

Article

The Ethics of Global Justice Lawyering

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In the last two decades, as states, international institutions, and private donors invested heavily in the rule of law and human rights, lawyers gained a prominent place in transnational projects to reform domestic laws and institutions. As the U.S. legal profession moves into this global arena, we should pause to consider the ethical questions raised by the practices of “global justice lawyering.” Broadly conceived, two questions govern this inquiry: (1) What ethical justifications support the U.S. lawyer’s role in reforming the laws and political institutions of other societies? (2) Even if we can justify this role in theory, can we justify the particular practices of global justice lawyers?

To answer the first question, I draw on the ethical doctrine of cosmopolitanism, as well as the U.S. legal profession’s commitments to the rule of law and reformative justice, to conclude that there are strong ethical reasons to promote global justice. These reasons do not, however, justify promotion by any means. This is the dilemma of the cosmopolitan lawyer: the cosmopolitan project of global justice – although morally justified in theory – presents ethical questions in practice. In the final section of the Article, I suggest that to avoid ethical concerns, global justice lawyers must reject an “import” approach to law, in which foreign laws and institutions are transplanted into new environments, in favor of a normative approach to the processes of lawmaking.

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The protection and promotion of the universal values of the rule of law, human rights and democracy are ends in themselves. They are also essential for a world of justice, opportunity and stability.

– Kofi Annan, Secretary General, United Nations¹

About the ideal goal of human effort there exists in our civilization and, for nearly thirty centuries, there has existed a very general agreement. From Isaiah to Karl Marx the prophets have spoken with one voice. In the Golden Age to which they look forward there will be liberty, peace, justice and brotherly love Not so with regard to the roads which lead to that goal. Here unanimity and certainty give place to utter confusion, to the clash of contradictory opinions

– Aldous Huxley²

I. INTRODUCTION

Law-reform activities designed to promote the rule of law, human rights, and democracy have expanded to more regions of the world as private donors, Western states, and international institutions have “poured hundreds of millions of dollars into rule-of-law reform,”³ particularly in the last two decades.⁴ The United Nations (U.N.) currently conducts rule-of-law operations and programming in over 110 countries around the world.⁵ The American Bar Association (ABA) has greatly expanded its international rule-of-law initiative; what began as the ABA’s Central and Eastern European Law Initiative has grown into the Rule of Law Initiative with staff and programs in countries around the world.⁶ Various U.S. governmental entities also support similar programs worldwide, as do large networks of activists and non-governmental organizations (NGOs).

1. The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 128, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005).

2. ALDOUS HUXLEY, ENDS AND MEANS: AN INQUIRY INTO THE NATURE OF IDEALS AND INTO THE METHODS EMPLOYED FOR THEIR REALIZATION 1 (1937).

3. Thomas Carothers, *The Rule-of-Law Revival*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 3, 4 (Thomas Carothers ed., 2006).

4. According to David Trubek, “[t]he World Bank alone reports it has supported 330 ‘rule of law’ projects and spent \$2.9 billion dollars on this sector since 1990.” David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present, and Future*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 74, 74 (David M. Trubek & Alvaro Santos eds., 2006); see also Veronica Taylor, *The Law Reform Olympics: Measuring the Effects of Law Reform in Transition Economies*, in LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES 83, 84 (Tim Lindsey ed., 2007) (noting that the “surge in technical legal assistance to transition economies” is a “relatively recent phenomenon[on]”).

5. See United Nations, United Nations and the Rule of Law, <http://www.un.org/en/ruleoflaw/index.shtml> (last visited Dec. 14, 2009).

6. See Walter H. White, Jr., *Protecting and Advancing the International Rule of Law*, 34 HUM. RTS. 8, 9-10 (2007).

And U.S. law schools are increasingly involved in a similar mission as they expand their reach overseas through international programs, clinics, and exchanges.⁷

These practices are not new; they are the complex products of historical trends, including the law and development movement of the 1960s and the emergence of an international human rights system after World War II.⁸ In the 1980s, law played a critical role in the dominant vision of economic development grounded in market economies. In response to concerns regarding this neoliberal vision of law and development, objectives shifted in the 1990s to a focus on “good governance,” a model that seeks to moderate open markets with the “rule of law” in the form of legal regulation, rights enforcement, and political accountability. At the same time, human rights activists increasingly mobilized across borders, seeking to implement a global vision of social justice by asserting international human rights claims in domestic and international fora. Today, in word and deed, Western states and international institutions extol the virtues of the rule of law and human rights as guarantors of democracy, stability, and economic growth.

In emphasizing the rule of law and human rights, this approach to world justice and stability is intrinsically legal in nature. In short, public interest law is increasingly global. In the words of Scott Cummings and Louise Trubek, lawyers are today the “architects of the global system” and as such are “subject to praise or scorn, depending on one’s point of view, either as the vanguard of change or the agents of imperialism.”⁹ Indeed, some scholars have charged that these transnational lawyers are architects of a “new legal orthodoxy” that serves to legitimate a hegemonic neoliberal globalization that benefits Northern elites at the expense of most of the world’s population.¹⁰

7. See Johanna Bond, *The Global Classroom: International Human Rights Fact-Finding as Clinical Method*, 28 WM. MITCHELL L. REV. 317 (2001); Arturo J. Carrillo, *Bringing International Law Home: The Innovative Role of Human Rights Clinics in the Transnational Legal Process*, 35 COLUM. HUM. RTS. L. REV. 527 (2004); Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of Human Rights Clinics*, 28 YALE J. INT’L L. 505 (2003). See also Philip M. Genty, *Overcoming Cultural Blindness in International Clinical Collaboration: The Divide Between Civil and Common Law Cultures and Its Implications for Clinical Education*, 15 CLINICAL L. REV. 131 (2008) (reflecting on cross-cultural collaboration between U.S. and European clinical teachers).

8. Scott L. Cummings & Louise G. Trubek, *Globalizing Public Interest Law*, 13 UCLA J. INT’L L. & FOREIGN AFF. 1, 10-16 (2008); Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 960-69 (2008). The history of ideas regarding law and development may be separated into three “moments”: (1) Law as a tool for state intervention in the economy (“Law and the Developmental State”) in the 1950s and 1960s; (2) law as a tool of market economies and a limit on state intervention (“Law and the Neoliberal Market” or the “so-called Washington Consensus”) in the 1980s; and (3) law as part of an expanded notion of development that includes human freedom (“law reform as an end in itself”), beginning in the 1990s. David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 4, at 1, 1-9.

9. Cummings & Trubek, *supra* note 8, at 3.

10. See Yves Dezalay & Bryant G. Garth, *Legitimizing the New Legal Orthodoxy*, in GLOBAL

In light of these empirical and theoretical concerns about the role of U.S. lawyers abroad, an ethical inquiry is long overdue. For the most part, debates in the legal ethics literature continue to revolve around the appropriate conception of the lawyer's role in the U.S. system of justice and democracy. But as the U.S. legal profession adapts to this global picture of public interest law, we should pause to consider the ethics of these new transnational practices. Broadly conceived, two questions govern this inquiry: (1) What ethical justifications support the U.S. lawyer's role in reforming the laws and political institutions of other societies? (2) Even if we can justify this role in theory, can we justify the particular practices of these transnational lawyers?

To answer these questions, this Article proceeds as follows. In Part I, I briefly describe the kind of transnational practices at the heart of this inquiry. In Part II, I address the objection that transnational lawyering unduly interferes in other societies, rejecting the claim that moral relativism mandates noninterference. I then explore the possible ethical foundations for what I call "global justice lawyering," a phrase that captures the practices of transnational lawyers involved in rule-of-law assistance and some forms of human rights advocacy.¹¹ Drawing on the ethical doctrine of cosmopolitanism and the legal profession's commitments to justice, I discuss the ethical reasons and justifications for acting to promote justice abroad.

Although I conclude that there are strong ethical reasons to promote global justice, these reasons do not justify promotion *by any means*. This is the dilemma of the cosmopolitan lawyer: the cosmopolitan project of global justice – although morally justified in theory – presents ethical questions in practice. In Part III, I explain the ways in which the practices of global justice lawyering – that is, the means by which lawyers promote legal reform abroad – risk violating the dignity of others. Sociolegal studies raise concerns that reform efforts are ineffective in whole or part because imported legal rules, strategies, and institutions are perceived as

PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY 306, 306 (Yves Dezalay & Bryant G. Garth eds., 2002). Critics of international rule-of-law assistance often focus on the ways in which the "rule of law" as a discourse legitimates the global expansion of market economies that largely benefit Northern countries. See, e.g., UGO MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* (2008). The concern that rule-of-law assistance furthers or seeks to further a fundamentally unfair global economic order is, for the most part, outside the scope of this article. In focusing on American lawyers involved in rule-of-law assistance and human-rights advocacy, I assume that lawyers are motivated by a commitment to these ideals, rather than an interest in political dominance or economic gain. Practices motivated by the latter are clearly unethical in many respects and do not therefore present the difficult questions I wish to explore.

11. I use the term "global justice," rather than "international justice," because it implies an ethical orientation that does not understand justice solely in terms of justice among nation-states. See Amartya Sen, *Justice Across Borders*, in *GLOBAL JUSTICE AND TRANSNATIONAL POLITICS* 37, 50 (Pablo De Greiff & Ciaran Cronin eds., 2002) (arguing that "global justice" is not "international justice," because our "various affiliations, identities, and priorities" give rise to obligations both inside and outside national borders).

illegitimate. This lack of social acceptance has important implications for the ethics of global justice lawyering. If lawyers impose a predetermined means to political justice by importing the political institutions, legal rules, and legal strategies with which they are familiar, they risk violating the dignity of those they hope to assist. In the final section of the Article, I suggest that to avoid ethical concerns, global justice lawyers should focus not on importing familiar laws and institutions, but on facilitating processes of lawmaking and social change. I conclude with a discussion of the particular challenges global justice lawyers face in facilitating these processes in societies transitioning to liberal democracy given the absence of an established democratic political culture and lawyers' own ethical commitments to political justice and human rights.

With this Article, I hope to begin a conversation and acknowledge that, in covering much ground, I cannot adequately explore the nuances of all the questions and issues raised. My approach draws on scholarship from different disciplines, including moral philosophy, legal ethics, sociolegal studies, and legal and political theory. Although questions concerning the ethics of global justice lawyering intersect with issues at the heart of different disciplines, my discussion of many of these issues is necessarily limited in an effort to maintain my overarching focus. In addition, I explore the ethics of transnational practices from the standpoint of the individual lawyer, rather than from the standpoint of international institutions and nation-states. In other words, I do not directly respond to the geopolitical critiques of international development assistance or the debates regarding the political legitimacy of international human rights. That said, my critique of the practices of global justice lawyering does implicate these debates insofar as changes in the practices of transnational lawyers would necessitate changes in the practices of donor organizations, including international institutions and nation-states.¹²

II. JUSTICE ABROAD: THE PRACTICES OF GLOBAL JUSTICE LAWYERING

A. Rule-of-Law Reform

The rule of law is a notoriously open-ended and contested concept. In the history of political and legal thought, it is defined and used in such varied ways that we might conclude it is an empty vessel devoid of any enduring content.¹³ Despite this conceptual history, international aid

12. Donors vary in the extent to which they control funded projects. *See, e.g.*, SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* 173-74 (2006) (describing how donors, such as the Ford Foundation, set the general agenda for funded projects).

13. *See* BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 4 (2004) ("The rule of law thus stands in the peculiar state of being *the* preeminent legitimating political ideal in the world today, without agreement upon precisely what it means."); *see also* RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* 126-87 (2002)

entities typically subscribe to a version, or definition, of the rule of law that includes not simply procedural elements, but also substantive human rights norms. For example, the U.N.'s ambitious definition of the rule of law includes an extensive list of legal and institutional principles:

[The rule of law] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹⁴

The U.S. Agency for International Development (USAID) has cited the U.N. definition as consistent with its understanding of the rule of law, emphasizing, in addition, that the rule of law is a universal principle that transcends social and cultural differences.¹⁵ Whether the rule of law is truly universal is a complex question. Here, the important point is that donor organizations engaged in rule-of-law reform understand rule of law to be a universal good and have embraced a normative definition that includes a wide range of formal criteria (e.g., transparency), institutional arrangements (e.g., separation of powers), and substantive rights.¹⁶

What purpose or end does this recipe for the rule of law serve? According to the Secretary General, rule-of-law reform is not designed to "build international substitutes for national structures, but to help build domestic *justice* capacities."¹⁷ Development entities embrace an expansive notion of justice. Like rule-of-law definitions, the U.N. definition of "justice" is both broad and universal in aspiration:

(discussing how to define the rule of law).

14. The Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004). This normative statement appears consistent with how rule-of-law practitioners envision the rule of law. According to Thomas Carothers, "[t]hey want to see law applied fairly, uniformly, and efficiently throughout the society in question . . . and to have law protect various rights that ensure the autonomy of the individual in the face of state power." Thomas Carothers, *The Problem of Knowledge*, in PROMOTING THE RULE OF LAW ABROAD, *supra* note 3, at 15, 19 [hereinafter Carothers, *The Problem of Knowledge*].

15. USAID, GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK (A GUIDE FOR USAID DEMOCRACY AND GOVERNANCE OFFICERS) (2008), available at http://pdf.usaid.gov/pdf_docs/PNADM700.pdf.

16. See Joel M. Ngugi, *Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse*, 26 U. PA. J. INT'L ECON. L. 513, 540-554 (2005) (analyzing the ways in which definitions of the rule of law endorsed by international development agencies, such as the World Bank, incorporate both formal and substantive content).

17. The Secretary-General, *supra* note 14, at summary.

For the United Nations, “justice” is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions¹⁸

In other words, the U.N. definition of justice reflects a “thick” conception of the rule of law. “Thin” definitions of the rule of law tend to be procedural, or “formal,” emphasizing the need for general, prospective, clear rules that are publicly promulgated and stable.¹⁹ On the other hand, “thick,” substantive conceptions of the rule of law, like that endorsed by the United Nations, are often tied to a particular form of democracy, namely a liberal constitutional democracy, in which laws and governmental practices are subject to judicial review for compliance with higher-order rules, such as human rights provisions, in a constitution.²⁰ Understood as inextricably tied to human rights and democracy,²¹ this definition of the rule of law includes not only guarantees of “legal liberty” (certain laws of general and equal application) and structural liberty (separation of powers with an independent judiciary), but also commitments to “political liberty” (democracy) and “personal liberty” (individual rights).²²

Global justice lawyers are therefore participating in a project to construct laws and political institutions that instantiate a particular conception of justice, a conception that incorporates a “thick,” or substantive, definition of the rule of law. Underlying this normative commitment to justice is, of course, a mixture of altruism and self-interest. As noted above, public and private donors have spent hundreds of millions of dollars on rule-of-law assistance because of an entrenched belief that rule-of-law reform is necessary if transitioning states are to become stable democracies capable of participating in the global market economy. In other words, rule-of-law assistance is motivated by a particular vision of global justice – of an international community of liberal constitutional democracies peacefully cooperating in a mutually beneficial economic regime.

Moreover, the approach to implementing this vision of justice is *legalistic*: rule-of-law reform focuses on creating the laws and institutions familiar to liberal democracy at the domestic level. Not surprisingly, then,

18. *Id.* ¶ 7.

19. See LON FULLER, *THE MORALITY OF LAW* 39 (rev. ed. 1969) (setting out “eight canons” of the process of lawmaking).

20. See generally TAMANAHA, *supra* note 13, at 91-113 (distinguishing between formal (“thin”) and substantive (“thick”) versions of the rule of law).

21. Carothers, *The Problem of Knowledge*, *supra* note 14, at 18.

22. See TAMANAHA, *supra* note 13, at 34-36. As a theoretical matter, the rule of law need not be conceived in such “thick” terms; indeed, the components of this definition can conflict – e.g., individual rights place substantial limits on majoritarian democracy.

rule-of-law reformers often seek to reproduce familiar Western-style legal institutions.²³ Normative understandings of the rule of law do not, of course, dictate this approach. In fact, as I discuss in Part III below, the legalistic, or technical, approach has serious conceptual problems in that it conflates the rule of law with a particular means (i.e., specific legal rules and institutions) of achieving the rule of law.²⁴

B. Human Rights Advocacy

Human rights advocacy is also inextricably tied to normative visions of justice. The Universal Declaration of Human Rights begins by claiming that the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”²⁵ Although lawyers engaged in human rights advocacy often devote their time to a subset of human rights (e.g., women’s rights), they share a commitment to the realization of human rights as a necessary condition for a just society – much like the rule of law is understood as a necessary condition for a just society.

Indeed, human-rights advocacy is not distinct from rule-of-law reform; rule-of-law projects claim human rights as a desired end. I discuss it separately only to highlight a particular approach to human rights advocacy: legal efforts to implement human-rights norms at the state level using domestic legal institutions, such as legislatures and courts. Although rule-of-law reform is essentially focused on building political institutions and drafting new legal rules, some human rights advocacy seeks to implement or enforce human-rights norms at the local level by advocating for legal reform in established legislatures or challenging existing laws and governmental practices in already established courts. Seeking social change through litigation is a practice familiar to U.S. lawyers, as social movements ranging from the women’s rights movement to the conservative religious movement have engaged in the practice.²⁶

23. See Thomas Carothers, *The Problem of Knowledge*, *supra* note 14, at 20.

24. See Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in *PROMOTING THE RULE OF LAW ABROAD*, *supra* note 3, at 31, 47-54.

25. Universal Declaration of Human Rights, G.A. Res 217A (III), preamble, U.N. Doc. A/8/10 (Dec. 12, 1948). The preambles to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights contain the same clause. Compare International Covenant on Civil and Political Rights preamble, Dec. 16, 1966, S. Exec. Doc. E., 95-2 (1978), 999 U.N.T.S. 171 with International Covenant on Economic, Social, and Cultural Rights preamble, Dec. 16, 1966, 993 U.N.T.S. 3.

