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978-1-107-01328-5 - Global Justice and International Economic Law: Opportunities and Prospects

Edited by Chios Carmody, Frank J. Garcia and John Linarelli

Excerpt

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## Introduction

Chios Carmody, Frank J. Garcia, and John Linarelli

Global justice, as both an idea and as a practice followed by countries and institutions, has faced many obstacles in its realization. Consider the difficulties a cosmopolitan might have in Washington, D.C. or any other capital city. A suggestion to anyone in the Washington, D.C. trade policy elite that the world should be governed by cosmopolitan notions of global justice in which states should not matter would be met with a blank stare, but only if the official were being polite. States matter in practical affairs. Theories that put states in tension, such as cosmopolitan theories of global justice, are difficult for states to accept. In the nationalist contexts in which officials of national governments perform their duties and in which people live their lives, justice is understood as a duty of the state, if it is understood as a duty at all. With states at the center of action on matters of justice, domestic institutions within a state provide justice to the state's citizens, and national borders determine who gets justice and who does not. Justice is political and political systems are domestic.

After World War II, the progression of international law into the area of human rights helped spread the notion that human rights are properly the subject of international law and that states may be called to account for failing to respect human rights. Still, the central case of human rights in international law is that states owe human rights to their own citizens.<sup>1</sup> International human

<sup>1</sup> This is changing as the connections between international human rights law and international humanitarian law are becoming less distinct. For example, human rights law is increasingly applied to military conduct in armed conflicts. In other words, states have a duty to respect the human rights of citizens of other states when their military is employed in other states. In addition, states likely must apply principles of fundamental human rights in general to noncitizens within their jurisdiction. See Mark Osiel, *The End of Reciprocity: Terror, Torture, and the Law of War* (New York: Cambridge University Press, 2009); Paul Eden and Matthew Happold, "Symposium: The Relationship between International Humanitarian Law and International Human Rights Law," *Journal of Conflict and Security Law* 14(3) (2009): 441–447.

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rights law depends on the notion that states are the primary providers and enforcers of human rights. If the source of human rights is something distinct from positive law, such as the moral equality of all persons or the rights that persons possess in a state of nature apart from what any institution might grant, then human rights just might be cosmopolitan, but their dependence on national political communities makes their practical realization without states and domestic state law problematic. Regardless of one's views on the justification for human rights, positive law sources for human rights seem to be necessary to avoid Onora O'Neill's criticism that human rights are simply manifestos.<sup>2</sup>

The ideas that have influenced international law do not come from normative theories about justice, and certainly not from cosmopolitanism. International relations realism, Hobbesian notions of state sovereignty and the state of nature, and Grotian natural law accounts of international law have all had significantly more traction in influencing international law and international relations than theories of global justice.<sup>3</sup> John Rawls, the most prominent political and moral philosopher in our contemporary period, rejected the notion of global justice. Instead, his "Law of Peoples" set forth a limited set of basic rights and duties for well-ordered societies at the international level, distinct from his full-blown account of justice for the basic structure of domestic society.<sup>4</sup> In sum, it is sovereign equality of states, not the moral equality of persons, that has informed international law. Sovereignty is a political and not a moral concept.<sup>5</sup> It is conceivable, then, that international law might be fundamentally unjust. Add to this the unexamined assumption by many international economic lawyers that progressive trade liberalization based on Ricardian comparative advantage is the basic operating *grundnorm* for the World Trade Organization (WTO) legal system, and the results are predictable. The normativity of

<sup>2</sup> O'Neill's worry is about "putting rights first" in any question of global justice. Her view is that the discussion should start with obligations:

The most questionable effect of putting rights first is that those rights for which no allocation of obligations has been institutionalized may not be taken seriously. When obligations are unallocated it is indeed right that they should be met, but nobody can have an effective right – an enforceable, claimable or waiveable right – to their being met. Such abstract rights are not effective entitlements. If the claimants of supposed "rights" to food or development cannot find where to lodge their claims, these are empty "manifesto" rights.

See Onora O'Neill, *Bounds of Justice* (Cambridge: Cambridge University Press, 2000), 126.

<sup>3</sup> Thomas Christiano and John Christman (eds.), *Contemporary Debates in Political Philosophy* (West Sussex: Wiley-Blackwell, 2009), 17.

