

COMMENT ON NOAH FELDMAN'S 'COSMOPOLITAN LAW?'

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Noah Feldman has written an ambitious and learned essay that seems to be asking whether cosmopolitanism as a tradition of political theory can contribute to a humane approach by American government, including courts, to the application of law in the post-9/11 world, and to a lesser extent, to a post-Rwanda (1994) world. I say 'seems' because Feldman never resolves to my satisfaction the uncertainty of perspective signaled by the question mark that follows the title of the essay, leaving this reader in doubt as whether a carefully qualified cosmopolitanism is being recommended as a way of addressing a series of highly contested issues raised by 'the global war on terror' and the incidence of genocide in the world or is simply being presented in an equivocal spirit as one possible option.

There is no doubt that these questions deserve jurisprudential scrutiny. Feldman seems to be following the general admonition about political theorizing well formulated by Martha Nussbaum at the very beginning of her *Frontiers of Justice*. Nussbaum insists that political theory should be expressed in sufficiently abstract language so that it will be "stable over time," and this requires the theorist to be "standing back from immediate events." But she adds it must also "be responsive to the world and its most urgent problems." [p.1] Feldman's essay is definitely sensitive to this double message of distance and responsiveness, and his reliance on cosmopolitanism functions well to maintain a delicate balance while treading this tightrope.

What I find absent from Feldman's articulation is an account of the precise character of the post-9/11, post-Rwanda challenges to *the American legal system*, and its governing process. Nor is it entirely clear whether these challenges are mainly connected with the distinctive nature of the 9/11 conflict as it has been addressed by the Bush administration or is mostly a reflection of an excessively sovereignty-oriented neoconservative outlook that was pre-programmed to abandon notions of liberal legality well before 9/11, and gladly replaced them with a combined reliance on American exceptionalism, the distinctive imperatives of global counter-terrorism, and an artfully contrived and grandiose conception of presidential war powers. [See John Yoo; more broadly Jeremy Rabkin] Feldman does not engage this debate, and so his inquiry is not as rooted in the real controversy about what adjustments in law, if any, were justifiable in the post-9/11 world. This ongoing controversy is being played out, especially, with respect to the curtailment of legal rights associated with classifying a suspected terrorist as an 'enemy combatant,' as well as in relation to 'black holes' in the law supposedly resulting from holding suspected terrorists in secret CIA detention centers in foreign countries or at Guantanamo Bay Naval Base, which is treated jurisdictionally as being neither part of Cuba nor of the United States. The US Supreme Court has rejected the preferred approach of the Bush presidency, particularly in the Hamdan case that requires both the participation of Congress in the creation of a special criminal procedure (via military commissions) for the trial of captured terrorist suspects and affirms the applicability of the Geneva Conventions. This minimum level of legal protection must be provided even to non-Americans detained under US auspices anywhere in

the world, and thus so-called no-law zones where anything goes are declared unlawful. [Hamdan citation]

Perhaps the most contested and troublesome of all the 9/11 issues involves the reliance on interrogation techniques by the US Government that would certainly be perceived to be ‘torture’ if American soldiers were the victims. The Bush administration has never acknowledged that it engages in torture, and explicitly repudiates torture as an interrogation method. US officials have been operating on the basis of an extremely narrow definition of torture that considers the use of highly coercive techniques such as waterboarding, forced nudity, sleep deprivation to be lawful because they are not torture as defined by the Executive Branch. [New Pentagon rules specifically prohibit these techniques] President Bush in his September 6, 2006 White House Address defends these practices as necessary for the prevention of further terrorist attacks and the saving of American lives, contending that through such techniques invaluable intelligence was obtained. Bush referred to the CIA reliance on “an alternative set of procedures’ to obtain valuable information from ‘high-value’ detainees, withholding any description of “the specific methods used,” but insisting that although the “procedures were tough” “they were safe, and lawful, and necessary.” [“President Discusses Creation of Military Commissions to Try Suspected Terrorists,” White House, Sept. 6, 2006]