26. The conventional role of a lawyer in the United States is that of an emotionally detached advocate who zealously pursues her client’s ends without identifying with the client’s personal or political objectives. See Part III.C. *infra*. Of course, the professional identities of lawyers are more varied and complex than the conventional ideal. In fact, as historical accounts of the U.S. civil rights movement demonstrate, public interest lawyers often reject neutrality, taking sides to be advocates for causes, not just clients. In sociolegal scholarship, this kind of lawyering is called “cause lawyering.” See generally Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An*

But success in one context does not necessarily translate into success in another. Deena Hurwitz's description of a human-rights training in Bosnia-Herzegovina illustrates the challenges.²⁷ International human rights advocates designed trainings for local judges, lawyers, and prosecutors to educate them regarding various international human rights provisions, which had been incorporated into the state constitution. In addition to educating participants concerning the content of various human rights treaties and laws, human rights advocates encouraged participants "to include human rights arguments and cite the treaties in their court briefs."²⁸ But when Bosnian lawyers followed this advice, judges dismissed the arguments as "irrelevant,"²⁹ a result that suggests that domestic litigation may not always be a productive social-change strategy.³⁰

Of course, human rights activists also use a range of other means to effect legal and political reform. For example, they engage in traditional "shaming" techniques, writing human rights shadow reports and holding media campaigns. They also lobby their own governments to assert diplomatic pressure and impose sanctions on governments that violate human-rights norms.³¹ And they work at the international level, influencing international institutions and bringing claims in international and regional courts, such as the European Court of Human Rights. In most of these situations, however, activists and lawyers are operating within a legal or political system of which they are arguably a part.

In these cases, the "imperialism" objection has less force because advocates are not acting outside a political system that recognizes them as participants; that is, they are less vulnerable to the charge that they are

Introduction, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3 (Austin Sarat & Stuart Scheingold eds., 1998). As it is applied in the scholarship, the definition of cause lawyering is broad, ranging from lawyers' efforts to guarantee equal access to justice to legal advocacy by conservative lawyers to preserve the status quo. See Thomas M. Hilbink, *You Know the Type . . . : Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657 (2004) (discussing different kinds of cause lawyering). Although this kind of lawyering in the United States is often associated with public interest litigation, it can take other forms; what cause lawyers typically share, however, is moral activism in the form of a personal commitment to the objectives of their advocacy. See STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 6-7 (2004). For collected studies, see CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart A. Scheingold eds., 2006) (examining how cause lawyers contribute to and influence social movements); CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (Austin Sarat & Stuart Scheingold eds., 2001) (investigating how cause lawyering in different countries affects, and is affected by, processes of democratization and globalization); and CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES *supra* (examining the ways in which cause lawyering challenges and legitimates the conventions and values of the legal profession).

27. Hurwitz, *supra* note 7, at 519.

28. *Id.*

29. *Id.*

30. I discuss this more fully in Part IV, *infra*.

31. See MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 16-25 (1998) (describing the tactics transnational advocacy networks use to persuade and socialize state and international actors).

imposing their moral values on another society. But like rule-of-law reformers, transnational human-rights lawyers who press for legal change through domestic legal channels reject traditional social and political boundaries in the name of global justice. Hence, like rule-of-law reform, a transnational cause-lawyering approach to human rights advocacy gives rise to concerns that U.S. lawyers are engaged in a form of imperialism. To justify their intervention abroad, we must appeal to an ethical theory of global dimensions.

III. THE ETHICAL FOUNDATIONS OF GLOBAL JUSTICE LAWYERING: COSMOPOLITAN COMMITMENTS TO JUSTICE

Although the global practices described above can take place in the aftermath of military, economic, and political sanctions, they do not generally motivate forcible intervention and sanctions. The following analysis rests on the assumption that intervention in the form of advocacy and persuasion does not present the legal, political, and ethical questions that, for example, humanitarian intervention presents. That said, even though transnational lawyers do not use militaristic means, these lawyers nonetheless intervene in the social and political processes of other societies in order to promote particular values.³² They are therefore subject to the charge that they are imposing their own moral and political beliefs on others. But as I explain below, this general objection is grounded in theories of moral relativism and subjectivism, which are not, in the end, very convincing. Furthermore, if we reject relativism as an absolute bar to engaging in the lives of those outside our cultural and political communities, we can identify strong moral reasons – grounded in the ethical doctrine of cosmopolitanism and the U.S. legal profession's commitments to the rule of law and social justice – that justify lawyers' efforts to promote political justice around the world.³³

32. In fact, as I argue below, if transnational practices impose a particular vision of political justice, the cultural imperialism objection has substantial force. *See infra* Part IV. Indeed, the objection is stronger than in cases of humanitarian intervention to prevent "great evils," such as genocide, which few would defend in the name of moral or cultural relativism. *See* David Luban, *Intervention and Civilization: Some Unhappy Lessons of the Kosovo War*, in *GLOBAL JUSTICE AND TRANSNATIONAL POLITICS*, *supra* note 11, at 79, 106 [hereinafter Luban, *Intervention and Civilization*] (distinguishing between intervention to impose a "conception of the good" and intervention to prevent the "infliction of evils").

33. By "political justice," I am referring to political principles and values associated with, in Rawls's terms, the "basic structure" of society, which includes "a society's main political, social, and economic institutions, and how they fit together into one unified system of social cooperation from one generation to the next." JOHN RAWLS, *POLITICAL LIBERALISM* 11 (1993) [hereinafter RAWLS, *POLITICAL LIBERALISM*]. Political justice is therefore limited (i.e., it does not "cover all cases of right and wrong"). *Id.* at 21. Transnational lawyers who seek to promote rule-of-law ideals and human rights are motivated by liberal values that find expression in political organizations; that is, they seek to promote *political* justice. Of course, political justice necessarily includes both legal and social justice, a distinction some theorists emphasize. *See, e.g.,* DAVID MILLER, *SOCIAL JUSTICE* 22 (1976) (distinguishing between legal justice, which includes criminal punishment and civil compensation in addition to legal procedures

A. Moral Arguments for Noninterference in Other Societies

The argument that we should not intervene in other societies or cultures is associated with various forms of moral relativism, which hold that we can only answer normative questions regarding morality (i.e., what we ought to do) by reference to something else, such as a religious or cultural view of the world.³⁴ For a relativist, morality is a matter of social convention and practice, not universal principles or theories. This view of morality is attractive because – unlike baseball or chess, for example – the concept of morality seems to lack a set of built-in rules and standards to which we can appeal to answer questions absolutely.³⁵ Given that morality is indeterminate, relativism seems to support the old adages “live and let live” and “to each his own” and to endorse the view that we should not judge other societies according to our moral views, which are, after all, no more “correct” than other moral views. Following this logic, for example, although we may adjudge it wrong to exclude women from political office in our society, we cannot and should not judge this political exclusion in other societies.

The fact that morality *appears* to be relative (in that people actually do hold different moral beliefs) seems to bolster the normative position that we should not judge other societies.³⁶ But as moral philosophers have shown, moral relativism does not mandate “tolerance” or limit our moral judgments. Even if morality is contingent on social context, it does not logically follow that we cannot judge others according to our moral standards; when we make a moral judgment we necessarily make a *judgment* concerning what people ought or ought not to do. Moral judgments are not like judgments of taste; they necessarily require a normative position. As James Dreier explains, “moral judgment is unlike the judgment that artichokes taste good, which does not commit me to the judgment that you ought to eat them.”³⁷ A moral judgment that the political exclusion of women is morally wrong does, for example, commit me to a judgment that others ought not to do this.

To see this more clearly, consider what happens if we insist that our moral judgments do not commit us to judgments regarding others’ beliefs and actions. If in one society the political exclusion of women is morally wrong and in another society it is not morally wrong, then there is no moral disagreement between these two societies because both views are

associated with due process, and social justice, which concerns the institutional distribution of benefits and burdens among members of society).

34. See James Dreier, *Moral Relativism and Moral Nihilism*, in THE OXFORD HANDBOOK OF ETHICAL THEORY 240, 240 (David Copp ed., 2006).

35. *Id.* at 244.

36. Faced with this diversity of belief, people may find moral relativism a compelling explanation because they cannot identify clear standards by which to assess different beliefs; as noted above, this is so because morality *as a concept* does not appear to have built-in rules or standards. See *id.* at 242 (explaining why people find moral relativism plausible).

37. *Id.* at 256.

true from a relativist standpoint. Consequently, individuals from each society would not be disagreeing; they would be talking past one another.³⁸ As philosophers point out, in denying that moral disagreement exists, relativism is in deep conflict with what appears to be true of the way morality works in the world: moral disagreement is a phenomenon that most of us agree exists.³⁹

But what if morality is not objective? The charge that we should not impose our moral views on others might claim to be based in the metaphysical denial of the existence of moral facts – and therefore objective morality.⁴⁰ This view draws a distinction between beliefs, which are based on objective facts reflected in the world, and subjective desires, which are based on what we want to happen. Because beliefs are based on facts, they can be true or false, whereas because desires are not based on facts, they cannot be evaluated as true or false. In this line of thinking, our moral judgments necessarily include desires about how the world should be, not simply facts about the world as it is. Following this logic, because moral judgments include desires, they cannot be evaluated as true or false.

Interestingly, however, if we follow this line of thought, it mandates a kind of imperialism, not tolerance. Kwame Anthony Appiah refers to the philosophical tradition associated with the belief-desire distinction as “Positivism” and explains the “disconnect” between this approach and the conclusion that “we ought not to intercede in other societies on behalf of our own values”:

[O]n the Positivist account, to value something is, roughly, to want everyone to want it. And if that’s the case, then values are, in a certain way, naturally imperialist. So the whole strategy of arguing for toleration of other cultures on the basis of Positivism seems self-contradictory. How can you argue rationally that other people’s basic value choices should be tolerated on the basis of a view that says that there are no rational arguments for such basic choices?⁴¹

38. We could say the same if two individuals within a particular society held contrary moral views. Indeed, the form of relativism that holds that morality is based on cultural practice is based on the problematic assumption that cultural practices reflect the views of all (or most) individuals in a given society. Cultural practices are, of course, products of complex power relations; they may reflect the preferences of some, while silencing the voices of others.

39. See Terry Horgan & Mark Timmons, *Morality Without Moral Facts*, in CONTEMPORARY DEBATES IN MORAL THEORY 220, 229 (James Dreier ed., 2006); see also Martha Nussbaum, *Still Worthy of Praise*, 111 HARV. L. REV. 1776, 1788 (1998) (arguing that the position that moral arguments are subjective opinions with “equal weight on both sides” is a false description of how people typically understand moral arguments).

40. Horgan & Timmons, *supra* note 39, at 230.

41. KWAME ANTHONY APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS 24-25 (2006) [hereinafter APPIAH, COSMOPOLITANISM]. Furthermore, if I deny the existence of objective moral truth, I cannot support the conclusion that the value of “tolerance” is morally required. See *id.* at 25 (“[T]here is no route from the subjectivity of value judgments to a

Thus, he concludes, "Positivism doesn't motivate intervention; but it doesn't motivate nonintervention, either."⁴²

In sum, although we may conclude that toleration is an important value guiding our interactions with other societies, moral relativism (or subjectivism) does not mandate this conclusion. It also does not make interference in the affairs of others morally obligatory or even permissible. Other moral and political considerations, for example, ideas of political autonomy and state sovereignty, will factor into the analysis. In addition, whether we have a positive moral duty to act on behalf of others will likely depend on prudential factors stemming from the nature of the intervention and the level of sacrifice it entails.⁴³ But as we turn to questions of moral obligations and global justice, we can comfortably leave behind the relativist, or subjectivist, view that we should or must refrain from evaluating the practices of other societies based on our own moral standards. Of course, this is not to deny the reality that people endorse a diversity of moral views. But as David Luban has counseled, this reality should lead us to "epistemic humility" – "the reminder to ourselves that we might be wrong, that the other fellow might be right, that maybe we don't know after all" – but in the end, we must decide for ourselves.⁴⁴

B. Cosmopolitan Commitments: The "Oneness of Humanity"

Even if we conclude that cultural differences and moral disagreement do not alone mandate noninterference, this conclusion does little to justify or motivate interference in other societies. Fortunately, we can do much more to justify global justice lawyering. In fact, we may plausibly argue, as ethical cosmopolitans do, that our moral obligations do not stop at political borders, but extend instead to all of humanity – that because every individual in the world has equal moral worth, we have moral responsibilities not just to our friends, family, and co-citizens, but also to people we have never met living in places we may never even visit. It follows from this that if we are morally committed to furthering the ends of justice, we are committed to furthering *global* justice.

Although cosmopolitanism evokes a number of meanings – from the cultural cosmopolitanism that describes a way of living in the world⁴⁵ to the political aspirations of global democracy⁴⁶ – it is also an ethical doctrine

defense of toleration. Toleration is just another [subjective] value.").

42. *Id.*

43. See Luban, *Intervention and Civilization*, *supra* note 32, at 94.

44. David Luban, *The Inevitability of Conscience: A Response to My Critics*, 93 CORNELL L. REV. 1437, 1450 (2008) [hereinafter Luban, *The Inevitability of Conscience*].

45. See Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J. L. REFORM 751 (1992) (using the term "cosmopolitan" to describe an individual who does not define her identity by reference to a particular community or ethnic group).

46. See, e.g., DANIELE ARCHIBUGI, *THE GLOBAL COMMONWEALTH OF CITIZENS: TOWARD COSMOPOLITAN DEMOCRACY* (2008). For an overview of historical and contemporary uses of the term cosmopolitan, see Steven Vertovec & Robin Cohen, *Introduction: Conceiving*

that emphasizes the “oneness of humanity.”⁴⁷ Dating to the Cynics in the fourth century B.C.E. and later the Stoics, it rejects the view that moral obligations extend only to those within a bounded community, such as a family, city, or nation.⁴⁸ It also understands the individual, as opposed to a social group or other community, as the fundamental unit of moral concern. As Appiah explains, ethical cosmopolitanism recognizes that we have “obligations to others, obligations that stretch beyond those to whom we are related by the ties of kith and kind, or even the more formal ties of a shared citizenship.”⁴⁹ This commitment to others does not require that we eschew particularized loyalties to family, friends, and community, for these loyalties not only motivate, but also define, us. Instead, a commitment to ethical cosmopolitanism is an acknowledgement that “no local loyalty can ever justify forgetting that each human being has responsibilities to every other.”⁵⁰ Thus, scholars consistently articulate the central idea of ethical cosmopolitanism in terms of individual moral worth, equality, and universal obligation: “The crux of the idea of moral cosmopolitanism is that each human being has equal moral worth and that equal moral worth generates certain moral responsibilities that have universal scope.”⁵¹

Cosmopolitanism, in CONCEIVING COSMOPOLITANISM: THEORY, CONTEXT, AND PRACTICE 1 (Steven Vertovec & Robin Cohen eds., 2003).

47. APPIAH, COSMOPOLITANISM, *supra* note 41, at xiv. I refer to cosmopolitanism as an ethical *doctrine*, rather than a moral *theory*, because it is a set of moral principles, which are consistent with various normative moral theories. For example, although it acknowledges universal obligations to others, it does not specify how to satisfy these obligations. Scholars who identify with ethical or “moral” cosmopolitanism therefore rely on different moral theories – both consequentialist and deontological – to justify their arguments for how we should meet our obligations to others.

48. *Id.*; see also Robert Fine & Robert Cohen, *Four Cosmopolitan Moments*, in CONCEIVING COSMOPOLITANISM: THEORY, CONTEXT, AND PRACTICE, *supra* note 46, at 137, 137-39 (describing the historical origins of cosmopolitanism in the ancient writings of the stoics and cynics).

49. APPIAH, COSMOPOLITANISM, *supra* note 41, at xv.

50. *Id.* at xvi. Furthermore, as Amartya Sen notes, our loyalties and identities stretch beyond family and nation, creating “ethical commitments and obligations [that] are [not] mediated through relations between nations.” Amartya Sen, *Justice Across Borders*, in GLOBAL JUSTICE AND TRANSNATIONAL POLITICS, *supra* note 11, at 37, 42-43, 48. For example, a “feminist activist in America who wants to help, say, to remedy some features of female disadvantage in Africa or Asia, draws on a sense of identity that goes well beyond the sympathies of one nation for the predicament of another.” *Id.* at 49. Moreover, to say the moral obligations created by these commitments are “imperfect” Kantian obligations is not to say they are optional or somehow “negligible.” AMARTYA SEN, *THE IDEA OF JUSTICE* 129 (2009). To acknowledge the obligation is to recognize a “good reason” to act, which “must be taken into account in deciding what should be done.” *Id.* at 373.

51. Gillian Brock & Harry Brighouse, *Introduction*, in THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM 1, 4 (Gillian Brock & Harry Brighouse eds., 2005). See also SIMON CANEY, *JUSTICE BEYOND BORDERS: A GLOBAL POLITICAL THEORY* 4 (2005) (“Cosmopolitans, then, generally affirm three principles: the worth of individuals, equality, and the existence of obligations binding on all.”); CHARLES JONES, *GLOBAL JUSTICE: DEFENDING COSMOPOLITANISM* 15 (2001) (describing cosmopolitanism as “impartial, universal, individualist, and egalitarian”). Thomas Pogge describes the principles as follows:

Three elements are shared by all cosmopolitan positions. First *individualism*: the ultimate units of concern are human beings, or persons – rather than, say, family lines, tribes, ethnic, cultural, or religious

Although ethical cosmopolitanism does not prescribe a particular political or global order, scholars who endorse the principles of ethical cosmopolitanism often focus on questions of global justice,⁵² and the moral principles of individualism, equality, and universality are widely endorsed by political theories of justice.⁵³ Not surprisingly, early cosmopolitan thought focuses on duties of justice. As Martha Nussbaum explains, Cicero's duties of justice extend across national borders forming the basis for a "transnational law of humanity."⁵⁴ These duties "involve an idea of respect for humanity, of treating a human being like an end rather than a

communities, nations, or states. . . . Second, *universality*: the status of the ultimate unit of concern attaches to every living human being equally – not merely to some subset, such as men, aristocrats, Aryans, whites, or Muslims. Third, *generality*: this special status has global force. Persons are ultimate units of concern for everyone – not only for their compatriots, fellow religionists, or such like.

Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 *ETHICS* 48, 48-49 (1992).

