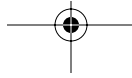
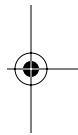


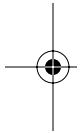
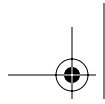
COSMOPOLITAN CITIZENSHIP AND PATHOLOGIES OF PLURALISM

Richard JANDA*

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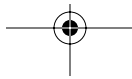
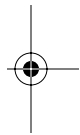
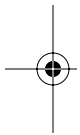
INTRODUCTION: HIDDEN QUESTIONS OF PLURALISM

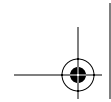
There are two interconnected questions obscured in the contemporary discourse of legal pluralism. The first concerns the legitimacy of the various forms of pluralism. The second concerns their pathology. If we accept that law does not issue from a unitary source, the problem becomes to characterize the kinds of pluralism in which we find ourselves and to discern their principles of legitimacy. It cannot be taken for granted that they are all legitimate, that is to say, that they can both articulate and fulfill founding principles of justification. That leads to the second question. To celebrate all legal pluralism simply by drawing attention to it as an observable, documented fact, without considering whether that pluralism conduces to the just and the good, is like speaking of the pluralism of the body's mechanisms without asking whether any given complex of cells is malignant or benign.

An authoritarian order, such as a business corporation, contributes to and is as characterized by pluralism as much as a democratic order. It has its implicit and explicit norms, its formal and informal institutional settings. Its pluralism is no guarantee of anything just or salutary. It is only a characteristic of the multiple and overlapping settings in which we live out our lives and form our identities. In the authoritarian order, those multiple settings can include forms of dissent and resistance, and can go underground in challenge to a dominant order that strives to contain them.

In an ideal democratic order, by contrast, those multiple and overlapping settings are acknowledged, with the ambition that they become a source for the mutual renewal of ideas and identities. Democracy, in its ideal form, aims at the freest expression of pluralism, but a pluralism of a specific and salutary sort: a purposive pluralism that is constructed with the aim of sharing burdens among and joining the life projects of the citizens who constitute it.

The cosmopolitan project aspires to a pluralism of legal orders that can be brought into alignment by a citizen who succeeds in mastering overlapping identities and civic responsibilities. But the transition from national to cosmopolitan citizenship is fraught with illegitimacy and pathology. The purpose of this paper is to explore





that last claim. I begin (I) with a short interpretation of a *locus classicus*: Kant's notion of pathology in law, and cosmopolitanism. I then explore (II) Jean-Guy Belley's work concerning the pathologies of "synaptic democracy" and (III) Andrée Lajoie's work concerning anomie and post-modern value judgments to develop an account of the transition from national to cosmopolitan citizenship. Finally (IV) I sketch the pathologies of pluralism expressed in seven vices corresponding to seven moments in the unfolding of cosmopolitan citizenship.

I. KANT ON PATHOLOGY

A. Kant's Ambivalence About the Origins of Society

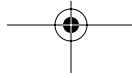
In *The Idea for a Universal History from a Cosmopolitan Point of View*, Kant defines the state as a "pathologically enforced social union" due to the human "tendency to come together in society, coupled, however, with a continual resistance which constantly threatens to break this society up."¹ He further explains:²

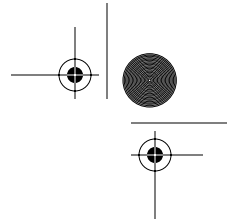
Man has an inclination to live in society, since he feels in this state more like a man, that is he feels able to develop his natural capacities. But he also has a great tendency to live as an individual, to isolate himself, since he also encounters in himself the unsocial characteristics of wanting to direct everything in accordance with his own ideas.

Our "social unsociability" poises us on the edge of virtue and vice, pathological conflict and lawful order. The encounter with others shakes us from a disposition to indolence, but awakens vanity, lust for power and greed. These passions in turn develop our talents and give rise to judgments of social worth. According to Kant, such judgments settle into practical principles and norms that can transform what begins as "heartless, competitive vanity" into a society that can be viewed as a "moral whole." It becomes a

¹ "The Idea of Universal History" in *Political Writings* (Cambridge: Cambridge University Press, 1991) at 44.