<sup>4</sup> John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).

<sup>5</sup> David Luban, "Just War and Human Rights," *Philosophy and Public Affairs* 9(2) (1980): 160–181.

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international law operates from a core set of assumptions in need of serious reexamination.

This book deals with two fields that we believe are in great need of closer contact with one another, for the good of these fields but also for a more just world. One is international law, in particular the international law of economic relations, which needs to have more contact with theories of justice. The other is political theory on the problem of global justice, which needs to have more contact with international law and the design of actual institutions. Work is needed in two distinct domains, international law and practical philosophy. In his Storrs Lecture at Yale Law School in October 2004, Thomas Nagel started with reflections on the state of moral and political theory: “[C]oncepts and theories of global justice are in the early stages of formation, and it is not clear what the main questions are, let alone the main possible answers.”<sup>6</sup> He also said that he believed “that the need for workable ideas about the global and institutional case presents political theory with its most important task, and even perhaps with the opportunity to make a practical contribution in the long run, though perhaps only the very long run.”<sup>7</sup> Nagel’s arguments easily extend as a critique of international law.

Let us first consider international law and how it might more concretely connect with theories of justice. It is by now a truism to say that the move in legal scholarship, at least in North America, has been toward interdisciplinary inquiry in the postlegal realist period of the past fifty years.<sup>8</sup> Legal scholarship, however, tends to lag behind in bringing the innovations of other disciplines to bear on the law.<sup>9</sup> International law scholarship lags even further, with most of

<sup>6</sup> Thomas Nagel, “The Problem of Global Justice,” *Philosophy and Public Affairs* 33 (2005): 113–147, esp. 113.

<sup>7</sup> Ibid.

<sup>8</sup> The interdisciplinary turn in North American legal scholarship has prompted the claim by Judge Richard Posner that the law is no longer an “autonomous discipline.” See Richard A. Posner, “The Decline of Law as an Autonomous Discipline: 1962–1987,” *Harvard Law Review* 100 (1987): 761–780.

<sup>9</sup> Francis Mootz describes the relationship between legal scholarship and other disciplines as follows:

In recent years, trends in legal theory generally have followed the intellectual movements within English departments and have lagged even further behind the developments emerging from philosophy departments. Although legal theorists sometimes resemble pathological necrophiliacs – rushing to embrace the latest Paris fashion without stopping to engage in careful, independent, and critical thinking – it would be incorrect to conclude that the interdisciplinary character of contemporary legal scholarship is entirely detrimental. Admittedly, legal theorists have, in the past, joined intractable debates that already had worn out their contestants in other disciplines, arriving too late to garner any intellectual energy. However, legal theorists have also brought new life to ongoing debates by culling the careful thinking and research that precedes them in other disciplines and

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the interdisciplinary work being done with international relations theory.<sup>10</sup> To be fair, there has been a rise in law and economics accounts of international law, some of which have been the subject of significant controversy.<sup>11</sup> We are, however, only at the beginning of thinking how moral and political theory might be brought to bear on international law.<sup>12</sup>

then advancing the debate within a new context. It would be as senseless as it is impossible to try to insulate legal theory from broader intellectual currents. Jurisprudence is not just an analytical tool for assessing the legal system; it is a critical gesture lodged within the concrete setting of legal practice that draws from and contributes to developments of our various political, ethical, epistemological, and ontological traditions.

Francis J. Mootz III, "Legal Classics: After Deconstructing the Legal Canon," *North Carolina Law Review* 72 (1994): 977–1038.

<sup>10</sup> In an empirical study of international legal scholarship, Marci Hoffman and Katherine Topulos found the following:

Among international legal academics, at least those trained in American law schools, it is increasingly a truism that "we're all interdisciplinary scholars now." That is, most international lawyers would accept the claim that international law is not an autonomous discipline; rather, international law is increasingly understood as a discipline that is itself interdisciplinary. Our data shows a growing interest in interdisciplinary research by international law scholars, as measured by the increased use of terms prevalent in other disciplines (such as economics, political science, and most especially international relations) in the international law literature. However, these measures indicate international law scholarship still lags behind legal scholarship generally in its use of interdisciplinary methodologies.

See Marci Hoffman and Katherine Topulos, "Tyranny of the Available: Under-Represented Topics, Approaches, and Viewpoints," *Syracuse Journal of International Law and Commerce* 35 (2008): 175–200, esp. 180.