52. See Brock & Brighouse, *supra* note 51, at 8 ("Most cosmopolitans believe that there are significant duties of global justice."). In considering which political structures and institutions are responsible for global justice, political theorists who endorse the moral tenets of cosmopolitanism tend to acknowledge the role that institutions at all levels – local, national, and international – play in determining peoples' lives, but they differ in how they allocate political power and sovereignty and how they understand the role of the state. See, e.g., KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* 246 (2005) [hereinafter APPIAH, *ETHICS OF IDENTITY*] (arguing that cosmopolitans should endorse the moral importance of the state and "the right of others to live in democratic states"); Brian Barry, *Statism and Nationalism: A Cosmopolitan Critique*, in *GLOBAL JUSTICE* 12, 37 (Ian Shapiro & Lea Brilmayer eds., 1999) (arguing that political institutions have no value in themselves because "the value of any political structure (including a world state) is entirely derivative from whatever it contributes to the advancement of human rights, human well-being, and the like"); CANEY, *supra* note 51, at 182 (endorsing a "multi-level system of governance in which supra-state authorities monitor the conduct of states . . . and seek to ensure their compliance with cosmopolitan ideals of justice"); Jürgen Habermas, *The Kantian Project of the Constitutionalization of International Law: Does It Still Have a Chance?*, in *MULTICULTURALISM AND LAW: A CRITICAL DEBATE* 205, 209 (Omid Payrow Shabani ed., 2007) [hereinafter Habermas, *The Kantian Project*] (conceptualizing global governance as "a multi-level system, which, at the supranational level, fulfils the worldwide society and human-rights goals of the UN Charter and which, at the transnational level, solves problems of global domestic politics"); David Held, *Principles of Cosmopolitan Order*, in *THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM*, *supra* note 51, at 10, 26-27 (arguing that a view of cosmopolitan law places the state within "an overarching cosmopolitan framework" in which people "enjoy multiple citizenships" in the "regional and global networks" that already affect their lives); JONES, *supra* note 51, at 213-30 (arguing that state sovereignty should be "qualified" when it fails to meet basic human rights); MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 258, 319, 323 (2006) [hereinafter NUSSBAUM, *FRONTIERS OF JUSTICE*] (advocating a "thin system of global governance, with at least some coercive powers," but one consistent with the moral salience of state sovereignty); Pogge, *supra* note 51, at 73-75 (advocating a "pluralist global institutional scheme" in which "sovereignty is widely distributed vertically, while the geographical shape of political units is determined by the autonomous preferences of situated individuals").

53. See CANEY, *supra* note 51, at 4 (discussing the tenets of moral cosmopolitanism – "the worth of individuals, equality, and the existence of obligations binding on all" – as moral principles shared by various political theories).

54. Martha C. Nussbaum, *Duties of Justice, Duties of Material Aid: Cicero's Problematic Legacy*, 54 *BULL. AM. ACAD. ARTS & SCI.* 38, 41 (2001) [hereinafter Nussbaum, *Duties of Justice*].

means."⁵⁵ Moreover, by insisting on universal respect for all human beings, these duties of justice are inherently global in scope.

Cosmopolitan principles of individual dignity, equality, and impartiality are also familiar tenets of *liberal* justice. Drawing from central thinkers, such as Kant, Rawls, and Mill, Nussbaum identifies core commitments within the liberal tradition:

At the heart of this tradition is a twofold intuition about human beings: namely, that all, just by being human, are of equal dignity and worth . . . and that the primary source of this worth is a power of moral choice within them, a power that consists in the ability to plan a life in accordance with one's own evaluations of ends [And] that the moral equality of persons gives them a fair claim to certain types of treatment at the hands of society and politics [This treatment] must respect and promote the liberty of choice, and it must respect and promote the equal worth of persons as choosers.⁵⁶

Ronald Dworkin has identified similar commitments in the liberal principles inherent in the U.S. Constitution.⁵⁷ A cosmopolitan ethics therefore resonates with political commitments to liberalism: obligations flow from the duty to respect and promote individual equality and liberty of choice.

And indeed, for this reason, a cosmopolitan ethics seems to support liberal engagements in the world. As Charles Jones observes, "we might understand cosmopolitanism as the ethical standpoint underlying modern liberal political theory."⁵⁸ In their commitment to the individual as the unit of concern, cosmopolitanism and liberalism are both subject to criticism by communitarian theorists who emphasize the moral value of community.⁵⁹ But although – and perhaps because – ethical cosmopolitanism recognizes the individual as the unit of moral concern, it also recognizes the varied beliefs and practices of individuals: "Because there are so many human possibilities worth exploring, [cosmopolitans] neither expect nor desire

55. *Id.* According to Nussbaum, Cicero's ideas as articulated in *De Officiis* influenced centuries of Western philosophy. *Id.* at 40. And indeed, Cicero's idea of respect for humanity quite clearly resonates in Kant's humanity formulation of his universal moral law – that we should act to treat humanity always as an end and never only as a means. See IMMANUEL KANT, *The Metaphysics of Morals*, in THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT: PRACTICAL PHILOSOPHY 353, 579 (Mary J. Gregor trans. & ed., 1996).

56. MARTHA NUSSBAUM, *SEX AND SOCIAL JUSTICE* 57 (1999).

57. RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 250 (1996). See also Richard Kay, *American Constitutionalism*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 16, 19 (Larry Alexander ed., 1998) (asserting that liberalism is premised on "the idea that the relevant moral unit in political discourse is the individual or, perhaps more accurately, that the *polis* itself has no moral standing independent of that of its members").

58. JONES, *supra* note 51, at 16.

59. See *id.*

that every person or every society should converge on a single mode of life. Whatever our obligations are to others (or theirs to us) they often have the right to go their own way."⁶⁰ This resonates, of course, with the liberal view that people should be able to live out their own conceptions of, or plans for, the good life.⁶¹

Although ethical cosmopolitanism may support political liberalism, the equal moral worth of individuals embraced by both plays out differently given the concerns of an ethical theory versus a political one. This is an important distinction if we wish to develop an ethics of transnational lawyering that does not conflate the ethics of individual lawyering with the morality of political engagement abroad. To understand the difference, it is useful to think of a distinction between ethics (i.e., "our individual conception of what kind of person we seek to be") and morality ("what we owe to others" as human beings).⁶² Ethical concerns recognize particular obligations rooted in our various identities as, for example, lawyers, U.S. citizens, parents, son, and daughters, while moral considerations involve universal obligations to others, which are often matters of political justice and give rise to the "claim to certain types of treatment at the hands of society and politics" that Nussbaum identifies.⁶³ The equal moral worth of individuals therefore requires the state to treat all individuals impartially (as in liberal theory), but it does not make the same demands of individuals.⁶⁴ Although equal moral worth does require that we give others "their due as fellow human beings," this does not mean we must treat strangers in the same way we treat our friends and family.⁶⁵

Given this difference, what does it mean to say that ethical cosmopolitanism recognizes the equal moral worth of every person? Kant's ethical philosophy is a good place to start, given what has been described as his "unqualified egalitarianism."⁶⁶ That all human beings are of equal moral worth is reflected in the humanity formulation of the universal law

60. APPIAH, *COSMOPOLITANISM*, *supra* note 41, at xv.

61. See JOHN STUART MILL, *ON LIBERTY* 71 (Forgotten Books 2008) (1859); RAWLS, *POLITICAL LIBERALISM*, *supra* note 33, at 19-20.

62. APPIAH, *ETHICS OF IDENTITY*, *supra* note 52, at 230.

63. NUSSBAUM, *SEX AND SOCIAL JUSTICE*, *supra* note 56, at 57; see also APPIAH, *ETHICS OF IDENTITY*, *supra* note 52, at 231 ("The interests that conjure up the moral person are those of social justice – which is to say, of the well-ordered *society*, the just *state*, the ideal of liberal *governance*.").

64. See APPIAH, *ETHICS OF IDENTITY*, *supra* note 52, at 228 ("Liberalism, in most accounts, is indeed concerned with moral equality: the state is to display equal respect toward its citizens. Where we go wrong is to suppose that *individuals* should be subject to the same constraint. Social justice may require impartiality.... But social justice is not an attribute of individuals.").

65. *Id.* at 229. Appiah illustrates this by noting that racism "typically involves giving people less than they are owed, failing to acknowledge their due as fellow human beings." *Id.* But giving people what they are owed does not mean equal treatment: "I can give you your due and still treat my friend better." *Id.*

66. Allen Wood, *General Introduction to Immanuel Kant*, in *THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT*, *supra* note 55, at xvii.

that human beings must always be treated as ends and not merely means.⁶⁷ Humanity as an end is a recognition that human beings have more than relative worth (a price); they have an inner moral worth – a dignity – that has no price.⁶⁸ We are obligated to acknowledge the dignity of others by respecting them, that is, by not treating them as mere means to personal ends.⁶⁹ Given Kant's association of moral worth with dignity, as well as dignity's pride of place in human rights law, equal moral worth implies at the very least a duty to respect the inherent human *dignity* of each individual. Indeed, Nussbaum connects the cosmopolitan idea of a world citizen to the Kantian idea of the "kingdom of ends," summarizing the obligation that both entail: "One should always behave so as to treat with equal respect the dignity of reason and moral choice in every human being."⁷⁰

Even so, in order for the concept of dignity to motivate us and guide our actions, we need a better understanding of its meaning and implications. According to Nussbaum, as the Stoics conceptualized it, human dignity did not depend on life status or conditions, for if "dignity went up or down with fortune, it would create ranks of human beings: the well-born and healthy will be worth more than the ill-born and hungry."⁷¹ That is, if we reject the notion that human dignity is relative, we must also reject the idea that it can be affected by external forces. But if this is the case, we will not be motivated to help others who suffer some misfortune (e.g., poverty or ill health) because their dignity is not affected by their suffering.⁷²

To address this tension, Nussbaum proposes that – instead of dignity – we locate the source of our duty to others in human capability: "the innate power to develop higher-level human capacities."⁷³ Our capability "can be thwarted in development, so that the more developed forms (of reasoning, moral character, sociability, and so forth) never fully mature, or are blocked in expression."⁷⁴ To recognize that a person's human capability is affected by external factors, such as poverty, acknowledges that "people

67. KANT, *supra* note 55, at 579.

68. IMMANUEL KANT, *Groundwork of The Metaphysics of Morals*, in THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT, *supra* note 55, at 84; KANT, *supra* note 55, at 579.

69. KANT, *supra* note 55, at 569, 579.

70. Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, in FOR LOVE OF COUNTRY? 3, 8 (Joshua Cohen ed., 2002).

71. Martha C. Nussbaum, *Compassion & Terror*, DÆDALUS, Winter 2003, at 18 [hereinafter Nussbaum, *Compassion & Terror*].

72. *Id.* at 15, 18.

73. Nussbaum, *Duties of Justice*, *supra* note 54, at 201.

74. *Id.* Nussbaum argues elsewhere that we need to combine two aspects of human nature: human dignity and human neediness. Martha C. Nussbaum, *Reply*, 19 QUINNIPIAC L. REV. 349, 355 (2000). These two features are seemingly in tension; dignity commands our respect, while neediness inspires compassion. We must reject the separation of the two and "recognize that neediness is not itself undignified." *Id.* Indeed, writing after the tragic events of September 11, Nussbaum defends compassion and the use of imagination (in extending our compassion to those distant from us) as a means of instilling a cosmopolitan humanity. Nussbaum, *Compassion & Terror*, *supra* note 71, at 12.

are entitled not only to mere life, but to a life compatible with human dignity."⁷⁵ In this view, human dignity is not a property or inherent quality a person possesses, but a way of describing a person's lived experience and quality of life: "[t]he guiding notion therefore is not that of dignity itself . . . but rather, that of a life with, or worthy of, human dignity"⁷⁶

Thus, when global justice lawyers work to secure the conditions of social and political justice abroad, they justifiably seek to promote something like Nussbaum's ideas of human capability and a life worthy of human dignity.⁷⁷ To join with others in their efforts to promote a more just society is to adopt others' *ends* as your own, a recognition of what Kant called the duty of love for one's neighbor.⁷⁸ And although as explained above, our ethical obligations to those close to us necessarily limit or qualify our obligations to human beings generally, a cosmopolitan understanding of equal moral worth suggests that we should do what we can to promote the global conditions that support lives worthy of human dignity. In short, a cosmopolitan ethics motivates us to act out of concern for others in addition to demanding that we refrain from using others for our own ends.

C. Professional Responsibilities for the Quality of Justice

Having hinted at the notion that certain identities – for example, professional identities, such as “lawyer” – give rise to particular obligations, I turn now to the question of whether the legal profession, as a matter of professional ethics, should endorse a commitment to the promotion of political justice abroad.⁷⁹ The Preamble to the ABA Model Rules of Professional Conduct proclaims that a lawyer is – in addition to a client representative and officer of the legal system – “a public citizen

75. NUSSBAUM, *supra* note 52, at 292.

76. *Id.* at 162. Recent political and moral theories of international aid and development advocate approaches to development focused on creating the conditions necessary for individuals to realize their capability. See generally DAVID CROCKER, *ETHICS OF GLOBAL DEVELOPMENT: AGENCY, CAPABILITY, AND DELIBERATIVE DEMOCRACY* (2008); NUSSBAUM, *supra* note 52; AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (2001).

77. In other words, this way of understanding dignity gives rise to positive obligation, unlike the Kantian conception of human dignity that is limited to a negative duty to respect others by not treating them solely as means to personal ends. See KANT, *The Metaphysics of Morals*, *supra* note 55, at 569. Another powerful argument for this obligation, as Amartya Sen has recently explained, may be derived from the “human rights approach,” an approach that recognizes obligations that arise from the asymmetry of power: “[I]f someone has the power to make a change that he or she can see will reduce injustice in the world, then there is a strong social argument for doing just that” SEN, *THE IDEA OF JUSTICE*, *supra* note 50, at 205-06 (contrasting the “obligation of effective power” with “mutual obligation for cooperation”).

78. KANT, *The Metaphysics of Morals*, *supra* note 55, at 569.

79. As a practical matter, a large and growing number of lawyers do endorse such a commitment, as evidenced by the ABA's ever-growing investment in rule-of-law assistance abroad. See American Bar Association Rule of Law Initiative, <http://www.abanet.org/rol/> (last visited Dec. 15, 2009).

having special responsibility for the quality of justice.”⁸⁰ This implies responsibilities beyond those a lawyer satisfies in carrying out duties to clients and the legal system, but the contours of these responsibilities are unclear. Even if we accept that lawyers have a special responsibility to promote political justice, we may understand this responsibility in a limited sense, that is, as fulfilled by the lawyer’s role in a legal system that contributes to the smooth functioning of an established political order. In contrast, we might understand this responsibility in a broader sense to require lawyers to promote what is just even if the established political order does not reflect it. Furthermore, in deciding whether the legal profession should support commitments to *global* justice, we must resolve another ambiguity: even if lawyers are responsible for the quality of justice in the broader sense, it is not clear that the responsibility extends beyond our national borders.

The extent of the American lawyer’s responsibility for “justice” has long been the concern of legal ethics scholars. Some scholars argue that lawyers best serve justice by adhering to a conventional client-centered role often referred to as that of the “neutral partisan” – neutral in that the lawyer does not adopt or endorse the client’s interests or ends and partisan in that the lawyer zealously advocates the client’s position.⁸¹ The conception of the lawyer as a neutral partisan is tied to accounts of the lawyer’s role in an adversary system of justice; in these accounts, lawyers serve the established legal and political order by zealously representing the interests and ends of their clients regardless of what their clients’ ends are. In response to these accounts, which range from the popular notion of the lawyer as a “hired gun” to more nuanced views,⁸² some scholars have argued that lawyers have a moral and professional responsibility to promote justice in a broader sense and that they cannot always avoid responsibility for their actions by simply invoking their role in the legal system – what David Luban has labeled “[t]he adversary system excuse.”⁸³

The different approaches to questions regarding the lawyer’s responsibility for justice are part of a debate involving two general

80. MODEL RULES OF PROF’L CONDUCT Preamble (1983).

81. See Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980) (describing neutrality and partisanship as the “standard conception of the lawyer’s role”); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, WIS. L. REV. 29, 36-38 (1978) (defining the principles of neutrality and partisanship). Legal ethicists who endorse the principles of neutrality and partisanship often acknowledge that a lawyer has some latitude in choosing which clients to represent based on personal views. For a strong view to the contrary (i.e., that a lawyer may not select clients based on personal beliefs), see Rakesh K. Anand, *The Role of the Lawyer in the American Democracy*, 77 FORDHAM L. REV. 1611 (2009).

82. For a compelling defense of client-centered lawyering and the neutrality it requires, see Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1 (2003).

83. DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 19-64 (2007) [hereinafter LUBAN, *LEGAL ETHICS*]. See also Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 2-15 (1975) (examining and critiquing the amorality inherent in the role morality of the lawyer).

approaches to lawyering, often referred to as the client-centered, or “traditional,” model of lawyering and the public interest, or “social justice” model of lawyering.⁸⁴ The distinction should by no means suggest that one model embraces a responsibility for the quality of justice and the other does not: most scholars who endorse the more conventional client-centered model of the lawyer argue that lawyers serve the ends of justice because they support a legal system that effectively furthers these ends by promoting the individual autonomy of clients,⁸⁵ facilitating the accurate resolution of disputes,⁸⁶ and safeguarding individual rights.⁸⁷ The social justice models distinguish themselves from conventional models in their scope: a lawyer may have moral responsibilities that cannot be justified by – and may even be in tension with – her functional role in the legal system.⁸⁸

Thus, social justice models support a professional ethics that recognizes the special responsibility of lawyers to promote justice in the broader sense, independent of their role in an established legal and political system. For example, Deborah Rhode’s framework requires that lawyers attempt to compensate for the system when it fails: “The less confidence that attorneys have in the justice system’s capacity to deliver justice in a particular case, the greater their own responsibility to attempt some corrective.”⁸⁹ Furthermore, although proponents of social justice lawyering recognize the importance of the attorney’s professional role within the system, they argue that role obligations do not automatically trump other moral duties and obligations. For example, the demands of justice may go beyond the particular case, requiring the lawyer to consider moral obligations to society or others in addition to professional

84. I am following Katherine Kruse in using these terms. She divides legal ethicists into traditionalists and social justice theorists and defines the distinction as follows: “Traditionalists defend . . . ‘amoral lawyering’ [i.e., moral neutrality regarding a client’s ends] by appealing to the lawyer’s role of providing the client with access to the law regardless of the purposes to which the client may wish to put the law. . . . [S]ocial justice theorists propose alternative models in which the lawyer plays a more active role in conforming client conduct to the requirements of justice.” Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389, 390 (2005) (footnotes omitted).