² *Ibid.*





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moral whole when it is lawful, that is, when the vying among individuals to impose their separate wills is organized around norms.

One can say, therefore, that for Kant the transition to legitimacy contains both pathology and a tension between pluralism and unity. The pathology originates in the passions that animate sociability. The tension between pluralism and unity originates in the antagonism between individual wills and social constraint.

Out of this sketch of the origins of law, Kant develops the thesis that the greatest problem facing humanity, the solution to which we are in a sense driven by our social unsociability, is the achievement of a lawful and plural civil society—a cosmopolitan order. Absent a solution to this problem, we will remain in a situation of war, strife and deprivation.

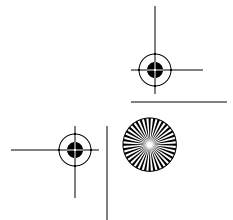
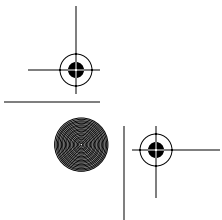
The giddy prospect Kant explores, tentatively and ironically, is that of interpreting history as imbued with the purpose of finding a solution to this problem. He does not, however, imagine the inexorable and triumphant march of reason toward a cosmopolitan order. He imagines a future that may include “a hell of evils, however civilized we may now be.”³ Though purposive, history’s path meanders. As Kant puts it in his famous pre-Wilsonian dictum:⁴

Through war, through the taxing and never-ending accumulation of armament, through the want, which any state even in peacetime, must suffer internally, Nature forces [humanity] to make at first inadequate and tentative attempts; finally after devastations, revolutions and even complete exhaustion, she brings them to that which reason could have told them in the beginning and with far less sad experience, to wit, to step from the lawless condition of savages into a league of nations.

Kant does not imagine the emergence of a lawful cosmopolitan civil society as forever overcoming the pathologies of an enforced legal order. Nor does he imagine that a cosmopolitan civil society will take shape within a unitary state. Rather, he imagines the grad-

³ KANT, “Idea for a universal history from a cosmopolitan point of view”, Lewis WHITE BECK tr. in *On History* (New York: Macmillan, 1963).

⁴ *Ibid.*





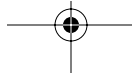
ual emergence of cosmopolitan citizenship out of the interplay of salutary and pathological legal orders. What conduces to cosmopolitan citizenship is salutary. What deflects from it is pathological. Insofar as particular legal orders are conceived and enforced to exclude potentially legitimate members, they are necessarily pathological, producing social ambivalence and conflict. Over time, through conflict and accommodation, social unions evolve to become less exclusive and to give greater scope for freedom of identity and allegiance; that is, they come to accept and acknowledge internal pluralism, leading in time to an increasingly propitious context for cosmopolitan citizenship and indeed for a cosmopolitan constitutionalism.

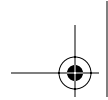
B. Citizen and Body Politic

Kant moves seamlessly from an account of salutary and pathological individual behaviour to the discussion of salutary and pathological legal orders. He seems to elide individual virtue and vice with civic virtue and vice. But why are the virtues and vices of individuals the same as the virtues and vices of the body politic? Is there here an implicit personification of legal orders? Does that in turn set the stage for the conclusion that cosmopolitan citizenship will be found in the mediation between legal orders rather than in direct participation in self-government?

What links the citizen and the legal order in Kant's account is a theory of human perfectibility. The legal order is the repository of our collective learning and experience. For example, when our social unsociability eventually produces reliable patterns of contracting, it is not requisite for each generation to re-elaborate and re-establish these patterns. The legal "tradition," not a term Kant uses, provides the baseline against which the social unsociability of each subsequent generation is played out.⁵ Indeed, if the tradition accentuates unsociability, this can sometimes lead to its own destruction. Nevertheless, by shaping our contexts of choice, providing the horizon within which individuals form their plans and ambitions, the

⁵ See Ernest SHILS, "Tradition and Liberty" in *The Virtue of Civility* (Indianapolis: Liberty Fund, 1997).