The wider Bush argument is tied to the view that al Qaeda is not a state, and provides no targets to attack for a country at war. As a result, the only way to engage such an enemy is to do so by obtaining information as to both the identity and location of those engaged in terrorist activity and their future plans. Such an

account, which is plausible up to a point, suggests that the appropriate approach to terrorism is to strengthen law enforcement rather than to engage in war making. And if so, the argument shifts to the moral issue of whether reliance on such coercive interrogation is permissible even if it produces reliable information, There is also the contested empirical question as to whether the information produced by coercive methods is reliable and whether more humane method might not yield equally valuable, or even more valuable information. [See Jane Mayer, “Department of Law Enforcement: Junior,” *The New Yorker*, Sept. 11, 2006, pp.34-39] The damage done to America’s moral reputation must also be taken into account in assessing the manner with which it has treated those detained as terrorist suspects in the period since 9/11. At present, there is a surprisingly unresolved debate that pits some leading Pentagon lawyers against the more ideologically inclined legal advisors in the Justice Department and the White House. I am not sure from Feldman’s essay how his depiction of a possible legal cosmopolitanism helps us come better to grips with these issues, or for that matter, the other set of issues that asks whether there exists any kind of legal duty for a government to do its best to prevent genocide that is threatened or taking place far from its homeland.

My central question arising from Feldman’s rather elaborate, and interesting, exploration of cosmopolitanism, is ‘why cosmopolitanism, and why not liberalism?’ Addressing his concerns within the paradigm of liberal legality seems far more responsive to their factual conditions and less complicated than venturing into the more unfamiliar, even exotic, jurisprudential terrain associated with the cosmopolitan tradition. The essay fails to make clear the value added that derives

from this move toward the adoption of a cosmopolitan perspective, and might have been more persuasive if it has a section explaining why liberal legality is not up to the task.

This source of perplexity is all the greater because Feldman makes very clear that he is not embracing the more idealistic or more maximal notions of cosmopolitanism, which imply a universal political community sustained by some form of world government. In his essay Feldman writes dismissively that “such an aspiration is unheard-of in serious circles” (p.4) and elsewhere he puts down such views as “utopian.”(p.5) Feldman affirms his belief in the continued dominance of states in the world, although he acknowledges the significance of the rise of the European Union and the development within states of multi-culturalism in forms subversive of nationalist identities that correspond to state boundaries. For instance, Feldman rejects the global extension of Rawls’ approach, described as ‘contractarian cosmopolitanism’ “as plagued by the mismatch between the theory of a global contract and the reality of the power and persistence of the states system in the face of the weakness and unenforceability of international agreements.”(p.6) From my perspective Feldman fails to take enough account of three sets of international developments that make it misleading to interpret world order as if we continue to be living in a world that can be understood as consisting of only sovereign states: the rise of transnational non-state actors; globalization; and the gradual emergence of global law, especially as associated with the accountability of leaders (‘The Nuremberg Tradition,’ International Criminal Court). [Falk, *The Decline of World Order*, New York: Routledge, 2004.]

I also find it odd that Feldman builds his argument around two books, excellent in their own ways, but not very useful, it seems to me, in developing a jurisprudential argument framed by reference to ‘legal cosmopolitanism.’ As Feldman notes, Martha Nussbaum refrains from even mentioning the word cosmopolitanism throughout her long book *Frontiers of Justice*. Nussbaum informs readers that her book is essentially an effort to extend the liberalism of John Rawls to address three problems that are unsolved in his work, and that of other Rawlsians. One of these problem areas is preoccupied with the advocacy of a capabilities approach to justice that seeks to diminish the unfairness to individuals of the existing global inequality of states [Nussbaum, 224-324], and this is by far the closest fit to the concerns that animates Feldman’s inquiry. Nussbaum’s other substantive concerns involve fairness to those with physical and mental disabilities and the nature of justice toward nonhuman animals. In shaping her approach to global inequalities, Nussbaum appropriately draws upon the heritage of thought associated with Grotius and Kant, and never, not once, invokes the cosmopolitan tradition with which she is so impressively familiar. True, Nussbaum is on record as a committed cosmopolitan. This was best exhibited in her essay ‘Patriotism and Cosmopolitanism’ that Feldman mentions, but here too the relevance of her cosmopolitanism to his argument seems marginal. Nussbaum’s position is based on the importance to the shaping of our moral sensibility of subordinating the particular ties of citizenship to the universal ties of humanity, a position that cuts against the grain of the sort of geopolitical practicality that characterizes Feldman’s worldview.