85. See, e.g., Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, AM. B. FOUND. RES. J. 613, 617 (1986) (arguing that by facilitating people’s access to the law, a “public good,” lawyers increase individual autonomy).

86. See Robert Gilbert Johnston & Sara Lufrano, *The Adversary System as a Means of Seeking Truth and Justice*, 35 J. MARSHALL L. REV. 147, 160 (2002). For a well-known defense of the adversary system as a means to impartial and informed judgment, see Lon. L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160-61 (1958).

87. Even those who object to neutral partisanship note that the individual-rights justification for the role has “special force in criminal cases.” DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 54 (2000).

88. Indeed, in seeking to reform or critique the legal and political system, public interest lawyering often breaks with conventional commitments to professional neutrality; lawyers are motivated by their own moral and political ends rather than the client’s (although they often coincide).

89. RHODE, *supra* note 87, at 67.

commitments to clients.⁹⁰

Most important for an ethical theory of global justice lawyering, the social justice lawyer is committed to improving the legal and political institutions responsible for political justice. For example, drawing on Louis Brandeis's notion of the "people's lawyer," David Luban's model of morally activist lawyering includes law reform, which he describes as "explicitly putting one's phronesis [i.e., practical wisdom], one's savvy, to work for the common weal."⁹¹ He argues that this is not an unrealistic expectation given "that legal training with its cultivation of practical judgment should enable lawyers to form a better picture of the human consequences of institutional arrangements than can those of us who have no comparable training."⁹² Others have argued that lawyers' training and professional expertise specially equip them to advance social agendas as leaders and participants in movements for reform.⁹³ Indeed, some argue that lawyers are not just specially equipped, but also specially obligated, to improve democratic institutions and liberal ideals, such as judicial independence.⁹⁴

In sum, in contrast to conventional approaches, social justice approaches understand the lawyer's responsibility for the "quality of justice" not in terms of the preservation of an established order, but in terms of the progressive realization of ideals of social and political justice. We might therefore understand traditional models as committed to conservative justice and social justice models as committed to reformative, or progressive, justice.⁹⁵ In seeking to promote political justice abroad,

90. Rhode's model is contextual, requiring the lawyer to consider the various interests implicated in each case and determine the best course of action. Sharon Dolovich describes Rhode's approach as follows: "[A] lawyer must in each case consider the full range of interests likely to be affected by his advocacy, and make a determination as to what approach to the client's interests justice requires the lawyer to take in the particular context." Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORD. L. REV. 1629, 1640 (2002). Justifications for conduct must also "accord with principles consistent with a commitment to the maintenance of a legal system and capable of being universalized." *Id.* at 1642; see also RHODE, *supra* note 87, at 67 ("Lawyers' conduct should be justifiable under consistent, disinterested, and generalizable principles."). William Simon's contextual approach also commits lawyers to actions that promote justice, although justice is defined in terms of principles and values (with moral content) that are part of the law. See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 139 (1998).

91. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 173 (1988) [hereinafter LUBAN, *LAWYERS AND JUSTICE*].

92. *Id.* at 171.

93. See, e.g., James E. Moliterno, *The Lawyer as Catalyst of Social Change*, 77 FORDHAM L. REV. 1559 (2009) (arguing that lawyers' attributes and training make them strong leaders in movements for social change).

94. Robin D. Barnes, *Natural Legal Guardians of Judicial Independence and Academic Freedom*, 77 FORDHAM L. REV. 1453 (2009).

95. My division of justice into conservative and reformative justice comes from D.D. Raphael, who distinguishes between the conservative and reformative aspects of both legal and social justice. Conservative legal justice "preserve[s] the order and smooth running of society as it now exists," while reformative legal justice recognizes the need to change the law to correct injustices or unfairness. D.D. RAPHAEL, *CONCEPTS OF JUSTICE* 1, 2-3 (2001). The

global justice lawyering clearly resonates with reformative models of lawyering. Furthermore, to the extent global justice lawyering is motivated by rule-of-law ideals, it can also draw support from professional commitments to the rule of law endorsed by all approaches, including conventional models committed to conservative justice. When lawyers promote rule-of-law ideals, they ensure the “quality of justice” in both a conservative and reformative sense; they conserve the existing political order *and* promote a normative vision of law. Because the rule of law can be understood to include both conservative and reformative justice, both conventional and social justice approaches endorse obligations associated with the rule of law. Indeed, few would object to the proposition that lawyers have a responsibility to promote the rule of law in all their professional activities – from client counseling to legal reform.⁹⁶

In fact, this professional norm recently provoked considerable public debate with the release of legal memoranda written by government lawyers justifying practices that many consider to be torture. These memos inspired both popular and professional critiques of the view that the lawyer should be able to make *any* argument to suit a client’s ends.⁹⁷ For example, Bradley Wendel has argued that although legal meaning is sometimes indeterminate, lawyers “must be dedicated to the process of understanding the meaning of legal norms as a reasoned settlement of normative controversy,” and this reason-giving process must satisfy rule-of-law criteria, such as “generality, prospectivity, clarity, and stability.”⁹⁸ In this view, the legal advice rendered by lawyers draws support from and promotes rule-of-law ideals.

Thus, a commitment to the political values associated with global justice lawyering finds solid support in the legal profession’s norms and practices. In promoting rule-of-law ideals and human rights, global justice lawyering is rooted not only in the social justice strain of lawyering, but

conservative aspect of social justice “maintain[s] the established order of . . . entitlements,” while reformative social justice seeks to redistribute benefits and obligations to achieve a more just (i.e., fair) social order. *Id.* at 4-6.

96. See, e.g., Fred C. Zacharias, *True Confessions About the Role of Lawyers in a Democracy*, 77 *FORD. L. REV.* 1591 (2009) (rejecting the proposition that lawyers have a special duty to promote democratic values, but endorsing an obligation to preserve the rule of law – understood as access to the courts – in constitutional democracies). See also Anthony T. Kronman, *The Law as a Profession*, in *ETHICS IN PRACTICE: LAWYERS’ ROLES, RESPONSIBILITIES, AND REGULATION* 29, 32 (Deborah L. Rhode ed., 2000) (explaining that as “an officer of the court” a lawyer has the duty to take “conscious, direct, and deliberate steps” to ensure the justice of the legal system).

97. See, e.g., LUBAN, *LEGAL ETHICS*, *supra* note 83, at 162-205; Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 *COLUM. L. REV.* 1681 (2005). According to Luban, the authors of “the secret ‘torture memo[.]’ . . . legitimized all but the most extreme techniques of torture, planned out possible criminal defenses to charges of torture, and argued that if the President orders torture it would be unconstitutional to enforce criminal prohibitions against the agents who carry out his commands.” LUBAN, *LEGAL ETHICS*, *supra* note 83, at 162.

98. W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law*, 77 *FORDHAM L. REV.* 1333, 1358, 1362 (2009).

also in the profession's commitment to the rule of law. Indeed, given the profession's ethical commitment to the rule of law, we might ask if the legal profession's special responsibilities for the quality of justice extend beyond its political community to the world's citizens.

Robin West has addressed this very question, arguing that the legal profession's commitment to the rule of law requires a cosmopolitan ethics if we define the rule of law in an egalitarian sense.⁹⁹ An egalitarian understanding of the rule of law requires regard for the "equal worth" of all human beings by "ensur[ing] the preconditions for a community of equal individuals."¹⁰⁰ This conception of the rule of law commits us to ethical cosmopolitanism because, in ensuring a "community of equals," it cannot "excommunicate" some to benefit others within the community, but must be universal, extending its protections to all.¹⁰¹

West argues that because the legal profession holds itself out as committed to an egalitarian rule of law, it should also adopt an explicitly cosmopolitan ethics. Indeed, she argues that "the internal moral logic of the legal profession demands it."¹⁰² Egalitarian ideals of equality and dignity are present "in law day speeches, commencement addresses, and catalogue copy," but we routinely excommunicate those outside our political borders by failing to see how our lives are connected to the suffering of others in the world (for example, the poverty caused by a global economic order from which we benefit).¹⁰³ This disconnect in our stated ideals and actual practices "stretches cognitive dissonance to its schizophrenic limit."¹⁰⁴ Thus, West argues lawyers should commit themselves in word and practice to a cosmopolitan ethics, ensuring that law, as an increasingly global practice, reflects the egalitarian essence of the profession's commitment to the rule of law.¹⁰⁵ In sum, if we say that we are committed to equality under the law, we should, as a profession, support the efforts of global justice lawyers who seek to secure this equality for everyone – a global community of equals.¹⁰⁶

99. Robin West, *Is the Rule of Law Cosmopolitan?*, 19 QUINNIPIAC L. REV. 259, 260 (2000) ("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?").

100. *Id.* at 277.

101. *Id.* at 276-79.

102. *Id.* at 280.

103. *Id.*

104. *Id.*

105. *Id.* at 281.

106. Of course, even if we accept West's characterization of the professional commitment to the rule of law and its cosmopolitan scope, we might stop short of recognizing obligations outside of our own legal and political system. In other words, we might conclude that we have a responsibility to further justice on a cosmopolitan scale in the United States, for example, through immigration reform, but decide our obligations do not extend to legal and political reform abroad. Thomas Pogge has argued that cosmopolitan obligation is tied to institutions; we have an obligation not to participate in institutions that fail to live up to cosmopolitan ideals. See Pogge, *supra* note 51, at 51-52; see also THOMAS W. POGGE, WORLD

IV. ONE PATH TO JUSTICE: TENSIONS CREATED BY THE PRACTICES OF GLOBAL JUSTICE LAWYERING

Global justice lawyering therefore finds support both in the profession's own ethical commitments and in the ethical doctrine of cosmopolitanism. Of course, moral justification for the *idea* of global justice lawyering does not justify its *practices* any more than justifying the idea of neutral partisanship in client representation justifies all actions motivated by the idea. For example, lawyers may not make false statements of law or fact to a court or assist their clients in criminal or fraudulent conduct in the name of neutral partisanship.¹⁰⁷ The conduct of lawyers motivated by professional norms – whether neutral partisanship or global justice – requires separate scrutiny and justification.

In this section, I discuss concerns raised by sociolegal studies of global justice lawyering suggesting that reform efforts are ineffective in whole or part because legal rules, strategies, and institutions lack social acceptance and support. This lack of acceptance has important implications for the ethics of global justice lawyering. In practice, global justice lawyers should not simply promote a predetermined means to political justice by importing familiar political institutions, legal rules, and legal strategies. By turning a particular path or means to political justice into the end goal for every society, global justice practitioners risk violating the dignity of those they hope to assist.

A. Global Justice in Action: Practices and Challenges

With the shift to an emphasis on “good governance” in the 1980s and 1990s, Western lawyers’ participation in law-and-development assistance expanded. As international development institutions such as the World Bank increasingly endorsed the “rule of law,” development assistance no longer sought domestic change primarily through external incentives (e.g., loan conditionality). At the same time, the international community grew more involved in the building of legal and political institutions in countries seeking to transition to democracy and market economies in every region of the world – from post-Soviet countries in Central and Eastern Europe to

POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS 168-95 (2002) (revising earlier article, Pogge, *supra* note 51). According to Iris Young’s “social connection model of responsibility,” we have obligations to work toward remedying the injustices produced by structural processes to which we contribute. See IRIS MARION YOUNG, *GLOBAL CHALLENGES: WAR, SELF-DETERMINATION, AND RESPONSIBILITY FOR JUSTICE* 159-60 (2007). By either logic, lawyers who participate in institutions that provide rule-of-law assistance and human rights advocacy acquire obligations by virtue of their participation.

107. See MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(1) (2007) (prohibiting knowingly “false statement[s] of fact or law to a tribunal”); *id.* R. 1.2(d) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct the lawyer knows is criminal or fraudulent . . .”).

post-conflict countries, such as Afghanistan and Iraq.¹⁰⁸ In response to the international community's investment both financially and ideologically in rule-of-law assistance, a professional field of "experts" in legal-reform assistance is emerging, consisting mainly of Western lawyers, including lawyers from the United States.¹⁰⁹

In light of this considerable investment in the rule of law, the most pressing question today is: how successful has the most recent wave of rule-of-law assistance been? An ever-growing number of studies and commentaries seek to answer this question.¹¹⁰ Of course, the evaluation of reform efforts must take place in context; challenges will vary with place and circumstance. Surprisingly, however, many of these assessments reach the strikingly similar conclusion that rule-of-law assistance is largely ineffective (and some would say counterproductive).¹¹¹ Although many commentators acknowledge the difficulties in defining and measuring success, particularly in the short term, the consensus seems to be that the prognosis is at best uncertain and at worst quite bleak.¹¹² As recent studies indicate, transplanted laws and institutions fail in the positivist sense as explicated by H.L.A. Hart. That is, reforms fail to satisfy both the external and the internal aspects of law: the general public does not observe or obey the law, nor do officials (e.g., judges, lawyers, and politicians) accept certain rules as standards for their behavior and the critical evaluation of others' behavior.¹¹³

108. For a discussion of the international financial institutions' adoption of "second-generation reforms" addressing social objectives, see Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, 26 MICH. J. INT'L L. 199 (2004).

109. See Carothers, *The Problem of Knowledge*, *supra* note 14, at 27; Steven Golub, *A House Without a Foundation*, in PROMOTING THE RULE OF LAW ABROAD, *supra* note 3, at 105, 127.

110. Not surprisingly, donors are increasingly interested in evaluating the legal systems in countries receiving aid. See Taylor, *supra* note 4, at 83 (noting the recent efforts of international donors, such as the World Bank and USAID, to evaluate the legal systems in transitioning economies).

111. See, e.g., Howard Dick, *Why Law Reform Fails: Indonesia's Anti-Corruption Reforms*, in LEGAL REFORM IN DEVELOPING AND TRANSITIONAL STATES, *supra* note 4, at 42; see also Thomas F. McInerney, *Law and Development as Democratic Practice*, 38 VAND. J. TRANSNAT'L L. 109, 110 & n.1 (2005) (citing several scholars in support of the conclusion that "[r]ecent scholarship seems united in the belief that the promotion of the rule of law and good governance have, until now, failed to deliver either improved rule of law or improved governance").

112. Efforts to reform commercial laws and economic institutions have enjoyed some success, however. Indeed, as many have noted, China's economic success suggests the rule of law, at least in its liberal constitutional incarnation, is not a necessary condition for economic liberalization. See, e.g., Carothers, *The Problem of Knowledge*, *supra* note 14, at 17. But as John Ohnesorge has explained in his work on Northeast Asia, the introduction of new legal rules and institutions did not lead to the region's economic success, as development entities had theorized and expected. John K.M. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 U. PA. J. INT'L ECON. L. 219, 290-99 (2007). See also Golub, *supra* note 109, at 110-11 (noting several examples, many from East Asia, that challenge the theoretical link between rule-of-law reforms and economic growth and investment).

113. H.L.A. HART, *THE CONCEPT OF LAW* 113 (1961). The positivist analysis of a society's legal system takes the form of a historical sociological inquiry, see, e.g., *id.* at 89-96, by which

In addition to the consensus regarding the efficacy of reform assistance, scholars routinely identify similar reasons for failure. Although case studies of rule-of-law programs in different countries demonstrate that results flow from complex causes and conditions, they frequently emphasize that reform fails in part because it lacks social acceptance and support.¹¹⁴ In other words, newly minted laws and institutions are perceived as illegitimate.

Given the widespread acceptance of human-rights norms and the rule of law, we should be concerned that reforms designed to further the rule of law and human rights lack social acceptance. People around the world often do more than simply endorse the rule of law and human rights as valuable: they risk their lives to further these ideals. In recent years, for example, lawyers and judges in both Pakistan and Egypt have engaged in prolonged protests in response to their governments' attempts to control the judiciary and undermine the rule of law.¹¹⁵ The protests continued despite numerous arrests and violent reprisals by police.

So, why do laws and institutions designed with these ends in mind lack social legitimacy? The answer is – in part – that these institutions are perceived as foreign transplants imposed by outside forces. As many have observed, reform assistance proceeds as if the rule of law is the equivalent of a Western-style liberal constitutional regime.¹¹⁶ More specifically, as

we seek to identify various kinds of rules through empirical observation. See also Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152, 161 (Larry Alexander ed., 1998) (explaining that Hart's rule of recognition does not reach questions of legitimacy because it is only a social fact). Hence, positivism does not offer a general theory of what law should be or which legal structures (e.g., parliamentary versus constitutional democracy) should prevail. At most, we could say Hart's positivism predicts the necessity of secondary rules that remedy defects (of uncertainty, rigidity, and inefficiency) in the primary rules of less advanced societies. See HART, *supra*, at 89-91.

114. See Faiz Ahmed, *Afghanistan's Reconstruction, Five Years Later: Narratives of Progress, Marginalized Realities, and the Politics of Law in a Transitional Islamic Republic*, 10 GONZ. J. INT'L L. 269, 285-94 (2006-2007); Martin Krygier & Whit Mason, *Violence, Development and the Rule of Law*, (UNSW Law Research Paper No. 2008-8, 2008), available at <http://ssrn.com/abstract=1392055>; Brian Z. Tamanaha, *The Primacy of Society and the Failure of Law and Development* (St. John's Legal Studies Research Paper No. 09-0172, 2009), available at <http://ssrn.com/abstract=1406999>.

115. See Tamir Moustafa, *Taking a Stand for Rule of Law*, BALTIMORE SUN, July 9, 2006, at 19A (discussing protests by Egyptian judges); Jane Perlez & David Rohde, *Lawyers Resist Emergency Rule by Musharraf*, N.Y. TIMES, Nov. 6, 2007, at A1; Michael Slackman & Mona El-Naggar, *Police Beat Crowds Backing Egypt's Judges*, N.Y. TIMES, May 12, 2006, at A3; James Traub, *The Lawyers' Crusade*, N.Y. TIMES MAG., June 1, 2008, at 46 (describing lawyer's movement in Pakistan). See also Terence C. Halliday et al., *The Legal Complex and Struggles for Political Liberalism*, in FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM 1, 32 (Terence C. Halliday et al. eds., 2007) (finding lawyers and judges mobilize on behalf of political liberalism narrowly defined as negative political rights and political freedoms).