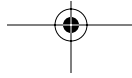
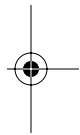
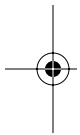
COSMOPOLITAN CITIZENSHIP AND PATHOLOGIES OF PLURALISM

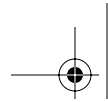
legal order is partly constitutive of the self. At the same time, the choices each individual makes to engage or to disengage, to build upon or to separate herself from a legal order become partly constitutive of that legal order. There is thus a reflexive, mutually constitutive, relationship between law and citizenship. Kant offers a reading of history that would posit purposiveness to nature in the sense that all natural capacities evolve toward their natural end. Thus, the reflexive relationship between law and citizens could be read as tending toward individual and civic virtues. But Kant purports to give no demonstration that this redemptive reading is indeed borne out history. To the contrary, he plants seeds of scepticism when he castigates European claims to civilization.

II. SYNAPTIC DEMOCRACY

That there is a reflexivity of law and citizenship need not lead to the conclusion that the virtues of a legal order are the same as the virtues of citizenship. A good legal order is not simply the aggregate expression of what it means for each to be a good citizen. Thus, a particular legal order, for example that within a university, will display its virtues in accordance with the purpose of the relationships forged in that community. A good citizen of a university will both be shaped by that community and participate in the pursuit of its goals. But that same good citizen will be engaged by other legal orders and thus, for that individual, the meaning of good citizenship will be found in the integration of multiple roles and responsibilities. Accumulating and finding integrity within multiple roles and responsibilities presents a challenge for the individual citizen, one of inter-normativity, that is not precisely parallel to the challenge of inter-normativity faced by legal orders.

For example, a university community can measure itself against its capacity to pursue its own ends for their own sake, taking account of other legal orders only to the degree necessary for its own purposes. Indeed, for it to pursue ends other than its own, such as those of a business corporation or those of a government, is to undermine its meaning as a community and to weaken the possibility of good citizenship within it. The same might be said for a business corporation or government attempting to cast itself as a university or



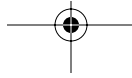
*MÉLANGES ANDRÉE LAJOIE*

something other than it is. The integrity and legitimacy of a legal order could be characterized as reposing on its ability to identify and reproduce a discrete set of ends.

In contrast, the citizen must be able to act with integrity in multiple legal orders. The legitimacy of citizenship lies not in pursuing a discrete set of ends with integrity, but in pursuing overlapping and competing ends with integrity. Citizenship within plural legal orders entails a heuristic of self-legislated justice: giving to each part of oneself its due. What is “due” in the sense of what commands priority, and brings us to devote time, is one inter-normative dimension of justice for the citizen. What is “due” in the sense of what calls us to account to show care and concern is another dimension. What is “due” in the sense of what is needful in the circumstances and brings us to exercise judgment, is a third dimension. The legitimacy of citizenship within plural legal orders requires the alignment of time, care and judgment so as to issue in a form of self-legislated justice.

Each legal order both conduces to and deflects from the self-legislated justice of the individual citizen. Being a citizen of the university provides the occasion for the investment of time, care and judgment. But because membership in that community involves the exclusive pursuit of a discrete set of ends, the individual’s self-legislated justice can be bent out of shape to those ends. Indeed, the exemplary citizen of the university may be that individual for whom time, care and judgment are entirely devoted to the single community. The inter-normativity of justice and virtue of a citizen is in tension with the singularity of justice and virtue of the legal order. This upends notions of the singularity of the self in contrast to the inter-normativity of the community. Hybrid legal orders that attempt to conciliate multiple ends—the socially responsible corporation, for example—can be understood as openly acknowledging the inter-normativity of the actors that form them.