<sup>11</sup> Joel P. Trachtman, *The Economic Structure of International Law* (Cambridge, MA: Harvard University Press, 2009); Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford: Oxford University Press, 2009). Works that have generated controversy include Eric A. Posner, *The Perils of Global Legalism* (Chicago: University of Chicago Press, 2009), and Eric A. Posner and Jack L. Goldsmith, *The Limits of International Law* (Oxford: Oxford University Press, 2006).

<sup>12</sup> In the late 1990s, the American Society of International Law held a Symposium on Method in International Law. See Steven R. Ratner and Anne-Marie Slaughter, "Appraising the Methods of International Law: A Prospectus for Readers," *American Journal of International Law* 93 (1999): 291. There has been considerable progress in interdisciplinary inquiry about international law since that symposium. Notably, moral and political theory in general and theories of justice in particular apparently were not covered in the symposium. Most of the focus of interdisciplinary inquiry in international law relies on international relations theory. See Jeffrey L. Dunoff, "Why Constitutionalism Now? Text, Context and the Historical Contingency of Ideas," *Journal of International Law and International Relations* 1 (2005): 191 (on the interdisciplinary turn of international law and international relations theory scholarship), and Anne Marie Slaughter, "International Law and International Relations Theory: A Dual Agenda," *American Journal of International Law* 87 (1993): 205. Recently there has been a turn toward the approaches of law and economics.

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This presents something of a paradox. As Fernando Tesón, a contributor to this book, said at the American Society of International Law Annual Meeting in 1987,

[t]he marriage between international law and ethical theory has a long and venerable tradition. Grotius, the father of international law, conceived of the law of nations as an integral part of the law of nature. By the 19th century, however, the joint rights of nationalism, positivism, and relativism have all but destroyed references to the philosophical underpinnings of the discipline in international legal scholarship.

While moral philosophy is now routinely part of the debates in areas such as constitutional or criminal law, international law lags behind in this respect. With few exceptions, current international legal scholarship is mired in a theoretical framework formed by a mix of so-called realism and old-fashioned positivism, both of which exclude independent philosophical analysis.

Moral philosophy is necessarily part of the articulation of international legal propositions. For example, in attempting to define the concept of custom, are instances of state practice to be perceived as a violation of international law, creating a new rule of law, or simply an exception to the existing rule? I would submit that state practices are, and must be, interpreted in the light of their value or purpose, in short, in light of explicit or implicit normative moral political theory.<sup>13</sup>

More recently, Jeremy Waldron, in discussing the need for an analytical jurisprudence of international law, said,

the neglect of international law in modern analytical jurisprudence is nothing short of scandalous. Theoretically it is the issue of the hour; there is an intense debate going on in the legal academy about the nature and character of customary international law, for example. Analytic legal philosophers seem mostly to have missed this, even when it is evident that they might have a substantial contribution to make.<sup>14</sup>

Although the series in which this book appears has begun to address Waldron's concerns with its publication of Brian Lepard's *Customary International Law: A New Theory with Practical Applications*,<sup>15</sup> the more general points that Tesón and Waldron raise still remain true. International law has had little

<sup>13</sup> Fernando Tesón, "Remarks," in Robyn Lipsky, "Ethical Foundations of International Law," *American Society of International Law Proceedings* 81 (1987): 415–445, esp. 416.

<sup>14</sup> Jeremy Waldron, "Hart and the Principles of Legality," in Matthew Kramer, Claire Grant, Ben Colburn, and Antony Hatzistavrou (eds.), *The Legacy of H.L.A. Hart: Legal, Political and Moral Philosophy* (Oxford: Oxford University Press, 2008), 67–84, esp. 69.

<sup>15</sup> Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge: Cambridge University Press, 2010).