116. See, e.g., Tim Lindsey, *Legal Infrastructure and Governance Reform in Post-Crisis Asia: The Case of Indonesia*, in LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES, *supra* note 4, at 3, 7, 27-29; Taylor, *supra* note 4, at 85-86 (citing John K.M. Ohnesorge, *The Rule of Law, Economic Development and the Developmental States of Northeast Asia*, in LAW AND DEVELOPMENT

Thomas Carothers has explained, rule-of-law practitioners tend to translate the rule of law into an institutional checklist, with primary emphasis on the judiciary."¹¹⁷ Carothers further explains the reasons for this focus on judicial institutions:

The emphasis on judiciaries is widespread in the rule-of-law field with the terms *judicial reform* and *rule-of-law reform* used interchangeably. The emphasis derives from the fact that most rule-of-law promotion specialists are lawyers and when lawyers think about what seems to be the nerve center of the rule of law they think about the core institutions of law enforcement.¹¹⁸

The prevailing approach of rule-of-law practitioners from the United States is therefore to attempt to reproduce the institutions and laws that they understand as critical to the rule of law in the United States.¹¹⁹

Of course, the fact that laws and institutions are transplants does not necessarily mean they are destined to fail for lack of acceptance. Many legal systems are transplants at their inception and most continue to borrow, as they should, from other systems in an effort to solve new problems and adapt over time.¹²⁰ The problem is not the laws or institutions per se, but the lack of a political process that engages as many people from as many segments of society as possible.¹²¹ The constitution-making process in Iraq is a telling example. From the beginning, U.S. forces in Iraq presided over a process that largely excluded Sunni Arab participation and failed to allow sufficient time for public deliberation and consensus.¹²² In

IN EAST AND SOUTHEAST ASIA 91 (Christoph Antons ed., 2002)).

117. Carothers, *The Problem of Knowledge*, *supra* note 14, at 20.

118. *Id.*

119. JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 389 (2006).

120. As James Cooper observes, "From the Ten Commandments . . . to, more recently, corporate governance and insider trading regulations, legal models have long been exported to new jurisdictions from those in which they were created." James M. Cooper, *Competing Legal Cultures and Legal Reform: The Battle of Chile*, 29 MICH. J. INT'L L. 501, 510 (2008).

121. Wade Channell explains how the typical legal reform process excludes broad-based participation: "Donor-sponsored legislative reform projects frequently use what could be called a star chamber system in which a small working group of experts quietly drafts new legislation chosen in part by outside donors, which is then rapidly adopted by the legislature with little meaningful public comment." Wade Channell, *Lessons Not Learned About Legal Reform, in PROMOTING THE RULE OF LAW ABROAD*, *supra* note 3, at 137, 140; *see also* Carothers, *The Problem of Knowledge*, *supra* note 14, at 20 ("[S]ome research shows that compliance with law depends most heavily on the perceived fairness and legitimacy of the laws."); Dick, *supra* note 111, at 61 ("The alternative to ineffectual top-down law reform is to embed law reforms in a broad reform programme that emerges from the political process.").

122. *See generally* Andrew Arato, *From Interim to 'Permanent' Constitution in Iraq, in CONSTITUTIONAL POLITICS IN THE MIDDLE EAST: WITH SPECIAL REFERENCE TO TURKEY, IRAQ, IRAN AND AFGHANISTAN* 163 (Saïd Amir Arjomand ed., 2008). *See also* Vicki C. Jackson, *What's in a Name? Reflections on Timing, Naming, and Constitution-Making*, 49 WM. & MARY L. REV. 1249, 1273-78 (2008) (explaining how the constitution-drafting process failed to provide sufficient time for consensus or public participation).

requiring that constitutional negotiations among Shi'ite, Kurdish, and Sunni representatives meet a rigid deadline, U.S. authorities facilitated the drafting of a document that Sunni leaders deemed unacceptable.¹²³ Not surprisingly, Sunni Arabs voted overwhelmingly against the constitution.¹²⁴

The lesson is that, without an inclusive process, laws and institutions are more likely to fail because they lack relevance and support in the local environment.¹²⁵ As Carothers reports, in drafting constitutional, commercial, and criminal laws and constructing political institutions, reformers "do not have much interest in non-Western forms of law, in traditional systems of justice, or, in the case of some American rule-of-law experts, even in civil law."¹²⁶ In other words, reformers often express limited interest in local conventions and laws, importing instead laws and institutional models tied to particular liberal democratic systems.¹²⁷ In failing to acknowledge the importance of local political culture, the current approach to reform is likely to fail and may actually undermine faith in rule-of-law and human-rights ideals.¹²⁸

Furthermore, this approach to reform confuses the means with the end by conflating the "rule of law" with the particular institutions that practitioners associate with the rule of law.¹²⁹ As noted above, development actors' widespread focus on judicial institutions is an example of this

123. See Arato, *supra* note 122, at 190; Jackson, *supra* note 122, at 1273-74.

124. See Jackson, *supra* note 122, at 1275.

125. See Nathan J. Brown, *Bargaining and Imposing Constitutions: Private and Public Interests in the Iranian, Afghani and Iraqi Constitutional Experiments*, in CONSTITUTIONAL POLITICS IN THE MIDDLE EAST, *supra* note 122, at 63, 75 (concluding that "[c]onstitutions are more likely to be legitimate if the processes by which they are written are inclusive, transparent and domestically driven," but acknowledging that these very conditions can frustrate parties' efforts to reach a meaningful consensus or "bargain").

126. Carothers, *The Problem of Knowledge*, *supra* note 14, at 19.

127. This is not to say that rule-of-law practitioners lack good intentions. See John C. Reitz, *Export of the Rule of Law*, TRANSNAT'L L. & CONTEMP. PROBS. 429, 450 (2003) (noting that many lawyers involved in rule-of-law assistance "have done so, at least in significant part, out of a desire to help").

128. For example, a recent study of rule-of-law reform in post-conflict societies emphasizes the importance of social acceptance and a political culture to rule-of-law reform: "The rule of law is as much a culture as a set of institutions, as much a matter of the habits, commitments, and beliefs of ordinary people as of legal codes. Institutions and codes are important, but without the cultural and political commitment to back them up, they are rarely more than window dressing." STROMSETH ET AL., *supra* note 119, at 310. See also Penelope Nicholson, *Comparative Law and Legal Transplants Between Socialist States*, in LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES, *supra* note 4, at 143-58 (examining the export of the Soviet court model to Vietnam and concluding that legal culture and other local factors affect the operation of legal transplants).

129. Stromseth and her coauthors note the tendency to confuse means with ends and further suggest that in post-conflict societies "law reform may not be the only way to develop a culture of procedural fairness and respect for human dignity and rights." STROMSETH ET AL., *supra* note 119, at 329. They note that "'nonlegal' approaches, such as informal or traditional dispute resolution," might be more expedient than "any number of courthouse refurbishments or judicial training programs." *Id.* Recently, donors, such as the World Bank, have begun to echo this concern regarding formal legal institutions and express interest in "informal mechanisms." See Trubek, *supra* note 4, at 91.

tendency to conflate rule-of-law ends with particular institutional means. By 1998, judicial training, for example, had become a "widely accepted vehicle of judicial development, accounting for up to twenty-five percent of [USAID's Latin American rule-of-law] assistance budget," even though project designers lacked information regarding the projects' impact (and some evidence pointed to disappointing results).¹³⁰

Certain approaches to human rights advocacy suffer from a similar tendency in that they privilege particular legal strategies (e.g., domestic litigation) over other means of advancing human rights. Public-interest models that privilege litigation as a means of legal and social change have an established history in the United States, dating to the National Association for the Advancement of Colored People (NAACP) and the civil rights movement and continuing today in organizations of various political orientations, such as the liberal American Civil Liberties Union (ACLU) and the conservative American Center for Law and Justice. But litigation on behalf of a cause ("cause lawyering") may not be an established or accepted practice in other settings, and it may therefore have little effect on widely held social attitudes. For example, where discriminatory practices are entrenched as natural and given elements of social life, social change is not likely to follow a legal victory in the absence of extended outreach and education aimed at changing public opinion.¹³¹

Moreover, the work of Yves Dezalay and Bryant Garth demonstrates the importance of professional norms and incentives to the success of cause-lawyering strategies, such as public-interest litigation.¹³² In contemporary Latin American states, "moral investment in the law" does not result in professional recognition or rewards as it does in the United States.¹³³ Dezalay and Garth emphasize the "importance of structural factors in determining how innovations such as cause lawyering for human rights get invented and legitimated in different ways in different places."¹³⁴

130. LINN HAMMERGREN, U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, JUDICIAL TRAINING AND JUSTICE REFORM 5 (1998), *available at* <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JudicialTraining.pdf>.

Wade Channell describes another striking example of rule-of-law reform reduced to legal transplantation or importation in the case of Albania: "Developed countries quickly provided assistance for Albania's transition in part through extensive legal reforms. Albanian lawyers today often speak proudly of the new system, noting, however that the new laws are European, not Albanian, and that they are not actually being applied." Channell, *supra* note 121, at 140-41.

131. The International Federation of Women Lawyers (FIDA), for example, adjusted its strategy in a pan-African campaign to change inheritance laws that discriminated against women. At first they pushed for legal change to provide for equal protection of the laws, but the lawyers soon realized the importance of changing public opinion through education and outreach efforts. See RICHARD J. WILSON & JENNIFER RASMUSSEN, PROMOTING JUSTICE: A PRACTICAL GUIDE TO STRATEGIC HUMAN RIGHTS LAWYERING 53 (2001).

132. Yves Dezalay & Bryant G. Garth, *Constructing Law Out of Power: Investing in Human Rights as an Alternative Political Strategy*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA, *supra* note 26, at 354.

133. *Id.* at 369.

134. *Id.* at 371.

Without a local basis for these practices, they conclude that U.S. models of cause lawyering, often exported by human rights organizations, will not be successful.

Noga Morag-Levine's study of the politics of transplanted models of cause lawyering in Israel reaches a similar conclusion.¹³⁵ In exploring the history of the Israel Union for Environmental Defense (IUED), she focuses on the tensions created by the organization's ties to U.S. funders and its mission of mobilizing local support for change. Although its commitment to social-change litigation may have helped secure U.S. funding, this strategy failed to produce the popular support necessary for success. This failure "in part stemmed from litigation strategies that relied heavily on foreign doctrines and expertise to the neglect of local litigants and domestic contacts," as well as "the perception that IUED was a rootless American import."¹³⁶ Again, despite the best intentions, strategies of legal reform fail when they lack local acceptance and are perceived as illegitimate legal imports.

These studies illustrate in different contexts an unsurprising reality: that for laws and institutions to function effectively in a particular society, a considerable number of the citizenry must accept them as authoritative. Moreover, local cultural norms and practices affect how ideas are received and whether people perceive them as legitimate. Legal and political change is not simply a matter of litigating human rights and training judges. Human rights must undergo, as Sally Engle Merry's work demonstrates, a "process of vernacularization."¹³⁷ That is, they must be appropriated by local actors and translated in a way that resonates with the local community.

As Merry's research illuminates, however, this process of translation does not necessarily result in transformation or indigenization.¹³⁸ Local actors may package human rights in familiar local terms, but they may retain their core conceptual meaning: "[t]he laws and programs acquire local symbolic elaboration, but retain their fundamental grounding in transnational human rights concepts of autonomy, individualism, and equality."¹³⁹ To indigenize human rights would render them less "effective in breaking old modes of thought, for example, denaturalizing male privilege to use violence against women as a form of discipline."¹⁴⁰ Thus, for example, women's rights activists in China may "package" ideas of gender equality using examples of strong independent women from Chinese history, but the underlying concepts are Western ideas of equality,

135. Noga Morag-Levine, *The Politics of Imported Rights: Transplantation and Transformation in an Israeli Environmental Cause-Lawyering Organization*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA, *supra* note 26, at 334.

136. *Id.* at 350.

137. MERRY, *supra* note 12, at 219.

138. *See id.* at 134-78.

139. *Id.* at 177-78.

140. *Id.* at 178.

rather than Confucian family harmony.¹⁴¹ The important lesson for transnational activists is that human rights can be a valuable resource and means by which local actors transform their societies, but "it is only when they take a familiar form that they are readily adopted."¹⁴² Because the strategies used to introduce human rights matter, certain strategies (e.g., the public interest litigation model of U.S. cause lawyering) may at times not be the best way to proceed.

That a process of translation is important is not surprising. Sociolegal studies have long underscored the link between society and law, particularly the ways in which law is connected to underlying sociocultural norms, interests, and practices.¹⁴³ In particular, the efficacy of judicial institutions may depend on popular acceptance and a supportive legal culture.¹⁴⁴ Without the power of the purse or sword, courts lack the ability to enforce their decisions, particularly when those decisions challenge powerful governmental and private actors.¹⁴⁵ For this reason and because courts rely on constituencies, a supportive legal culture is essential.¹⁴⁶ As Noga Morag-Levine's study demonstrates, unless people understand judicial review as a legitimate means to implement legal and social change, court decisions are not likely to produce results.¹⁴⁷

In sum, unless underlying social conditions change, imported legal strategies and legal transplants are not likely to produce the desired results. Of course, even if these transplants were likely to succeed, the consequentialist position that a particular means will produce the best outcome, or state of affairs, does not settle all ethical questions. Even if the

141. See *id.* at 162.

142. *Id.* at 178.

143. See, e.g., Lawrence M. Friedman, *American Legal Culture: The Last Thirty-Five Years*, 35 ST. LOUIS U. L.J. 529 (1991) (arguing that changes in society produce changes in legal culture, that is, in people's understanding of and expectations regarding the law). Much of this work is in the field of legal anthropology. See generally LAW AND ANTHROPOLOGY: A READER (Sally Falk Moore ed., 2005) (collecting classic and contemporary anthropological studies of law in different contexts); LAWRENCE ROSEN, *THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC SOCIETY* (1989) (conducting a cultural analysis of judicial reasoning and discretion in Islamic courts in Morocco).

144. See, e.g., JENNIFER A. WIDNER, *BUILDING THE RULE OF LAW* (2001) (investigating how new constitutional judges in African countries build the constituencies and public confidence necessary to function).

145. For the argument that court decisions cannot produce social change without political support, see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008). Rosenberg's work on the power of courts to produce social change has generated much debate. In particular, scholars have critiqued Rosenberg's methodology and approach to questions of judicial power. See, e.g., Michael McCann, *Causal Versus Constitutive Explanations (or, On the Difficulty of Being so Positive . . .)*, 21 LAW & SOC. INQUIRY 457, 472, 480 (1996) (criticizing Rosenberg's focus on short-time change and his failure to acknowledge the constitutive aspects of law in society).

146. See Shannon Roesler, *Permutations of Judicial Power: The New Constitutionalism and the Expansion of Judicial Authority*, 32 LAW & SOC. INQUIRY 545, 548 (2007) (noting that comparative studies of judicial authority highlight the ways in which courts are interactive institutions dependent upon supportive clienteles).

147. See Morag-Levine, *supra* note 136, at 347-48.

means is likely to produce a desired end, the means itself may give rise to ethical considerations because there is often a difference “between an *action* being right and *the state resulting from that action* being the best feasible state”¹⁴⁸ As I articulate in the next section, it is ethically problematic (as well as practically impossible) to engage in *actions* that frustrate others’ efforts to choose the specific laws and institutions that will govern them and the strategies or means by which to implement their political values.

B. Ethical Concerns

The fact that laws and institutions are failing to serve their purposes, that is, the fact that they are not effective in a positivist sense, should concern global justice lawyers who commit their time and effort to legal reform, but the inefficacy of reform does not in itself raise moral or ethical concerns. Nor would success in the form of compliance with laws and institutions rule out such concerns. This is so because knowing whether these legal means and strategies achieve their ends does not necessarily illuminate the practices or motivations of global justice lawyers. That said, the fact that reform efforts are producing outcomes widely perceived as illegitimate should concern transnational lawyers involved in reform processes. From a cosmopolitan perspective, to insist upon legal strategies and institutions that others do not accept is to fail to respect the dignity of others. As the next section makes clear, to respect the equal moral worth, or dignity, of those with whom they work, global justice lawyers must refrain from dictating the specific means of reform.

1. Cosmopolitan Interactions: Respecting the Dignity of Others

To the extent transnational practitioners dictate particular legal means and strategies of reform that others perceive as illegitimate, they not only undermine their efforts to establish liberal democratic ideals, but also risk violating the dignity of the individuals they wish to assist. In Nussbaum’s words, the “ability to join with others to give one another laws is a fundamental aspect of human freedom.”¹⁴⁹ Human dignity demands that

148. Amartya Sen, *Well-Being, Agency and Freedom: The Dewey Lectures 1984*, 82 J. PHIL. 169, 215 (1985). This is not to say that consequences do not matter to judgments regarding actions. The famous example is that of Jim, who must consider killing one person to save nine others, knowing the person would be killed anyway. See *id.* at 214-16 (discussing Bernard Williams, *A Critique of Utilitarianism*, in J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 77 (1973)). From a consequentialist standpoint, Jim should kill the person to produce the best state of affairs. But although a nonconsequentialist would conclude that Jim is not required to kill one person to save nine, it is not clear that Jim *must not* kill one person to save nine. As Sen explains, the answer is not clear because “[c]onsequences *are* relevant even if consequence judgments do not enjoy a hegemony over action judgments.” *Id.* at 216.

149. NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 52, at 257. The idea of “self-legislation,” the notion that human dignity resides in one’s ability to give laws to oneself, is decidedly Kantian; human autonomy, for Kant, is the recognition that the individual will has the

the basic structure of the state and its laws should be “expression[s] of human choice and autonomy.”¹⁵⁰ This does not mean that lawyers must remain silent. Lawyers may justify standards, such as human rights, as applicable to other societies without disrespecting others’ autonomy, but choosing the institutional means of implementation is another matter.¹⁵¹ Of course, even if laws and institutions are expressions of human choice, they may nevertheless fail to further or reflect liberal democratic principles of justice – a tension I discuss more fully in Part IV.B below. But the solution to this tension is not the imposition of particular institutions that we deem consistent with political justice. From an ethical standpoint, how we engage with others matters. That is, we may advocate human rights, but we violate the dignity of others when we determine the implementation or application of these rights in the form of particular laws and institutions.¹⁵²

David Luban’s relational understanding of human dignity illuminates how such practices can violate human dignity. Like Nussbaum, Luban rejects the idea of human dignity as “a property of persons.”¹⁵³ Instead, human dignity is best defined “through the various relations that we describe as honoring human dignity, respecting human dignity, enhancing human dignity, violating human dignity, degrading human dignity, and so forth.”¹⁵⁴ In other words, human dignity derives its meaning from specific relationships. For example, in investigating human dignity in the context of the traditional lawyer-client relationship, Luban concludes that lawyers violate clients’ dignity when they treat clients “as though their own subjective stories and commitments are insignificant.”¹⁵⁵ In treating

independent capacity to give (moral) laws to itself. IMMANUEL KANT, *Groundwork of The Metaphysics of Morals*, *supra* note 68, at 82-89. Political philosophy has built on this idea, acknowledging the giving of laws to oneself as a fundamental aspect of freedom. See JOHN RAWLS, *A THEORY OF JUSTICE* 225 (2d ed. 1999) (attributing to both Kant and Rousseau the “idea that liberty is acting in accordance with a law that we give to ourselves”); JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 212 (G. D. H. Cole ed., 1993) (“The people, being subject to the laws, ought to be their author: the conditions of the society ought to be regulated solely by those who come together to form it.”); MICHAEL WALZER, *THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD* 67-68 (1994) (recognizing “self-determination,” the idea that people “ought to be allowed to govern themselves,” as “the expression of moral minimalism in international politics”).

150. NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 52, at 262.

151. As Nussbaum explains, we can separate questions of justification from intervention. We may criticize a nation for failing to recognize basic human rights and liberties, even if we conclude that intervention (e.g., to impose laws and institutions) in the sovereign affairs of that nation is morally problematic. *Id.* at 255-56.

152. In terms of modern political theory, particularly theories of deliberative democracy, these laws and institutions would also be morally illegitimate. See, e.g., JAMES BOHMAN, *PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY* 5 (1996) (“[L]egitimate laws are authored by the citizens who are subject to them.”). See also THOMAS NAGEL, *EQUALITY AND PARTIALITY* 35 (“An illegitimate system . . . treats some of those living under it in such a way that they can reasonably feel that their interests and point of view have not been adequately accommodated . . .”).

153. Luban, *The Inevitability of Conscience*, *supra* note 44, at 1454.

154. *Id.*

155. LUBAN, *LEGAL ETHICS*, *supra* note 83, at 89.

someone's subjectivity as insignificant, the lawyer treats that person as if she were "a being of lower rank," which is a form of humiliation.¹⁵⁶ By focusing on the relationship of the lawyer and client, Luban elucidates the "second-personal" nature of human dignity: to honor human dignity requires recognition of a particular person and the relationship that renders "one person a dignifier and the other a dignified."¹⁵⁷ Luban's definition of dignity therefore underscores the ways in which human dignity is respected or violated in our *interactions* with others.

Although this relational understanding derives its meaning from context, it suggests a framework for respecting human dignity in our interactions with others. To respect the humanity of those distant from us does not mean to forego engagement with them; in fact, it should motivate us to act out of concern for others, as we have already seen.¹⁵⁸ That said, respecting the dignity of others does suggest a certain *approach* to engagement. We should work toward understanding, rather than agreement, recognizing that "[w]e enter every conversation – whether with neighbors or with strangers – without a promise of final agreement."¹⁵⁹ Although we may not reach agreement, we can work toward understanding each other through a process of communication and learning based on, as Appiah proposes, a mode of conversation.¹⁶⁰ In other words, even though we may not hold certain beliefs, we can "imagine" holding them and eventually *understand* why they motivate others.¹⁶¹ When we do this, we recognize the significance of people's subjective stories and commitments and thereby respect their human dignity.

In short, in addition to justifying the work of global justice lawyers, ethical cosmopolitanism speaks to the methods, or approaches, of global justice lawyering. In relating to or interacting with others, transnational lawyers respect the human dignity of others by honoring their stories, beliefs, and commitments. Despite good intentions, when global justice lawyers insist upon the implementation of particular laws, legal strategies,

156. *Id.*

157. Luban, *The Inevitability of Conscience*, *supra* note 44, at 1452-54. This relational conception of dignity resonates with Kant's idea that dignity demands mutual respect: "The respect that I have for others or that another can require from me . . . is therefore recognition of a dignity . . . in other human beings . . ." KANT, *The Metaphysics of Morals*, *supra* note 55, at 579. See also Stephen Darwall, *Morality and Practical Reason: A Kantian Approach*, in THE OXFORD HANDBOOK OF ETHICAL THEORY, *supra* note 34, at 282, 305 (describing Kant's dignity of persons as a "source of demands . . . that is, second-personal reasons we have the standing to address to one another as equal, free, and rational agents.").

158. See *supra* Part II.B.

159. APPIAH, *COSMOPOLITANISM*, *supra* note 41, at 44.

160. *Id.* at 84-85, 97-99.

161. *Id.* at 93. Nussbaum and Appiah both emphasize the use of imagination in understanding others, both those distant and closest to us. See *id.* at 94. See also Nussbaum, *Compassion & Terror*, *supra* note 71, at 26 ("When I was out in the rural areas of Rajasthan, visiting an education project for girls, I asked the Indian woman who ran the project (herself an urban woman with a Ph.D.) how she would answer the frequent complaint that a foreigner can never understand the situation of a person in another nation. She thought for a while and said finally, 'I have the greatest difficulty understanding my own sister.'").

and institutions, they risk violating the dignity of others by treating their beliefs and commitments as insignificant. By inhibiting or dictating the process by which people "give one another laws,"¹⁶² reformers violate others' "dignity of reason and moral choice."¹⁶³ When we join with others in their efforts to promote a more just society, we adopt their ends as our own. But because legal transplants in the form of familiar laws and institutions are likely to be solely *our* own ends, when we impose their adoption, we risk violating the dignity of others by treating them solely as means to our own personal ends.¹⁶⁴

2. Foregoing Advocacy: The Fact of Reasonable Disagreement

Implicit in the ethical approach I have described is an acknowledgement that global justice lawyers cannot and should not expect others to adopt the specific laws and institutions most familiar to them. In other words, we do not respect others' dignity by seeking to impose our particular laws, strategies, and institutions, even if we think they are the best means to laudable ends. Instead, we must recognize the practical obstacles to meaningful agreement on specific legal and institutional means. Even if everyone agrees on the general end goal (e.g., the rule of law or basic human rights) agreement regarding the legal and institutional means to these ends is by no means assured. Forceful advocacy in this context risks violating others' dignity by failing to respect their beliefs and commitments.

The reason the advocacy of particular rules, strategies, and institutions poses ethical problems derives from the practical reality of moral disagreement. Even if citizens are willing to set aside their narrow self-interests and collectively undertake the task of implementing their political values, they will confront what John Rawls terms the "fact of reasonable pluralism," that is, the fact that people hold different, often conflicting, comprehensive views of the good, some religious and some not.¹⁶⁵ Given this diversity, *reasonable* disagreement (in addition to unreasonable disagreement arising from narrow interests, prejudices, biases and irrational views) is a fact of society. This is so because of what Rawls calls the "burdens of judgment." These burdens, or sources, of reasonable pluralism are "the many hazards involved in the correct (and

162. NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 52, at 257.

163. Nussbaum, *Patriotism and Cosmopolitanism*, *supra* note 70, at 8.

164. See KANT, *The Metaphysics of Morals*, *supra* note 55, at 569.

165. RAWLS, *POLITICAL LIBERALISM*, *supra* note 33, at 36. Rawls distinguishes between pluralism and reasonable pluralism. Reasonable pluralism consists of a diversity of *reasonable* comprehensive doctrines, which "are not simply the upshot of self- and class interests, or of peoples' understandable tendency to view the political world from a limited standpoint." *Id.* at 37, 59. He acknowledges that democratic societies also exhibit the fact of pluralism, which recognizes the existence of unreasonable views and doctrines, and suggests that a doctrine is unreasonable if it seeks to use political power to suppress the fundamental liberties (namely liberty of conscience and freedom of thought). *Id.* at 63-64.

conscientious) exercise of our powers of reason and judgment.”¹⁶⁶ For example, people may reasonably disagree as a result of complex evidence, indeterminate concepts, or different experiences or because they must prioritize among values.¹⁶⁷ Moreover, although Rawls discusses the fact of reasonable pluralism as a condition of modern democracies (in that it results from the exercise of free reason secured by liberal institutions),¹⁶⁸ the burdens of judgment – the practical obstacles to political agreement – are present to some degree in any society.¹⁶⁹

These obstacles are not a reflection of a metaphysical skepticism or the moral relativism I discussed above in Part II. Rawls does not question the truth of moral judgments or endorse epistemological skepticism with regard to our beliefs; the burdens of judgment are simply a recognition of “some of the circumstances that make political agreement in judgment” especially difficult.¹⁷⁰ Moreover, the fact that a diversity of beliefs and views exists within and across societies is not to say that we can never agree. In fact, amidst the diversity, we will find we share a “vocabulary of values,”¹⁷¹ which will likely include many of the rule-of-law ideals and

166. *Id.* at 56.

167. *See id.* at 56-57.

168. As Rawls explains, the fact of reasonable pluralism is an enduring condition of liberal democracy: “Under the political and social conditions secured by the basic rights and liberties of free institutions, a diversity of conflicting and irreconcilable – and what’s more, reasonable – comprehensive doctrines will come about and persist if such diversity does not already obtain.” *Id.* at 36.

169. Indeed, a diversity of views is a condition of a modern state; political boundaries do not demarcate where one community or society ends and another begins, and even if they did, local “cultures” are not fixed or homogenous. Furthermore, disagreement can be just as or more intense when people actually share ideologies and comprehensive views. *See* APPIAH, *ETHICS OF IDENTITY*, *supra* note 52, at 254-56 (noting that “cross-cultural” difference may be exaggerated and that sameness, rather than difference, may produce the most intractable disagreement).

170. RAWLS, *POLITICAL LIBERALISM*, *supra* note 33, at 63 (“Political liberalism does not question . . . the possible truth of affirmations of faith. Above all, it does not argue that we should be hesitant and uncertain, much less skeptical, about our own beliefs.”); *see also* BRIAN BARRY, *JUSTICE AS IMPARTIALITY: A TREATISE ON SOCIAL JUSTICE*, VOLUME II 177-78, 188 (1995) (characterizing Rawls as committed to “epistemological restraint,” which does not question the truth of individual beliefs, but does place limits on the imposition of those beliefs on others in political society).

171. The term “value” in philosophy is often used interchangeably with “the good” such that “the theory of value says which states of affairs are intrinsically good and which intrinsically evil.” Thomas Hurka, *Value Theory*, in *THE OXFORD HANDBOOK OF ETHICAL THEORY*, *supra* note 34, at 357, 357 (noting as an example that “the theory of value can say that pleasure is good and pain evil, or that knowledge and virtue are good and vice evil”). I use the term in a broader sense and particularly, given my focus, to refer to moral and political ideals, such as the rule of law, that people endorse as standards for political society. My use parallels Thomas Scanlon’s abstract description of value: “To value something is to take oneself to have reasons for holding certain positive attitudes toward it and for acting in certain ways in regard to it.” THOMAS SCANLON, *WHAT WE OWE TO EACH OTHER* 95 (1998). When we claim that the rule of law or human rights are *valuable*, we claim that “others also have reason to value” these ideals. *Id.* Not everything we value is valuable in this sense; Scanlon’s example is that although we might say “I value my children,” it would seem strange to express this idea “by saying that they are valuable (except in the sense that everyone is).”

human rights to which global justice lawyers are committed.

We run into difficulty, however, when we seek to apply these values to particular cases and to determine how to weigh competing values. As an example of the first problem (the application of values), Appiah discusses a "universal declaration of global ethic" endorsed by an international group of religious leaders.¹⁷² The declaration contains various obligations, such as: "'We must put behind us all forms of domination and abuse.'" ¹⁷³ But as the example illustrates, the obligations leave much to application. As Appiah points out, "societies that, by our lights, subject women to domination and abuse are unlikely to recognize themselves in that description. They're convinced that they're protecting women's honor and chastity."¹⁷⁴ The weighing of values presents similar problems.¹⁷⁵ The point is that disagreement is most often – and quite inevitably – a result of our *judgments* about what values mean and how they should apply, rather than the values themselves.

Thinking about the Pakistani and Egyptian lawyers and judges protesting for the rule of law can help us understand these burdens on a global scale. People around the world can easily identify with their cause, recognizing arbitrary interference with the judiciary and brutal police repression of speech as infringing something called the "rule of law." But when people come together to design institutions to further values, such as "the rule of law" or "justice," they will face the burdens of judgment. Put differently, we unite behind what Michael Walzer calls a "minimal morality," thin universal principles, such as "truth" and "justice," that motivate us to join with each other behind a common cause.¹⁷⁶ Moral understanding is, however, "thick from the beginning," rooted in cultural, political, and historical contexts.¹⁷⁷ In fact, it is because our views of morality are thick from the beginning that we are able to recognize and unite behind universal concepts (e.g., we could not identify with the lawyers protesting abroad if we did not have our own commitment to independent judiciaries).¹⁷⁸ Global justice is therefore motivated by the intensity of thin universal principles, but it must confront the difficulties that arise from the thick nature of moral judgment, which necessarily involves "qualification, compromise, complexity, and disagreement."¹⁷⁹ The

Id.

172. APPIAH, *COSMOPOLITANISM*, *supra* note 41, at 59.

173. *Id.*

174. *Id.*

175. Fourth Amendment decisions of the U.S. Supreme Court evidence this in their attempts to balance privacy values against values of social order and security. *See, e.g.*, *United States v. Knights*, 534 U.S. 112 (2001) (balancing privacy values against the protection of society).

176. WALZER, *supra* note 149, at 6.

177. *Id.* at 4.

178. *Id.* at 19.

179. *Id.* at 6. Although Walzer appears to adopt a form of relativism by grounding morality in culture or social convention, his "moral minimalism" is, in T.M. Scanlon's words, a "benign relativism, according to which the requirements of morality vary but are not for that

thin agreement we begin with is not therefore the foundation for a more particularized vision, but a recognition of commonalities across time and place.¹⁸⁰

In the context of transnational lawyering, this means that arguments about particular legal means and institutions are arguments from thick morality; although they often incorporate thinly conceived universal values, such as equality or justice, they are not *produced* by these values.¹⁸¹ Moreover, it is because of this thickness, because the burdens of judgment are so rooted in our daily lives and experiences, that reasoned argument and debate of the kind lawyers are accustomed to making is not likely to change the minds of people who disagree. As Appiah explains, ethical cosmopolitanism recognizes this distinction between thin universal values and concepts informed by thick morality: "Cosmopolitans suppose that all cultures have enough overlap in their vocabulary of values to begin a conversation. But they don't suppose, like some universalists, that we could all come to agreement if only we had the same vocabulary."¹⁸² The goal of the global justice lawyer is not therefore to persuade others to adopt particular laws and institutions, but to engage others in conversations about how best to further shared values of political justice.

V. THE WAY FORWARD: FROM LAW TO PROCESS

Given the fact of reasonable disagreement, we cannot and should not predict the form laws and institutions will take. Thus, in addition to abandoning the tendency to think in terms of a particular means (i.e., legal strategy, political institution) to an end (rule of law, human rights), lawyers should resist the tendency to think in terms of particular ends. After all, by what measure would we assess whether a society is honoring the rule of law and human rights? Given the vagueness of concepts and the burdens of judgment, we would once again be tempted by bias and experience to

reason to be taken less seriously." SCANLON, *supra* note 171, at 333. Indeed, although the moral minimum, that is, our thin universal principles, are "expressive of our own thick morality" and there is therefore "no neutral (unexpressive) moral language," it is still the basis for solidarity and conversation with others distant from us. WALZER, *supra* note 149, at 9-11.

180. WALZER, *supra* note 149, at 17-18. Human rights are an example. Scholars and practitioners recognize many of the human rights expressed in international documents as universal values. See, e.g., APPIAH, *ETHICS OF IDENTITY*, *supra* note 52, at 267 ("The remarkable currency that human-rights discourse has gained around the world demonstrates that it speaks to people in a diversity of positions and traditions; this chord of resonating agreement explains why we can find global support for the human rights system."); Luban, *Intervention and Civilization*, *supra* note 32, at 107 (noting that international agreement regarding the protection of human rights "pulls much of the sting of the cultural imperialism argument"); NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 52, at 78 (arguing that the human rights norms reflected in her list of capabilities can gain "broad cross-cultural agreement"); see also Michael Ignatieff, *Human Rights as Idolatry*, in *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 56 (Amy Gutmann ed., 2001) ("Human rights can command universal assent only as a decidedly 'thin' theory of what is right, a definition of the minimum conditions for any kind of life at all.")

181. See WALZER, *supra* note 149, at 17.

182. APPIAH, *COSMOPOLITANISM*, *supra* note 41, at 57.

judge these ideals according to the presence or absence of particular laws and institutions. Or, we might be tempted to equate the rule of law or human rights with particular conditions or events. For example, rule-of-law practitioners might investigate whether governmental officials abide by the law. But this only tells us so much. In the United States, for example, many would conclude that executive officials disregarded the law in authorizing “enhanced” techniques of interrogation. But few people would argue that the United States lacks the rule of law all together.¹⁸³

Global justice lawyers should therefore shift their focus from particular legal means or ends, to the *processes* of lawmaking; instead of thinking of law in positivist terms (as a set of existing rules and institutions), lawyers must think in normative terms (i.e., in terms of what processes will produce law).¹⁸⁴ This entails a shift from an “import” approach to law, in which foreign laws and institutions are transplanted into new environments, to a normative approach to the processes of lawmaking. In this vein, rule-of-law ideals and human rights comprise the thin vocabulary of values from which dialogue begins. These ideals and norms provide a shared language for deliberation that shapes the outcome, but does not determine it. This is not to say that lawyers cannot share their technical legal expertise, but rather that technical advice and expertise should not supplant the process by which people choose the laws that govern them. Without a meaningful process, transplanted laws and institutions violate the dignity of those they are intended to govern. As we have seen, an ethical engagement in this process requires a commitment to understanding over agreement and to a dialogue that treats others’ beliefs and views as significant.