The construction and pursuit of cosmopolitan citizenship entails a multiplicity to the citizen-self because it entails the governance of multiple legal orders. Cosmopolitan citizenship is not premised upon the construction of a legal order for a single community that can rank and align all purposes pursued within it. Rather,





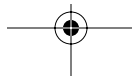
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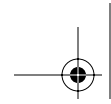
it is premised upon the nesting and overlapping of a multiplicity of communities each pursuing their separate ends and operating in a partially reflexive relationship with a shifting pool of citizens.

Consider the contrast with the idealized Greek *polis*. There it was possible to imagine a city constituted exclusively by a stable pool of citizen-kinsmen. Each of the practical arts, each commercial venture, each form of pedagogy, each display of poetry, indeed each form of conflict, was in principle bent to the purposes of the city. For a form of pluralism to emerge in the academy was an inherent corruption of the youth, who might devote their time, care and judgment to it rather than to the city. The academy could only survive if it showed that its purposes were subordinate to those of the city and if it made no claim to the pursuit of ends that were distinctly valuable in themselves. The laws were understood to issue from an understanding of the proper alignment of all purposes to be pursued by all citizens. Thus, non-citizens could only have instrumental value for citizens. Pluralism and inter-normativity were addressed either through hierarchy—which subsumes multiple orders by ranking them—or through opposition—which excludes multiple orders by creating zones of conflict.

Cosmopolitan citizenship eschews such hierarchy and seeks to substitute overlapping consensus for opposition. Jean-Guy Belley has described the form of legal order within which cosmopolitan citizenship is exercised as a “synaptic democracy.”⁶ His term trades on the metaphor of neural functioning in the brain. I understand him to mean that each legal order is like a synapse responding to its own set of stimuli and governed according to its own purpose. Synapses are coordinated and respond to each other. They are reflexive, and together they govern the functioning—at least the movement—of a single organism. But the participation of individual cells in governance happens within the specialized role of the synapse rather than indiscriminately for all of the body. In “synaptic democracy,” individual citizens can only participate in self-governance

⁶ Jean-Guy BELLEY, “Gouvernance et démocratie dans la société neuronale”, in Cardinal L. & Andrew C., ed. *La démocratie à l'épreuve de la gouvernance* (Ottawa: Les Presses de l'Université d'Ottawa, 2001) at 153-171.





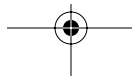
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through particular “synaptic” legal orders and cannot engage the governance of the cosmopolitan body politic.

Before discussing Belley’s argument that synaptic democracy can lead to dysfunctional—pathological—individuals, some observations about his metaphor are in order. The metaphor is arguably more apt for a Greek *polis* or a unitary state than for contemporary cosmopolitan citizenship. The synapse has its prescribed place within the functioning of the brain, which in turn governs the body. The famous illustration of the Leviathan taken from the second edition of Hobbes’s work shows a citizenry that forms a body surmounted by the head of the King. If the citizens can decapitate this head and substitute themselves, but nevertheless form a single Leviathan, everyone can be ranked through offices and lines of authority—often called the “organs” of government. While there can be some residual internal shifting and renewal of the function of citizen-cells, at any particular time each takes its place within the whole. What is organic is hierarchical and must absorb, resist or exclude what is foreign.

On closer inspection it might be said that cells forming synapses have semi-permeable membranes that both respond to a wide variety of stimuli originating throughout the body and themselves produce biochemical agents that to a greater and lesser degree operate throughout the body. As located and role-specific as each cell is, it not only forms part of the whole, but also influences, more or less directly, the functioning of every other cell. The reflexivities of the cell, the synapse, the nerve, and the nervous system are overlapping yet discrete. We can understand a great deal about the functioning of smaller body systems by seeing them as components of larger body systems. But we would not understand the organic character of the body by characterizing it only as a series of auto-poietic systems and subsystems. What is organic is both discrete and permeable.