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contact with contemporary practical philosophy, and almost none with philosophical accounts of justice.<sup>16</sup>

Turning to political theory, we see that if Nagel is correct and moral and political theorists have a long way to go on global justice, then we may be some distance from the point where theories of global justice can even influence international law. There are a number of ways of understanding the contemporary state of global justice theory, although our task is not to survey these accounts.<sup>17</sup> Philosophical accounts of global justice are often not easily demarcated or entirely distinct. As a simple framework for understanding the questions that this book deals with, we may usefully distinguish between cosmopolitan and communitarian accounts.<sup>18</sup>

Communitarian and cosmopolitan accounts of global justice can be distinguished according to the different relationships they posit between norms of justice and social relationships. Perhaps the voice most closely identified with global justice is the cosmopolitan one, arguing that justice *precedes* social relations and should structure social relations.<sup>19</sup> Cosmopolitanism is ideal theory at its purest. It requires us to ignore actual institutions and ask what kinds

<sup>16</sup> For a panel discussion of the lack of contact, see Joost Pauwelyn, Frank Garcia, Christian Barry, and Susan Esserman, “Just Trade under Law: Do We Need a Theory of Justice for International Trade Relations,” *American Society of International Law Proceedings* 100 (2006): 375–386. In a review of Frank J. Garcia, *Trade, Inequality and Justice: Towards a Liberal Theory of Just Trade* (Leiden: Brill, 2003), Joost Pauwelyn says this:

It says a lot about the current U.S. perspective on international law that the first 144 of a 213-page book entitled *Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade* are spent convincing the reader that “trade law inescapably involves questions of justice.” This is . . . a sobering remark on the prevailing realist approach to international law in the U.S. academy, an approach that explains international cooperation as the mere pursuit of self-interest and power and disavows any normative value to international law.

See Joost Pauwelyn, “Just Trade,” *George Washington International Law Review* 37 (2005): 559–571.

<sup>17</sup> Recent works that provide comprehensive treatments include Gillian Brock, *Global Justice: A Cosmopolitan Account* (Oxford: Oxford University Press, 2009); Simon Caney, *Justice beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005); and Kok-Chor Tan, *Justice without Borders: Cosmopolitanism, Nationalism, and Patriotism* (Cambridge: Cambridge University Press, 2004).

<sup>18</sup> This classification is from Caney, *Justice beyond Borders*, at 15. He borrows the cosmopolitan–communitarian distinction from Chris Brown, *International Relations Theory: New Normative Approaches* (Hemel Hempstead: Harvester Wheatsheaf, 1992) and Janna Thompson, *Justice and World Order: A Philosophical Inquiry* (London: Routledge, 1992). Caney disaggregates communitarianism into realism, society of states, and nationalism.

<sup>19</sup> By saying justice precedes social relations, we mean to say that justice as an obligation is owed to individuals because of their moral status as human beings, independent of whatever social relations and institutions they find themselves in. See Charles Jones, *Global Justice: Defending Cosmopolitanism* (Oxford: Oxford University Press, 2001), 15–16.

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of institutions we should have if we were starting from the very beginning. Thus, although the realization of global justice is necessarily constrained by political relations as we find them, its normative possibility is not established, or vitiated, by such relationships – it just *is*. The cosmopolitan view, as is well known, holds that we owe obligations of justice to one another because of our moral status as human beings, regardless of the nature or extent of social bonds between us.<sup>20</sup> In essence, justice precedes society; our social bonds grow out of and are structured by our obligations of justice.

From the point of view of a cosmopolitan, global justice as a concept is not a problem. We owe human beings justice in our social relations, wherever they are found, simply because they are human beings. The problem, of course, and it is still a considerable one, is determining what this justice consists of, and how to deliver it. One can distinguish between moral cosmopolitanism, which advocates individual cosmopolitan duties to be realized through existing institutional structures, and institutional cosmopolitanism, which advocates reform of existing institutions along cosmopolitan lines.<sup>21</sup> The bottom line for either view is that the possibility of global justice is rooted in the nature of individual duties to one another, expressed in and through global institutions.

The leading alternative view in this debate is communitarianism, objecting to global justice on the ground that justice is a virtue *within* political communities, not *between* them. Thus the very idea of global justice is incoherent because of the absence of the requisite global community. For communitarians, justice depends on the prior existence of certain kinds of social relationships, or “society,” but it requires a deeper level of interaction that we call “community,” usually identified politically with the nation and generally expressed in terms of shared traditions, practices, and understandings.<sup>22</sup> It is within communities that people create obligations of justice, through an intense level of social interaction that defines its principles, subjects, and objects.<sup>23</sup> In other words, social relations are more than the field of

<sup>20</sup> There is a rich cosmopolitan literature. See Simon Caney, “International Distributive Justice,” *Political Studies* 49 (2001): 975–979, and Jeremy Waldron, “What Is Cosmopolitanism?,” *Journal of Political Philosophy* 8 (2000): 227–243 (surveying cosmopolitanism). The strength and institutionality of such social bonds does, of course, affect the degree to which we can realize our obligations of justice, as do instrumental and practical concerns. Nevertheless, the obligations are asserted on this view to exist, independent of such concerns.