183. In fact, according to the World Bank, the United States is in the top tenth percentile of 212 countries measured using the Worldwide Governance Indicator for the rule of law. See WORLD BANK, GOVERNANCE MATTERS 2009, WORLDWIDE GOVERNANCE INDICATORS 1996-2008, available at http://info.worldbank.org/governance/wgi/sc_country.asp. The rule-of-law indicator “measures the extent to which agents have confidence in and abide by the rules of society, in particular the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence.” See *id.* at <http://info.worldbank.org/governance/wgi/faq.htm#2>. The governance indicators are based on data sources that reflect the perceptions of various stakeholders. See Daniel Kaufmann et al., *Governance Matters VIII: Aggregate and Individual Governance Indicators, 1996-2008* (Policy Research Working Paper 4978, The World Bank Development Research Group 2009), available at <http://econ.worldbank.org>.

184. Critiques of rule-of-law assistance recognize the importance of this shift as an empirical matter (i.e., a matter of efficacy). See, e.g., Carothers, *The Problem of Knowledge*, *supra* note 14 at 27 (noting that lawyers “who tend to dominate the operational side of rule-of-law aid . . . often have relatively formalistic views of legal change and are slow to take up the developmental, process-oriented issues that have come to inform work in other areas of socioeconomic or sociopolitical change . . .”). Recent empirical research indicates that it is not the fact that laws and institutions are transplanted, but the *way* in which they are transplanted that affects their “legality” or efficacy. See Daniel Berkowitz et al., *Economic Development, Legality, and the Transplant Effect* (draft 2001), available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/pistor-transplants.pdf> (finding that the legality of legal transplants may be enhanced when laws are adapted to local conditions or are familiar to the local population).

With this in mind, the final section of this Article outlines a general framework or approach for transnational lawyers involved in international projects to build and support liberal democratic laws and institutions.¹⁸⁵ Recent trends in legal theory inspired by pragmatist and deliberative models of democracy have sparked (or perhaps revived) an interest in the role lawyers play in legal and political processes. After discussing the relevant lessons global justice lawyers might learn from these process models, I address the challenges lawyers face as facilitators of these processes in societies that lack an established democratic political culture, as well as the tensions created by the global justice lawyer's own moral commitments to human rights and political justice.

A. Process Models: Consensus Building and Problem Solving

1. Democratic Lawmaking: Consensus-Building Processes

Drawing on Lon Fuller's conception of the lawyer as an "architect of social structure," Carrie Menkel-Meadow has argued that lawyers have a role to play as "process architects" that design and facilitate multiple processes for human problem-solving.¹⁸⁶ Building on earlier legal-process theories,¹⁸⁷ as well as Jon Elster's study of constitutional processes, she has developed a taxonomy of various processes of decisionmaking according to forms of process and "modes of discourse" (namely principled reasoning, interest-based bargaining, and emotive expression).¹⁸⁸ She describes new processes that have attempted to combine these different modes of discourse to accommodate the participation of more people and the resolution of complex claims and issues. In particular, "new forms of

185. I do not question here the privileging of the state as the site of political reform. Political theorists committed to the basic principles of ethical or moral cosmopolitanism have proposed different theories of political justice as consistent with these principles. Political cosmopolitanism therefore takes various institutional forms – ranging from something close to a world democratic government to enhanced international cooperation among nation-states. See *supra* note 52. As detailed above, core principles of political liberalism are consistent with cosmopolitan commitments to individualism and equality. See *supra* Section II.B. In its focus on liberal democratic institutions at the state level, global justice lawyering therefore adopts a political approach compatible with ethical cosmopolitanism. And although there may be good reasons to question the international community's focus on domestic institutions, I do not address them here.

186. See Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 352 n.15 (2005) (noting that the term "process architect" was "originally coined by both Lon Fuller and the Legal Process school legal theorists"); see also Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553 (2006) (exploring different kinds of problem-solving processes, including recent innovations).

187. For a historical discussion of the legal process school, see Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1394-1411 (1996).

188. See Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, *supra* note 186, at 365-67.

participatory and democratic lawmaking," often referred to as "consensus building processes," have aided in the resolution of myriad issues, ranging from environmental rules and procedures to transnational and domestic peace initiatives.¹⁸⁹ These processes are "democratic" not just in their commitment to participation, but also in the formation of procedural rules: participants negotiate the rules that are to govern deliberation and decisionmaking. And although the goal is "consensus," the nature of the outcome varies according to participants' goals (e.g. final agreement, contingent agreement, and enhanced understanding).¹⁹⁰

She argues that lawyers "may be particularly well suited to the design, management and facilitation of consensus building processes" and other emerging forms of participatory, democratic lawmaking.¹⁹¹ Lawyers have a role to play as "process experts" who facilitate the process in a number of ways; they may, for example, "coach parties with respect to negotiation skills, coordinate information sharing, manage meetings, develop agendas, record proceedings, prepare texts for negotiation, [and] assess conflicts as well as the underlying interests and needs of parties."¹⁹² Traditional legal training in seeing different sides of an argument and organizing and ordering information is, according to Menkel-Meadow, a foundation for process expertise, but lawyers also need to acquire other skills ("listening, facilitating, [and] reframing") and knowledge (e.g., theories of group behavior and human interaction), which they do not routinely develop in their legal education.¹⁹³

Several features of consensus building make it particularly promising as an ethical approach to rule-of-law assistance abroad.¹⁹⁴ First, its openness to different forms of discourse – to voices of emotion and interest in addition to reason – recognizes individuals as human beings in need, as

189. See *id.* at 359-63; see also Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63 (2002). See also THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT (Lawrence Susskind et al. eds., 1999) (explaining how to structure and implement consensus-building processes and describing consensus-building efforts in various settings).

190. Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, *supra* note 186, at 360.

191. *Id.* at 367.

192. *Id.* at 362.

193. *Id.* at 367-68. Lawyers serving as third-party neutral facilitators of consensus-building processes should also be governed by different ethics standards and professional norms than those tailored to the role of the lawyer as partisan advocate. See Menkel-Meadow, *supra* note 189, at 105-10 (offering a list of "aspirational standards and 'best practices,' which attempt to specify widely shared, if not universal, norms" as a potential foundation for an ethics code for consensus-building facilitators).

194. See McInerney, *supra* note 111, at 124-44 (arguing that rule-of-law assistance should be based on a deliberative democratic model of legal reform). For an extended application of deliberative democratic theory in the development context, see CROCKER, *supra* note 76, at 309-97. Crocker combines Sen's capability approach with tenets of deliberative democratic theory to explore the possibilities of deliberative participation in local development. Because I am focused here on the ethical role of the global justice lawyer, I do not have the space to comment on or build upon Crocker's significant contributions to deliberation in the development context. Important questions regarding the application of deliberative theories to the selection of participants, for example, are beyond the scope of this article.

embodied beings and not rational abstractions. This is consistent with the cosmopolitan notion of human dignity as, in Nussbaum's formulation, consisting of the social and physical needs of human beings in addition to their capacity for reasoning.¹⁹⁵ In this vein, process theories explicitly draw from the pragmatist tradition in American philosophy, which understands reason as connected to (and perhaps even subordinate to) human emotion and sentiment.¹⁹⁶

Another feature of consensus building that resonates with ethical cosmopolitanism's conception of dignity and moral equality is its commitment to equal participation in deliberation. The use of ground rules for deliberation encourages participants to "speak directly to each other with respect and dignity, with requests for reasons, more information, and justification for views, and in a spirit of 'appreciative inquiry' rather than adversarial besting or winning."¹⁹⁷ In creating the conditions for respectful dialogue rather than contentious argument, a consensus-building approach honors the dignity of participants by treating their personal experiences and commitments as significant and by encouraging participants to work toward understanding, if not agreement. Consistent with a cosmopolitan ethics that recognizes and respects our differences, the lawyer as process facilitator does not advocate a particular outcome; the partisanship that underlies the conventional role of the lawyer gives way to the neutrality more commonly associated with mediation.¹⁹⁸

This neutrality also extends to the lawyer's identification with the participants involved in the process. In contrast, again, with the conventional model, the lawyer does not have a client and does not therefore identify with the interests of any one individual. Rule-of-law and human-rights lawyering is not client-centered. But unlike the practices of mediation, it is not entirely "neutral" because it identifies with a cause. In Luban's terms, it is "morally activist" lawyering in that, as we have seen,

195. NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 52, at 159-60.

196. Dmitri Shalin observes that the "embodied rationalism" of the pragmatists "reconnects reason to the rest of the human body," a connection evident in John Dewey's definition of reason: "'Reason' as a noun . . . signifies the happy cooperation of a multitude of dispositions, such as sympathy, curiosity, exploration, experimentation, frankness, pursuit – to follow things through – circumspection, to look about at the context [sic], etc., etc.'" Dmitri N. Shalin, *Legal Pragmatism, an Ideal Speech Situation, and the Fully Embodied Democratic Process*, 5 NEV. L.J. 433, 442-43 (2004-2005) (quoting JOHN DEWEY, *HUMAN NATURE AND CONDUCT: AN INTRODUCTION TO SOCIAL PSYCHOLOGY* 196 (Modern Library ed., Random House 1950) (1922)).

197. Menkel-Meadow, *Peace and Justice*, *supra* note 186, at 573.

198. Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, *supra* note 186, at 368. Rule-of-law institutions are therefore the "background institutions" in William Simon's legal pragmatism. See William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 184-86 (2004). They facilitate deliberation regarding rule-of-law reforms by providing financial and technical support, ensuring equal participation, and assisting in implementing the solutions. See *id.* ("The role of [background institutions] is not to impose or divine an outcome, but to induce and assist the parties to negotiate one and to assist in its implementation.").

lawyers adopt the ends of those they serve as their own.¹⁹⁹ Moreover, in seeking to further rule-of-law ideals and human rights, global justice lawyers are clearly motivated by particular values, which they necessarily bring to the table. Although a cosmopolitan ethic requires that lawyers not impose a particular legal means to advancing these values, it recognizes – and is in fact grounded in – a moral commitment to creating the conditions necessary for lives worthy of human dignity.²⁰⁰ For global justice lawyers, this includes the laws and institutions that create the conditions for political justice. As I discuss below, in helping build consensus regarding these laws and institutions, lawyers too have a voice.

2. Problem Solving Through Experimentation and Learning

Process approaches, such as those involved in consensus building, are tied to their contexts and inherently pluralistic and creative; no one approach will serve all social needs. In this too they draw from the pragmatist tradition in American philosophy and in particular from John Dewey's understanding of democracy "as a process of collaborative inquiry and learning."²⁰¹ Pragmatist approaches are therefore problem-solving approaches, which take place in context, rather than the abstract, and recognize the need for ongoing revision based on learning and experimentation.²⁰² Every consensus, solution, or agreement is contingent in that it is subject to revision based on the learning process that occurs in implementation.²⁰³ For example, in the context of rule-of-law assistance, participants would attempt to reach consensus regarding not only the legal rules and institutions that further the rule of law, but also the means by which to measure the performance of these rules and institutions. The performance measures are not simple binaries, such as compliance or noncompliance, but are designed to produce the relevant details necessary

199. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 91, at 160. Luban focuses on the implications of moral activism for the lawyer-client relationship, but I think the concept is useful in illustrating the transnational lawyer's personal identification with the means and ends of global justice reform.

200. Orly Lobel has noted the tendency in new governance scholarship (of which legal pragmatism is a part) "to replicate weaknesses of particular versions of the American pragmatist tradition." Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 453 (2004). These weaknesses "include an aversion to strong expressions of shared public values and to normative claims of morality." *Id.* Katherine Kruse has offered a similar critique in response to Menkel-Meadow's approach to consensus building, arguing that these processes should be based on a normative theory of justice "that addresses the relationship between procedure and justice ideals." Katherine R. Kruse, *Learning from Practice: What ADR Needs from a Theory of Justice*, 5 NEV. L.J. 389, 389 (2004-2005).

201. Simon, *supra* note 198, at 131. See also Menkel-Meadow, *Peace and Justice*, *supra* note 186, at 563-64.

202. See Simon, *supra* note 198, at 187-89.

203. See *id.*

for learning and future revisions.²⁰⁴

In his influential article on legal pragmatism, William Simon describes this process of learning in implementation as a “rolling-rule regime.”²⁰⁵ In the U.S. context, he argues that the role of central state and federal institutions is to produce common performance measures that allow for meaningful comparisons across local cases.²⁰⁶ Standardized tests in education are an example. Such standardized measures are, of course, not possible or desirable as ways to monitor the implementation of vague concepts, such as the rule of law and human rights, across societies. But the ideas of local experimentation and learning from comparison are useful nonetheless.

In the human rights context, for example, global justice lawyers who are collaborating with human rights activists in various societies could facilitate learning from comparison by disseminating information about human rights activism elsewhere. For instance, rather than privileging a legal-liberal model of reform through public interest litigation, lawyers could facilitate a process of global learning and experimentation by investigating the strategies and tools of social change in various contexts and disseminating information about localized practices to activists in other settings.²⁰⁷ This approach would acknowledge that legal-liberal strategies rooted in the U.S. experience are not the only options and treat local activists with respect, as equal moral agents entitled to choose how to proceed.

B. Deliberative Transitions: Facilitating the Discussion of Political Values and Institutional Alternatives

As procedural theories of deliberation, process theories, such as consensus building, draw from and contribute to political theories of deliberative democracy. As I explain below, these political theories assume the presence of a democratic political culture, making them difficult to apply in societies transitioning to liberal democracy where such a culture has yet to develop. In these contexts, the goal of the global justice lawyer is

204. *See id.*

205. *Id.* at 187.

206. *Id.* at 190.

207. In a letter widely distributed in 2003, BAOBAB for Women’s Rights, a Nigerian organization, asked the international human rights community to stop the protest campaign on behalf of a woman sentenced to be stoned to death for adultery. The letter explained that the “international protest letter campaign is not necessarily the most effective strategy,” given that it had provoked the defiance of local leaders and could endanger victims and activists. *See* Letter from BAOBAB for Women’s Rights to International Human Rights Community (May 2003), available at <http://www.wluml.org/node/1025> (regarding the case of Amina Lawal). In addressing how activists outside Nigeria might help, BAOBAB specifically noted the value of information regarding others’ experiences and strategies: “Experience and strategy-sharing by other groups with similar experience in supporting victims through an appeals process and campaign would also be most welcome.” *Id.*

not necessarily to help participants reach agreement on all questions of political justice, but rather to facilitate dialogue about fundamental political values in order to help participants identify shared political principles and move toward the creation of a democratic political culture. Furthermore, even when public deliberation is based on shared democratic principles, these principles do not necessarily resolve disagreements as to the choice of laws and institutions. Again, the global justice lawyer's objective is not to facilitate complete agreement; because comprehensive agreement is unlikely, the goal should be to enable comparative assessments of what laws and institutions are more or less just.

1. The Conditions that Support Deliberative Democracy

Although many versions of the deliberative approach to democratic politics exist, they all recognize the importance of public debate and political participation as a foundation for contemporary democracy. Some echo Rousseau and classical republican ideals in emphasizing how citizens are transformed by public debate into ethical members of society who actually care about the common good and are committed to the collective resolution of their differences.²⁰⁸ Others assume that individuals are reasonable beings open to reaching consensus through rational, public debate.²⁰⁹ But they all share a commitment to deliberation in the public sphere as a means of negotiating individual differences often characterized in terms of Rawls's burdens of judgment.

Recognizing that political society cannot rest on one substantive view of the good (i.e., given the burdens of judgment), these theories of liberal democratic justice are largely procedural, focusing on public debate rather than specific outcomes. Provided the conditions for public deliberation exist, the outcome – the laws produced by citizen deliberation – will be legitimate. In other words, the democratic legitimacy of law is tied to the lawmaking process; laws become legitimate, in Habermas's words, "as laws of freedom in the process,"²¹⁰ or, in Rawls's words, when directed by the idea of public reason, the "politically reasonable addressed to citizens as citizens."²¹¹ In short, although deliberative democracy does not

208. See, e.g., Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 67, 69 (James Bohman & William Rehg eds., 1997) ("When properly conducted . . . democratic politics involves public deliberation focused on the common good . . . , and shapes the identity and interests of citizens in ways that contribute to the formation of a public conception of common good.").

209. See, e.g., IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 43 (2000) (challenging the argument that the objective of public dialogue should be the definition of a common good). For a discussion of both approaches, see Jon Elster, *The Market and the Forum: Three Varieties of Political Theory*, in *DELIBERATIVE DEMOCRACY*, *supra* note 208, at 3.

210. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 32 (William Rehg trans., 1996).

211. JOHN RAWLS, *The Idea of Public Reason Revisited*, in *THE LAW OF PEOPLES* 129, 132 (1999) [hereinafter RAWLS, *Public Reason Revisited*].

guarantee a common good, it does promote it by facilitating consensus in a diverse society.²¹²

Process theories of problem solving and consensus building clearly share a deliberative vision of democracy.²¹³ The role of the lawyer is not to secure a particular outcome, but to help create ideal conditions for deliberation.²¹⁴ For example, "[t]he underlying conception [of consensus-building processes] is Habermasian – to create 'ideal speech conditions' in which citizens or interested parties communicate directly with each other and with decision makers to participate in the making of rules or decisions that will affect them."²¹⁵ In negotiating toward consensus, deliberation is associated with "openness and reason giving," where openness means a willingness to participate in discussion and to consider others' views and reason giving means a commitment to stating personal views "in terms of general or public values."²¹⁶

Because these approaches to lawyering are based on deliberative democratic theory, they require – as deliberative democratic theories do – the existence of an underlying democratic political culture. For example, Habermas acknowledges that a liberal political culture is necessary for the formation of democratic institutions.²¹⁷ Rawls also explicitly acknowledges the importance of political culture.²¹⁸ He describes the content of public reason, the medium of deliberation, as consisting of a "family of [liberal] political conceptions[of justice]."²¹⁹ And the content of these political conceptions of justice is "expressed in terms of certain fundamental ideas seen as implicit in the public *political culture* of a democratic society."²²⁰

212. See CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 242-43 (2001).

213. Menkel-Meadow explicitly makes this connection, explaining it is her "hope to marry . . . work on deliberative democracy to conflict resolution theory and practice so that we might seek peace and justice . . . simultaneously." Menkel-Meadow, *Peace and Justice*, *supra* note 171, at 558. But as Amy Cohen has noted, in comparison to other scholars, Menkel-Meadow does not completely reject interest-based models of conflict resolution because she continues to acknowledge the importance of bargaining and interests in addition to deliberation and reasoned argument. Amy J. Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 *FORDHAM L. REV.* 1143, 1167 (2009).