Discreteness and permeability serve to make the organic metaphor one of continuing saliency for jurists attempting characterize legal orders. That metaphor in turn permits the recurrent personification of law. Law’s personification in the body politic, in legal personality and legal persons, in incorporation and corporeal and





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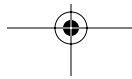
incorporeal property—indeed in property itself remains an apparently irresistible though misleading figure of speech. The body politic is not a body. Legal persons are not persons. Corporations have no corpus. Property is not proper to me.

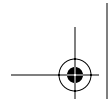
Yet there is an echo of the person in the legal person, of the corpus in the incorporation and of my properties in property. Perhaps this is the coming into being of a body generated by others.⁷ That is, if others author my own being, and if I can author other beings, I can conceive of a world entirely ordered through authored beings, or at least find intimations of such a world. In this sense law, and its plethora of personifications, emerges from an irresistible, indeed an erotic, creative property of the created self. It might be stated thus: I am part of a chain of being that must make my own chain of being. My own chain of being is my part of creation. It brings forth persons out of the passions, orders out of chaos. It is my lawmaking. Since it is part of a chain of being, to call law my own creation, my property, as if it emerged like Athena from the head of Zeus, imbues the fallacy that law always already is with the aesthetic quality on which its legitimacy ultimately depends.

Law is willed and made but it is also received and represented. It is an effort not only to project a creative will but also to call forth and to receive what I can know and understand. It speaks in affirmations and certitudes. But it acts in approximations and revisions. Metaphor is apt to the language of the law since it preserves the dual sense of creation and reception, revolution and tradition. We cast the law as personification through a creative act of will. Yet we set about discovering the properties of our creation seeking out what is proper to ourselves and thus receiving and representing a prior creation. I believe it is more than a play on words that we declare the created properties of ourselves to be goods.

Thus, I read a legal metaphor like synaptic democracy as an amalgam of creation and representation. It purports to be not only a novel reconstruction of legal orders but also a property of those legal orders, which can be explored and represented. What is for

⁷ See George STEINER, *Grammars of Creation* (New Haven: Yale University Press, 2001).





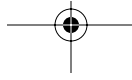
Jean-Guy Belley the “givenness” of synaptic democracy is imbued with both senses. To recast democracy as synaptic is both to reconstruct it, even to transform it, and to represent a deeper or better or newer understanding of law’s ancient corporeal leitmotif. Hobbes could not have spoken of synapses although he did speak of democracy and the body politic.

III. FROM NATIONAL TO COSMOPOLITAN CITIZENSHIP

A. Synaptic Democracy and Cosmopolitan Citizenship

Jean-Guy Belley’s synaptic democracy follows in a tradition of modesty of expectations about the democratic project. The modesty of synaptic democracy is this: we can only govern ourselves in a small subsection of the cosmopolitan body politic and even there we can only do so reflexively, in response to outside stimuli not within our control. Indeed, if the metaphor is pushed to its limit, our reflexive responses as citizens of a synaptic democracy would not truly be self-government. Rather, they would amount to conduct required of us in fulfilling our function within the whole polity. The modesty of this understanding can be restated: within synaptic democracy, self-government consists in recognizing and acknowledging the role we are called upon to play within the whole. Thus, the characteristic form of contemporary democracy emerges in the identification of the limited set of tasks that can be performed within restricted resources, taking account of the tasks performed by and resources available to other instances of government.

The modesty of such a democratic project corresponds to modesty about the role of citizens. If citizenship involves participation in self-government, synaptic democracy can allow only part of citizenship to be exercised within any legal order, since no single legal order can be self-governing. Cosmopolitan citizens are thus condemned either to the disaffection that accompanies incompleteness or to the pyrrhic task of negotiating and reproducing legitimacy simultaneously in multiple legal orders. When Jean-Guy Belley speaks of the cosmopolitan citizen who can become a dysfunctional individual, he has in mind the first of these two possibilities, although both are pathogenic. Belley’s dysfunctional individual refuses to





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acknowledge the challenge for identity that pluralism poses for cosmopolitan citizenship. She retreats to the particular legal order closest to her concerns and, having experienced the inability to participate in full citizenship there, ultimately retreats from citizenship altogether.