<sup>21</sup> Charles Beitz, “Social and Cosmopolitan Liberalism,” *International Affairs* 75 (1999): 515–529.

<sup>22</sup> Communitarian theorists differ on the precise nature of these necessary relations, and in general this aspect of communitarianism is undertheorized. See Allen E. Buchanan, “Assessing the Communitarian Critique of Liberalism,” *Ethics* 99 (1989): 852–882, esp. 867.

<sup>23</sup> See, e.g., David Miller, *On Nationality* (Oxford: Clarendon Press, 1995), and Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983). The communitarian critique of cosmopolitan global justice is only part of its larger critique of liberal justice, and liberalism generally.

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application for justice: In a community, they create justice itself. No community, no justice.

Thus for communitarians it is this need for *community*, as something “deeper” than mere society, that prevents us from reaching anything like global justice. Communitarians maintain that although at the global level we may share a common humanity and mutual interests, we do not share obligations of justice because we do not reach community at the global level. Put another way, communitarians might grant the existence of some kind of global society, consisting of associations for mutual self-interest but distinguishable from true “community,” which requires something more, reserving “justice” for the latter. Alternately, some communitarians might argue that an “international community” is under construction, but that it remains too embryonic and too ill defined to create true justice on a regular basis.<sup>24</sup> If we seek international justice, we need to look at specific international “communities” or their proxies in the shape of institutions, like the International Criminal Court or the WTO, to get some sense of what is involved.<sup>25</sup>

Although contractarian or contractualist accounts figure prominently in any discussion of justice, global or otherwise, they do not necessarily have to be identified as distinct accounts in the manner of cosmopolitan and communitarian accounts. This is because they can be understood not as justification for political obligation but as meta-ethics, as accounts of the form of moral argument or the idea and structure of morality and justice.<sup>26</sup> A contractualist as a moral philosopher, working in the moral version of contractualism identified by T. M. Scanlon, just might, in terms of the issues we are framing here, be a cosmopolitan, a communitarian, or a liberal nationalist, depending on

See Buchanan, “Assessing the Communitarian Critique of Liberalism,” 852–882 (summarizing this critique).

<sup>24</sup> Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (South Bend, IN: University of Notre Dame Press, 2006).

<sup>25</sup> See Bruno Simma, “Bilateralism and Community Interest in the Law of State Responsibility,” in Yoram Dinstein (ed.), *International Law at a Time of Perplexity* (Dordrecht: Springer, 1989), 821; also see Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007), 17, who note that “the concept of international community is an artificial construct and both its constitution and the content of the values derived therefrom are contested.” For a more confident view of international community, see David J. Bederman, *The Spirit of International Law* (Athens: University of Georgia Press, 2002), 49–54. For an intermediate account arguing that globalization has brought about limited yet relevant elements of community in key areas of global social relations, see Frank J. Garcia, “Globalization and the Theory of International Law,” *International Legal Theory* 11 (2005): 9.

<sup>26</sup> For this distinction see Samuel Freeman, “Moral Contractarianism as a Foundation for Interpersonal Morality,” in James L. Drier, *Contemporary Debates in Moral Theory* (Hoboken, NJ: Wiley-Blackwell, 2006), 57.



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how one works out general principles from Scanlon's notion of reasonable rejection.<sup>27</sup>

For contractualists such as Rawls, principles of justice are rooted in social association, specifically cooperative associations for mutual benefit.<sup>28</sup> In other words, it is the nature of their social interaction that brings about the need for agreed principles of allocation and that gives rise to the process of agreement concerning what such principles should be. This should not be confused with an actual historical agreement on first principles; rather, "they are the principles that free and rational persons concerned to further their own interest would accept in an initial position of equality as defining the fundamental terms of their association."<sup>29</sup> Absent the requisite social interactions and resulting agreements, there is no need for justice, and no opportunity for it. Thus a contractualist who accepts Rawls's *Law of Peoples* would be a liberal nationalist in the framework we are adopting.

