, that require the protective mantle of the rule of law. If embodied and vulnerable natural human beings are whom we seek to protect with law, then our understanding of what human traits we value and why can remain open, as it should, as our appreciation of the distinctiveness and universality of each other grow. We share a general human form, and a general subjective capacity for pain, pleasure, sorrow, joy, grief, sickness, and death. But that human form comes in all sorts of configurations, as do the pains, pleasures, sorrows, joys, grief, and sickness. To understand what is universal in us that demands equal regard, we must understand—and sympathetically engage—what differentiates us: to understand why something is hurtful to someone else, I must understand the uniqueness of the experience if I am to then respond sympathetically to what is universal in it. If I fail to understand the uniqueness of it, I am acting arrogantly—but if I fail to appreciate the universality of it, and to respond accordingly, I am simply acting selfishly or boorishly, and, on a global scale, imperially. We need to understand what is different, and respond to what is shared. It might, paradoxically, be the body and its stories, better than the will and its choices, that, when sympathetically engaged, impress upon us *both* an understanding of what we share and a realization of what we don't, and what we need to do to acknowledge the human dimension of the latter as well as the former. It might, then, be our bodies and their stories, sympathetically engaged, rather than our choices, that force upon us an

acknowledgment not only of the universality of our legal duties and obligations, but of the profound differences among the various shapes, forms, and configurations of human life that prompt them, as well.