B. Anomie and Post-Modern Value Judgments

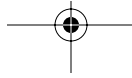
Andrée Lajoie detects the same dysfunction of citizenship as does Belley but imagines a kind of cure: judicial value judgments that seek overlapping consensus between majorities and minorities. According to Lajoie, contemporary societies have abandoned not only the possibility of consensus but even the possibility of stable self-reproducing majorities.⁸ Given a society made up of a varying and variable pluralism of ideologies and allegiances, Lajoie asks whether the idea of modernity—which she identifies with the aspiration for democratic consensus—has given way to social anomie and law's complete indeterminacy. The reference to anomie ties quite precisely to considerations of civic pathology and dysfunction, since for Durkheim, the absence of norms—*a-nomos*—could produce such social disorganization and disorientation as to lead even to what he called *le suicide anémique*.⁹ Post-modernity arguably produces a redoubling of anomie since not only does it serve to dislocate traditional social order—as modernity had done before it—but instead of substituting a new set of norms toward which anomic citizens could gravitate, on Lajoie's account it offers only normative indeterminacy.

Nevertheless, Lajoie's conclusion about contemporary anomie is disarmingly coy: "Feu la modernité? Viennent l'anomie sociale généralisée et l'indétermination totale du droit? Ce n'est pas si clair."¹⁰ The burden of her argument is that in constitutional decision-making judges will decide within a wide range of normative indeterminacy attempting to arbitrate among minority and major-

⁸ Andrée LAJOIE, *Jugements de valeurs* (Paris: PUF, 1997) at 207.

⁹ Émile DURKHEIM, *Le suicide : étude de sociologies* (Paris: PUF, 1973).

¹⁰ Andrée LAJOIE, *supra* note 8 at 207.





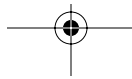
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ity values but nevertheless staying within boundaries delimited by the interests of the majority. She goes so far as to suggest that it is precisely because normative pluralism has given rise to a legitimacy deficit of formal legislative institutions, which can no longer claim a monopoly on adherence, that the judiciary has emerged to fill the vacuum.¹¹ The judiciary, she argues, is not constrained to pay homage to a fleeting electoral majority. It can go about the task of carefully refashioning social values in quest of an elusive overlapping social consensus. Indeed, according to Lajoie's characterization of post-modernity, the judge is no longer discerning and applying majority values, but attempting to posit values that could become those of a majority. Such a role for the judiciary is, she claims, essential if a post-modern state is to survive.

But Lajoie's last word on whether the judiciary could succeed in this task is to say the least ambivalent. Her final assertion is that the interests of the majority have become indefinable. Thus how can the judiciary successfully identify an overlapping consensus of values if there is no such thing as a majority to anchor it around? And how can judges overcome anomie if their task has become to articulate values that are always at some distance from those of any particular social group and indeed if they proceed on the assumption that there is no fixed, stable delimitation of social groups and values within which to work? If their role is conceived this way, are they not, rather, agents of anomie and the embodiment of its presence in the heart of institutions that had been conceived as norm-reproducing?

There is yet another dimension to this dilemma. In seeking to fashion some kind of overlapping consensus, the judge will presume that those who are seeking a judicial pronouncement on values will accept and live by the adjudicated outcome and that they stand in for wider social strata that will do the same. Judicial deliberation is thus conceived to take place within an ideal communicative setting that can contain all discourse about values. But judicial deliberation is itself but one setting within which value judgments are made and it has only a modest steering capacity with respect to the

¹¹ *Ibid.*, at 209-10.





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synaptically connected sets of legal orders through which citizens navigate. Judicial overruling of anomie by fiat is thus an illusory notion. At best, judges could view themselves as helping to stabilize a possible hypertrophy of pluralism by drawing from and contributing to the reflexive inter-normativity of fragmented legal orders.