To my mind, this matter of problematic relevance is even starker with respect Kwame Anthony Appiah's two books, *Cosmopolitanism* and *The Politics of Identity*, especially with respect to 9/11 issues. As Appiah explains, his principal preoccupation is classically liberal, the formation of the self. His inspiration derives from John Stuart Mill, not the Stoics or Marcus Aurelius. The approach is urbane autobiographical, Appiah links his ethnic background and childhood in Ghana to his celebration of difference as it is manifest elsewhere, most vividly and specifically for him in the British homeland of his mother. Citing his father's testamentary advice, Appiah affirms the cosmopolitan ideal of being a citizen of the world in the highly personal sense of being tolerant and respectful of foreign cultural practices however seemingly strange, and yet still remaining sufficiently partial to his country of citizenship as to fight for its survival. How this engagement with citizenship deals with the wrongdoing of one's own country is not addressed by Appiah, and yet that seems to be the issue that is at the heart of comprehending the proper role of this country's legal approach to dealing with its enemies in the post-9/11 setting.

Appiah is potentially more helpful in addressing issues of humanitarian intervention. His cosmopolitanism gives a moral and political cover to placing limits on tolerance, however cosmopolitan. In his words, "[w]e will sometimes want to intervene in other places, because what is going on there violates our fundamental principles so deeply. We, {that is, we cosmopolitans[too, can see moral error. And when it is serious enough—genocide is the uncontroversial case—we will not stop the conversation. Toleration requires a concept of the intolerable." [Appiah, *Cosmopolitanism* (New York: W.W. Norton, 2006), at 144.] It is something of a

mystery to me why Feldman did not rely on such a paragraph to develop his position.

Supposing that Feldman insists on addressing the 9/11 agenda of law and policy from a cosmopolitan perspective, then the writings of David Held and Daniele Archibugi, and several others, seem far more pertinent than Nussbaum and Appiah. Their studies are grounded in encounters with the global setting that are acutely responsive to the tensions between patriotic partiality and universalized identities. [See Archibugi, Held and others, *Cosmopolitan Democracy*; also Archibugi, Koehler, Held; Archibugi] I suppose such authors lack appeal for Feldman because they seem more critical of political realism as it operates within a statist or Westphalian paradigm, which they believe is in the historical process of being superseded. It is adherence to this statist paradigm that seems to define Feldman's jurisprudential comfort zone.

But there are other traditions of thought, including those of jurisprudentially minded international jurists, that seem also closely connected with Feldman's project. For instance, C. Wilfred Jenks, especially in his small, prophetic book *The Common Law of Mankind* embraces a cosmopolitan orientation without explicitly situating his work in that tradition. Similarly, F.S.C. Northrop in his pathbreaking *The Meeting of East and West* gives an alternative, more synthetic, vision of what Appiah calls 'rooted cosmopolitanism.' It is certainly true that neither Jenks nor Northrop can be classified as 'realists,' and for this reason would probably strike the geopolitically attuned Feldman as irrelevantly idealistic.

But what about Myres McDougal, a seminal jurist who founded the New Haven School of jurisprudence for free societies? Should not McDougal's work, especially in collaboration with Harold Lasswell, and later with Michael Reisman, give much more direct insight into post-9/11 issues than can be found in cosmopolitan thinking, however construed. Theirs is an approach that is avowedly realist in orientation and focused upon the development of a jurisprudence that is values-driven, and systematically takes ethical and moral account of all participants in the world public order. [McDougal; Reisman, etc.] In my view this policy-oriented jurisprudence, given Feldman's outlook, would far more effectively than cosmopolitanism offer insight into his real world concerns. Cosmopolitanism even in its most diluted form offers little traction to advance our understanding of how law might properly function in a post-9/11 world, which is declared to be the animating motivation for guiding Feldman's inquiry.