Whatever the account of justice, in the end it all comes down to institutions and conditions on the ground. Moral and political theorists have long struggled with the notion of bringing their ideas to bear on the actual design of institutions. Much has been said about how the question of justice is fundamentally about institutional design. It is basic to the idea of justice itself that justice requires, in Charles Beitz's words, "efforts at large scale institutional reform."<sup>30</sup> Rawls's theory of justice is about the basic structure of society as that structure is reflected in social institutions, a tradition going at least back to his intellectual forbearers Rousseau, Kant, and Hobbes.<sup>31</sup>

Although philosophers have argued over and again that justice is about duties of social institutions, they have not gone very far in specifying how the requirements of justice might operate in practice. Their focus is almost wholly

<sup>27</sup> See, e.g., Michael Blake, "Distributive Justice, State Coercion, and Autonomy," *Philosophy and Public Affairs* 30(3) (2001): 257–296.

<sup>28</sup> For more on Rawls and these points, see, e.g., Norman Daniels, "Introduction," in Norman Daniels (ed.), *Reading Rawls* (New York: Basic Books, 1975).

<sup>29</sup> See John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999), 10; also see John Charvet, "International Society from a Contractarian Perspective," in David R. Mapel and Terry Nardin (eds.), *International Society: Diverse Ethical Perspectives* (Princeton, NJ: Princeton University Press, 1999), 115. For a criticism of hypothetical nature of Rawlsian contractarianism, see Ronald Dworkin, "The Original Position," in Daniels, *Reading Rawls*, at 17–18.

<sup>30</sup> Charles R. Beitz, "Justice and International Relations," *Philosophy and Public Affairs* 4(4) (1975): 360–389.

<sup>31</sup> For accounts that claim that individuals owe duties of justice, see Gerald A. Cohen, *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008), and Liam B. Murphy, "Institutions and the Demands of Justice," *Philosophy and Public Affairs* 27(4) (1998): 251–291.

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on *whether* institutions should be just and on what sorts of requirements justice might impose, but not on *how* institutions might go about implementing justice. In other words, philosophers have only reluctantly departed from the ideal view of “the forest” to look at “the trees” of how justice might work in practice.

Michael Blake, a Scanlonian contractualist, offers a promising approach. He suggests an institutional theory for moral and political theorists along the following lines:

Another sort of attitude would prompt one to ask not what institutions we ought to have, but what the institutions we currently have would have to do to be justified. This sort of theory – which I call institutional theory – would take much more of the world as a pretheoretical given for purposes of analysis. It would include, I think, both the fact of state power and the division of territorial jurisdiction found in the world today. It would ask not whether we ought to have developed such a world, but what the various states we have now must do for their powers to be justifiable.<sup>32</sup>

Thomas Pogge advocates something similar for cosmopolitans. He makes the case for a distinction between a legal cosmopolitanism and a moral cosmopolitanism. Pogge’s legal cosmopolitanism is “committed to a concrete political ideal of a global order under which all persons have equivalent legal rights and duties” and requires that everyone stand in relation to one another as “fellow citizens of a world republic.”<sup>33</sup> This is not the sort of theory connected to practice to which Blake refers, nor do we endorse it. Nonetheless, Pogge’s moral cosmopolitanism offers an account that connects more closely to this project in terms of approach, though we make no overriding claims in this book for cosmopolitanism. Pogge says that the moral equality that moral cosmopolitanism demands “imposes limits on . . . our efforts to construct institutional schemes” and provides “standards for assessing the ground rules and practices that regulate human interactions.”<sup>34</sup>

More recently, Amartya Sen’s *The Idea of Justice* offers the distinction between transcendental institutionalism and realization-focused comparison. According to Sen, transcendental institutionalism has two key features. First, it focuses on identifying “perfect justice” and not on relative comparisons of justice and injustice. Second, it concentrates on identifying ideal institutions needed for perfect justice and not directly on actual institutions in

<sup>32</sup> Blake, “Distributive Justice, State Coercion, and Autonomy,” at 262.

<sup>33</sup> Thomas Pogge, “Cosmopolitanism and Sovereignty,” *Ethics* 103(1) (1992): 48–75.

<sup>34</sup> *Ibid.*