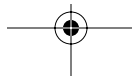
Lajoie's intuition is that there is much more normative stability than the notion of generalized anomie would suggest. But this impression may have to do with the proportion of citizens who embrace the loosening of normative moorings as emancipatory or who discover within legal orders that are partly constitutive of their lives (the workplace, the family, religion, etc.) strong supervening conventional ties substituting for the nation-state. That is to say that the roots of anomie in normative instability may in fact be present but subject to more or less successful adaptive strategies. Indeed, Lajoie's work on aboriginal governance investigates communities for which adaptation to anomie is in various states of instability.

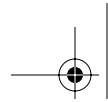
The question therefore becomes not simply whether judicial value judgments can provide a buffer against social anomie, but whether the disorientation and instability associated with the transition from national to cosmopolitan citizenship will produce a greater aggregate of dysfunction or emancipation. The answer to this question requires a preliminary account of citizenship itself. Thus far, this discussion has been trading on the notion of participation in self-government.¹² In another paper, Dann Downes and I distinguished among seven dimensions of citizenship that we identified using canonical accounts within the Western tradition:¹³

- (1) to exemplify civic virtue (the Athenian in Plato's *Laws*)
- (2) to participate in the exercise of offices (Aristotle)
- (3) to be the equal subject of the laws (St. Paul; Gaius)
- (4a) to unite in a common will to make a sovereign (Hobbes)

¹² Rousseau, *Du contrat social*, chapitre 1.8.

¹³ The Problem of Cosmopolitan Citizenship (with Dann Downes) unpublished manuscript.





- (4b) to consent to the making of the laws in return for rights (Locke)
- (5) to engage a common cultural identity (Rousseau; Montesquieu)
- (6) to accord hospitality and comity to strangers (Kant)
- (7) to ensure social welfare (Marshall)

C. Seven Moments in the Unfolding of the Citizen-Self

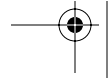
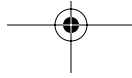
The seven dimensions of citizenship suggest seven moments in the unfolding of the self to which they correspond. These moments, although they relate to the stages in the unfolding of our lives, are intertwined throughout our lives. Citizenship corresponds to these moments of self-hood as they are lived out in the polity.¹⁴ The transition from national citizenship—here understood as an exclusive, singular public identity—to cosmopolitan citizenship—here understood as a plural, universal public identity—is lived out in each of these moments.

The first moment in the unfolding of the self comes in being born and having identity bestowed. The national citizen-self receives the identity of citizenship at birth or by the re-creation of birth through naturalization. In the *Contrat social*, Rousseau speaks of the most important form of law¹⁵

qui ne se grave ni sur le marbre, ni sur l'airain, mais dans les cœurs des citoyens; qui se fait la véritable constitution de l'État; qui prend tous les jours de nouvelles forces; qui, lorsque les autres lois vieillissent ou s'éteignent, les ranime ou les supplée, conserve un peuple dans l'esprit de son institution, et substitue insensiblement la force de l'habitude à celle de l'autorité. Je parle des mœurs, des coutumes, et surtout de l'opinion; partie inconnue à nos politiques, mais de laquelle dépend le succès de toutes les autres; partie dont le grand législateur

¹⁴ A parallel, though not entirely congruent discussion is found in Northrop FRYE, *The Great Code* (Toronto: Academic Press, 1982) at 106-138.

¹⁵ *Du contrat social*, chapitre 2.12. Note the lovely play on the idea of divine legislation which, for example as Torah, may secretly form the spirit of a people while it appears to concern itself with particular edicts.





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s'occupe en secret, tandis qu'il paraît à se borner à des règlements particuliers, qui ne sont que le cintre de la voûte, dont les mœurs, plus lentes à naître, forment enfin l'inébranlable clef.