Overall, my criticism takes two main forms: first, the two books that Feldman relies upon seem not useful in addressing the issues of law and morality raised in the post-9/11 world. Secondly, other texts and traditions of thought are available to illuminate these issues, and yet are ignored by Feldman. I am quite prepared to admit that I might not have understood Feldman's argument properly, and that his motivation for relying on a minimalist form of cosmopolitanism as a possible reframing of law has a plausibility whose subtlety eludes me. Yet I am immodest enough to think that whatever failure of comprehension exists on my part results somewhat from Feldman's unwillingness to connect the dots stemming from his excursion into cosmopolitan political theory with issues of law and injustices

arising from the way the Bush administration has gone about prosecuting its 'global war on terror.' Or for that matter, in relation to the failure of the Clinton presidency to do its best to stop genocide in Rwanda.[For different assessment see Linda Malvern; Michael Barnett]

Feldman toward the end of the essay approaches directly the question as to what would provide a foundation for 'legal duty' in a system of cosmopolitan law, and briefly considers the relevance of natural law theory, especially as it was relied upon by that great Roman stoic emperor, Marcus Aurelius. Feldman suggests that the connecting the authority of the natural with a willingness to treat the stranger on the basis of a shared humanity was made easier by the extent to which the Roman Empire controlled the known world. Going beyond this, Feldman argues that this affinity between cosmopolitanism and natural law has historically entered American legal thought and practice whenever positive law has been put under severe moral pressure.

Feldman then goes on to suggest that a limited reliance on 'universal jurisdiction' to address *core* violations of human rights might provide an acceptable way of inserting a cosmopolitan element more explicitly into the operation of the American legal system. And then, finally, and most relevantly to the post-9/11 issues that he alludes at the start of the essay, what is referred to as a 'minimalist legal cosmopolitanism' might be relied upon to ensure that there are no gaps in the application of protective norms of law, such as common Article 3 of the Geneva Conventions applicability to even al Qaeda captives and the Supreme Court decision

in the Hamdan case that detainees at Guantanamo cannot be entirely denied the protection of law by having the base treated as a ‘no-law’ zone.

It is difficult to disagree with such policy outcomes, but whether it is helpful, or necessary, to drag cosmopolitanism into the legal discourse is what puzzles me, even after several readings of Feldman’s essay. It might have been valuable to write more generally on the relations between American law and cosmopolitan philosophical and political traditions of thought, but not to do so as a way of grounding objections to the way the Bush administration has dealt legally with the challenge of 9/11, with its basically flawed decision to respond by invoking an extreme version of ‘the war paradigm’ rather than focusing on the distinctive character of the adversary by strengthening ‘the law enforcement paradigm,’ including its intelligence-gathering dimension. And beyond this, it is difficult to disentangle the counter-terrorist project of the Bush foreign policy from the pre-9/11 grand strategy agenda of his neoconservative advisors set forth with stunning clarity in the 2000 report of the Project for a New American Century entitled ‘Repairing America’s Defenses.’

I suppose that Feldman’s elaborate undertaking in the end represents a jurisprudential effort to transplant Appiah’s basic sentiments about loving your country yet caring for humanity in a manner that does not violate realist sensitivities and can find antecedent norms and decisions in prior American law. The effort is to suggest that dealing with this new extremist adversary in a humane manner is morally desirable, however objectionable a person may feel about those who launched the suicidal attacks on civilian targets that took place on 9/11.

Feldman underscores this reading by ending his essay with an approving reference to Diogenes the Cynic who seemed to believe that even cannibalism does not violate human nature because it has been sanctioned by “the habits of foreign nations.” I can only wonder why it is necessary to go quite so far a field to deal with the complexities of law and justice in the post-9/11 as it has been defined by the Bush presidency, or in finding the legal grounds for an interventionary response to foreign instances of imminent genocide.