214. In seeking limited consensus on particular issues, deliberative models of lawyering resemble Cass Sunstein's notion of "incompletely theorized agreements," in which people can reach consensus on issues without completely agreeing as to why. See SUNSTEIN, *supra* note 209, at 49-66.

215. Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, *supra* note 186, at 359-60.

216. Simon, *supra* note 198, at 181-82.

217. See HABERMAS, *supra* note 210, at 130-31; Jürgen Habermas, *Popular Sovereignty as Procedure*, in *DELIBERATIVE DEMOCRACY*, *supra* note 208, at 36-37, 59.

218. JOHN RAWLS, *THE LAW OF PEOPLES* 108-10 (1999) (emphasizing the role of political culture in the development of illiberal "burdened societies").

219. RAWLS, *Public Reason Revisited*, *supra* note 211, at 141.

220. RAWLS, *POLITICAL LIBERALISM*, *supra* note 33, at 13 (emphasis added); see also *id.* at 14 ("In a democratic society there is a tradition of democratic thought, the content of which is at least familiar and intelligible to the educated common sense of citizens generally. Society's main institutions, and their accepted forms of interpretation, are seen as a fund of implicitly

The reason the underlying social conditions in deliberative theories are important is because theories of deliberative democracy depend on liberal democratic principles as the *conditions* for deliberation. The public reason that furthers Rawls's political liberalism actually incorporates a rather long list of liberal principles, such as religious liberty and fairness in opportunity.²²¹ Indeed, Rawls acknowledges that his vision of public deliberation is substantive, not merely procedural.²²² In contrast, other theories specify rather minimal procedural conditions, such as, for example, that deliberating citizens must be free and equal.²²³ At a minimum, deliberative theories generally recognize that "[d]eliberative democracy limits the reasons citizens may give in supporting their political opinions to reasons consistent with their seeing other citizens as equals."²²⁴ But as Michael Walzer has argued, the "minimum morality prescribed by these theories is simply abstracted from, and not very far from, contemporary democratic culture."²²⁵ Furthermore, even in a democratic society, these abstractions are subject to critique because they are ideals, not social realities.²²⁶

The point is that theories of deliberative democracy, as well as deliberative process theories of consensus building and problem solving, assume the very conditions that may not be present in some societies. Where conditions for democratic deliberation are present, lawyers may have a role to play as neutral facilitators of public deliberation and collaboration and as problem-solvers promoting localized, experimental solutions. But in the absence of a democratic culture, deliberative models may be anything but pragmatic; indeed, they may accomplish very little. The deliberation that takes place as a society seeks to transition to liberal democratic government, for example, cannot necessarily draw upon this minimum procedural morality, even if a critical mass of citizens is committed to political and social change. Particularly in post-conflict situations, public debate is not likely to proceed on equal and fair terms as a political culture that enables deliberation will likely be far from developed.

Consequently, lawyers involved in these processes may need to do more than *neutrally* mediate among interests and views to facilitate meaningful deliberation. But as we have seen, the imposition of particular

shared ideas and principles.").

221. RAWLS, *Public Reason Revisited*, *supra* note 211, at 141. Public reason applies to discussions of constitutional essentials and basic justice, including the basic social structure and therefore matters of basic economic and social justice. *See* RAWLS, *POLITICAL LIBERALISM*, *supra* note 33, at 227-30.

222. RAWLS, *Public Reason Revisited*, *supra* note 211, at 141 n.26.

223. *See, e.g.*, HABERMAS, *supra* note 210, at 111-19.

224. RAWLS, *Public Reason Revisited*, *supra* note 211, at 139 n.21.

225. WALZER, *supra* note 149, at 13.

226. *Id.* Some deliberative theories are subject to critique by feminist theorists and others on the ground that the norms of deliberation exclude some forms of expression and do not recognize social inequalities. *See, e.g.*, YOUNG, *supra* note 209.

views rooted in “thick” moralities and lawyers’ own experiences is both ethically and practically problematic.²²⁷ To ensure an ethical approach, the global justice lawyer must therefore confront and negotiate the tension inherent in her role as a facilitator with normative commitments. The final section of this article explores the challenges inherent in this role and offers a theoretical framework that seeks to reconcile the tensions created by the lawyer’s commitments to furthering global justice and her ethical obligations to refrain from violating the dignity of others.

2. Toward (Some) Shared Political Principles and Limited Agreement

i. Facilitating Dialogue: Public Reason and the Wide View of Public Political Culture

As we have seen, given the fact of pluralism in the form of conflicting comprehensive religious and nonreligious doctrines, people do not necessarily share a common theory of the good. Moreover, some comprehensive views will not be liberal in themselves (e.g., religious doctrines that dictate certain choices based on gender). How is it that people with such views can commit themselves to a legal regime that does not reflect their comprehensive doctrine – the one true way of life as they see it? Because this is the question posed by Rawls and at the heart of political liberalism, I begin with Rawls’s response, particularly his explanation of the role of public reason in legitimating law and the place of comprehensive views in public political discourse. According to Rawls, in liberal democratic societies, people *ideally* come to see their comprehensive views as compatible with some set of liberal political principles, thereby accepting them as matters of belief and not simply interest or convenience.²²⁸

According to Rawls’s political liberalism, consensus in a liberal democracy regarding constitutional essentials and the basic structure of society rests on a “class [or family] of liberal conceptions” of justice that are supported by reasonable, although conflicting, comprehensive doctrines (both religious and nonreligious), which are not necessarily liberal.²²⁹ As

227. I should add that, even if lawyers remain “neutral” in advocating a particular process or form of conflict resolution, they still risk imposing substantive views and ideologies on others. In her work on the anthropology of law, Laura Nader argues that the export of alternative dispute resolution internationally furthers a “harmony ideology” that is, itself, a tool of power. See LAURA NADER, *THE LIFE OF THE LAW: ANTHROPOLOGICAL PROJECTS* 149-59 (2002). Conflict-resolution processes are, of course, embedded in particular sociocultural contexts. The construction of a specific lawmaking process therefore requires collaboration with local actors and a commitment to understanding local social norms and power dynamics. How development actors should approach particular lawmaking and advocacy projects will vary from place to place and is outside the scope of this article.

228. RAWLS, *POLITICAL LIBERALISM*, *supra* note 33, at 147.

229. *Id.* at 164.

described by Rawls, public reason in support of political liberalism is “a way of reasoning about political values shared by free and equal citizens that does not trespass on citizens’ comprehensive doctrines.”²³⁰ In essence, public reason is a mode of political discourse, in which people justify political decisions to one another in terms of shared political values rather than their comprehensive views.²³¹ Limiting political discourse in this way facilitates consensus, or agreement, among people who hold conflicting views.

But for this mode of reasoning to take hold, people must first accept that their comprehensive views can support basic liberal principles, such as the basic rights and liberties found in liberal democratic constitutions.²³² In societies transitioning to liberal democracy after prolonged conflict or authoritarian rule, a history and culture that support basic liberties and rights may not be established. For people to endorse democracy and basic liberties, they must first understand them as compatible with their own comprehensive views.

In order to move toward liberal democracy, people should therefore be encouraged to discuss their comprehensive views in relation to liberal political values and principles. To do so acknowledges, in Rawls’s words, “that the roots of democratic citizens’ allegiance to their political conceptions lie in their respective comprehensive doctrines, both religious and nonreligious.”²³³ This is Rawls’s “wide view of public political culture,” a view that permits public dialogue based on comprehensive views with the understanding that individuals will eventually justify their positions in a mode consistent with public reason.²³⁴ If and when this shift occurs, the “commitment to constitutional democracy is publicly manifested.”²³⁵ In other words, as people begin to use their comprehensive doctrines to support shared political principles, their commitment to public reason grows stronger and the conditions for deliberative democracy are more likely to take hold.

To encourage acceptance of shared principles, practitioners facilitating lawmaking processes should therefore focus on creating the *conditions* for deliberative democracy by encouraging public dialogue consistent with Rawls’s “wide view” of political culture. That is, they should facilitate

230. Rawls, *Public Reason Revisited*, *supra* note 211, at 179-80.

231. *Id.* at 136. Rawls’s idea of public reason applies only to constitutional essentials and the basic structure of society, the subject, of course, of constitutional-making and much rule-of-law assistance.

232. *See id.* at 141.

233. *Id.* at 153.

234. *Id.* at 152.

235. *Id.* at 154. I emphasize *if* to highlight the fine line between facilitating discussion of political values and appealing to the values of a particular political culture. The latter is a practice that reflects what Habermas calls “hegemonic liberalism.” Habermas, *The Kantian Project*, *supra* note 52, at 216-18 (nothing further than “[t]he citizens of one political community cannot anticipate the outcome of the interpretation and application of supposedly universal values and principles accomplished by the citizens of another political community from *their* local perspective and in *their* own cultural context.”).

dialogue that examines if and how liberal political values and principles can find support in the comprehensive doctrines shared by many in the society. Of course, given the global justice lawyer's cosmopolitan commitments, the goal of dialogue is understanding, not agreement. But because dialogue enhances understanding, it ideally facilitates further discussion, which in turn creates openings for agreement regarding political principles.

ii. Real-World Agreements: Comparing the Alternatives

The openings created by public dialogue – even dialogue consistent with public reason as understood by Rawls – do not necessarily lead to complete agreement regarding all questions of political justice. In addition, even if people agree on some set of shared political principles, this does not guarantee that they will reach agreement on the means to implement these principles, namely particular laws and institutions. Given these obstacles to agreement, how then should global justice lawyers understand the goals or objectives of the lawmaking process? One response to this question is that facilitators of these processes should not expect more than partial agreement, that is, agreement on particular laws and institutions given the actual choices available.

In his most recent contribution to political theory, Amartya Sen argues for a comparative approach to questions of justice. He argues that people cannot and need not agree on which social arrangements and institutions are perfectly just.²³⁶ Rather, as people engage in public reasoning, the congruence of impartial reasons can result in the partial ordering of comparative institutional choices. Sen explains, by way of example, that if “we can place an alternative *x* above both *y* and *z*, without being able to rank *y* and *z* against each other, we can comfortably go for *x*, without having to resolve the dispute between *y* and *z*.”²³⁷ A concrete historical example he draws upon is the argument against slavery, an argument that ranks a world without slavery above a world with one, but does not speak to the comparative justice of all institutions: “Slavery as an institution can be assessed without evaluating – with the same definitiveness – all the other institutional choices the world faces. We do not live in an ‘all or

236. SEN, *THE IDEA OF JUSTICE*, *supra* note 50, at 8-18. Sen's theory responds to and critiques contractarian theories of justice and in particular Rawls's theory of justice as fairness. These theories falter, according to Sen, in their attempts to identify a “transcendental” institutional solution to questions of justice. *Id.* at 9-10. My discussion of public reason draws from Rawls's later work and does not and need not engage his theory of justice as fairness. Indeed, Sen recognizes that, in his later work, Rawls acknowledged that public reason could be supported by a *family* of competing conceptions of justice – of which justice as fairness is only one (although he claims that Rawls does not explain how institutions could be chosen from these competing conceptions). *Id.* at 11-12. In addressing ethical questions regarding global justice lawyering, I need not endorse one liberal theory of political justice. That said, Sen's underlying ethical commitments (to global justice and human capabilities) are clearly cosmopolitan and therefore resonate with the ethical commitments of global justice lawyering.

237. *Id.* at 399.

nothing' world."²³⁸

Sen's approach to justice emphasizes that "[j]ustice-enhancing changes or reforms demand comparative assessments, not simply an immaculate identification of 'the just society' (or 'the just institutions')."²³⁹ An approach that provides for comparative assessments among extant institutional alternatives allows for real-world consensus on some questions by recognizing the reality of reasoned disagreement and the necessity of choosing among feasible, as opposed to theoretical, alternatives. As the facilitator of a process of institutional change, the global justice lawyer's objective is not to seek complete agreement on a limited set of principles that would dictate the laws and institutions of a society, but to further public discussion of the comparative justice of institutional alternatives so that participants may reach reasoned agreement on some matters.

iii. The Global Justice Lawyer as Impartial Spectator

Diverse interests, biases, and power asymmetries among participants may, however, lead to results that conflict with the global justice lawyer's own values and ethical commitments to human-rights norms and political justice. For example, a deliberative process that leads group members to endorse a regime that denies women the equal protection of the laws would be inconsistent with the ethical commitments of the lawyer. To ask the lawyer to remain *neutral* in these circumstances would require the lawyer to violate the very ethical commitments that motivate and justify her participation in the first place. But the same could be said if she insists that the group endorse her preferred laws and institutions even though they do not reflect a shared value judgment. In other words, both the *process* and the *outcome* matter to the global justice lawyer. In shifting the focus from positive laws to normative lawmaking, the global justice lawyer is not simply a neutral bystander or even a detached mediator who helps participants reach a mutually acceptable agreement; the lawyer's engagements abroad are shaped and justified by her commitments to cosmopolitan justice.

How then should the global justice lawyer negotiate this tension? Again, Sen's approach to questions of justice is suggestive because his theory recognizes the need for engaging views beyond those held by members of a particular state or society. He argues that in making judgments regarding justice, the views of those outside a given society have "enlightenment relevance."²⁴⁰ That is, although a "person's voice may be relevant because he or she is a member of the group that is involved in the negotiated contract for a particular polity . . . it may also be relevant because of the enlightenment and the broadening of perspectives that such

238. *Id.* at 398.

239. *Id.* at 401.

240. *Id.* at 108-09.

a voice coming from outside the contracting parties might provide.”²⁴¹ The relevance and importance of such a voice derive from its capacity to facilitate critical scrutiny of local conventions that appear natural and encourage public dialogue concerning “local and possibly parochial values.”²⁴² Drawing on Adam Smith’s device of the “impartial spectator,” Sen emphasizes the need for group members to scrutinize local conventions by “endeavouring to view them with the eyes of other people, or as other people are likely to view them.”²⁴³

The device of the impartial spectator, as Sen develops it, illustrates one way in which global justice lawyers may contribute to processes of deliberation abroad. In fulfilling the role of the impartial spectator, the global justice lawyer may weaken barriers created by people’s “positional limitations.”²⁴⁴ As Sen explains, “[t]he reach of public reasoning may be limited in practice by the way people read the world in which they live.”²⁴⁵ In a society that has long treated women as subordinate to men, for example, “the cultural norm of focusing on some alleged features of women’s supposed inferiority may be so strong that it may require considerable independence of mind to interpret those features differently.”²⁴⁶ In such a society, the fact that women do not, in fact, hold positions of power or pursue advanced training or education might be cited in support of the conclusion that women are somehow unable to achieve these things.²⁴⁷ As Sen explains, the impartial spectator can provide a different perspective by commenting on the achievements of women in societies where they have more opportunities, thereby facilitating a different interpretation of observed reality – namely that, given the necessary opportunities, women perform just as well as men in these areas.²⁴⁸ As impartial spectators, global justice lawyers may comment on the experiences of women in societies that have recognized political principles of equality and nondiscrimination and encourage participants to make comparative assessments of laws and institutions based on these principles. Although lawyers may not ethically impose a particular outcome, they may share their knowledge of the comparative possibilities and, as impartial spectators, offer their perspectives on the relative justice of various laws and institutions.

In short, global justice lawyers have a unique role to play in public reasoning and deliberation regarding laws and institutions. Rather than serving as technical legal advisers, counseling the uncritical adoption of a certain set of laws and institutions, global justice lawyers ideally facilitate and participate in *processes* of lawmaking and institutional change. As these

241. *Id.* at 131.

242. *Id.* at 128.

243. *Id.* at 125.

244. *Id.* at 169.

245. *Id.* at 168.

246. *Id.* at 162.

247. *Id.*

248. *Id.*

lawyers assist in efforts to establish the conditions for liberal democracy around the world, they support processes of lawmaking that are designed to advance values and ideals consistent with cosmopolitan commitments to justice. Although rule-of-law ideals and human rights are not "the universal credo of a global society," they can serve as a "language that creates the basis for deliberation."²⁴⁹ They are, in Michael Ignatieff's words, "the shared vocabulary from which our arguments can begin, and the bare human minimum from which differing ideas of human flourishing can take root."²⁵⁰ The global justice lawyer might modify this slightly by characterizing these ideals as a vocabulary toward which public dialogue aspires as it seeks to assess the comparative justice of various laws and institutions.

VI. CONCLUSION

Long before the global justice lawyering of today, Lon Fuller called upon lawyers to be "architect[s] of social structure[s]."²⁵¹ He regretted what he understood as a move in the legal profession toward the "technical rationalization" of proposed rules and decisions "within the framework of accepted [legal] doctrine," and argued instead that lawyers should be concerned with the principles, or the "order-creating process[es]," that produce social institutions.²⁵² Global justice lawyering is motivated by a faith in the "order-creating processes" that ensure political justice, and yet, it struggles to transcend tendencies toward "technical rationalization" in that lawyers too often understand legal and political reform "within the framework of [their] accepted doctrine."²⁵³ But to further political justice abroad, lawyers must approach their work not as legal positivists, understanding law as a prepackaged product, but as facilitators of processes of lawmaking and social change. In doing so, they must always acknowledge that the social order they seek to influence is not their own and that their engagement therefore requires a commitment to conversation and learning oriented toward the goal of understanding, rather than agreement. Consistent with their cosmopolitan commitments, global justice lawyers therefore serve not as the ultimate architects of social structure, but as advocates of political justice and social change, understanding that although they act on shared ideals and values that inspire global solidarity, they cannot dictate the specific laws and institutions that give these shared values political expression.

249. IGNATIEFF, *supra* note 180, at 95; see also APPIAH, *ETHICS OF IDENTITY*, *supra* note 52, at 264 (following Ignatieff in endorsing human rights as a "language for deliberation" that is based in "conversation, not mere conversion").

250. IGNATIEFF, *supra* note 180, at 95.

251. LON. L. FULLER, *The Lawyer as an Architect of Social Structures*, in *THE PRINCIPLES OF SOCIAL ORDER* 264, 264 (Kenneth I. Winston ed., 1981).

252. *Id.* at 269.

253. *Id.*