Echoing Montesquieu's account of the spirit of the laws, Rousseau innovates by ascribing custom, manner and tradition to the heart of citizenship and to the identity born of the laws.¹⁶ The cosmopolitan citizen-self is adopted by the wide family of customs, manners and traditions and reconceives identity as having its origin in their unity. For the national and cosmopolitan citizen-self alike, the absence of customs, manners and traditions would empty citizenship of its affinities and allegiances, thus emptying it of its affective core.

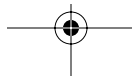
The second moment of the unfolding of the self comes in the experience of authority through the acquisition of the capacity to express identity. The national citizen-self earns capacity for expression by participating in the administration of justice and the exercise of offices through which authority is wielded. For Aristotle, this aspect of citizenship, even more than the experience of identity, forms the common core of the concept.¹⁷ Whereas some who are born in a polity or are otherwise of a polity may participate in citizenship only imperfectly (for example, not yet be of age, or be past age), those who are eligible to participate in offices are universally understood to be citizens. For the ontogenesis of the cosmopolitan citizen, however, this mode of expression is problematic given the multiplicity of languages and the problem of translation.¹⁸ How can one speak with authority in many tongues? The national citizen-self could in principle speak with authority in all offices. The cosmopolitan citizen-self can learn to speak in the language of others but relies upon others to be able to speak with authority in all languages. Thus, in principle she will only fill that representative



¹⁶ Although see Plato's *Crito* 51c.

¹⁷ *Politics* Book III, chapter 1 1275a.

¹⁸ See Rod MACDONALD, "Legal Bilingualism" (1997) 42 *McGill Law Journal* 119-167 and George STEINER, *After Babel: Aspects of Language and Translation* (New York: Oxford University Press, 1992). The Jewish diaspora tied to the universal city of Jerusalem produced the overlap of languages that allowed for a cosmopolitan theological project: Acts 2:5.





portion of offices in which she can speak to and for the whole polity. Just as the absence of the capacity for linguistic expression deprives a self of its core, so too the absence of capacity to express one's citizenship through participation in offices deprives it of its core.

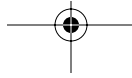
The third moment in the unfolding of the self comes in entering into reciprocal relationships through which identity is tested and refined. The national citizen-self forges a common will with her fellow citizens and consents to a compact governing the pursuit of ends for that polity. The cosmopolitan citizen-self foregoes insistence upon that original compact in the name of a cosmopolitan compact that is in the process of being forged. Whereas Hobbes's account of the formation of the social contract emphasizes the submission of all wills to a single will and denigrates the notion of consent,¹⁹ Locke's account elevates the idea of consent, notably to majority rule, and denigrates the idea of a single will.²⁰ Hobbes thus highlights the emergence from the citizenry of a sovereign to impose a single will, whereas Locke highlights the guarantees given to citizens, especially the protection of property, in exchange for their consent to government. Nevertheless, for both Hobbes and Locke, the formation of a contract is at the core of citizenship because its absence would leave individuals outside of political society, and hence outside of the setting in which citizenship arises.

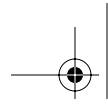
The fourth moment in the unfolding of the self comes in giving oneself to another and thus creating a common identity with another. The national citizen-self engages the community of fellow citizens in common projects. The cosmopolitan citizen-self affirms the unknown of the other, with whom a life could be made together.²¹

¹⁹ *Man and Citizen* (Bernard Gert ed.), (Garden City, New York: Doubleday, 1972) chap. 5, at 168-9.

²⁰ *Second Treatise on Government*, chapter 8, especially §98. Rousseau connects the general will and consent. Locke speaks of subjects and members of a commonwealth rather than of citizens under the sovereign, perhaps in contrast with Hobbes's usage.

²¹ On the contrast within citizenship between patriotic love and cosmopolitan love, see Martha NUSSBAUM, "Patriotism and Cosmopolitanism" in Martha NUSSBAUM *et al.*, *For Love of Country?* (Boston: Beacon Press, 1996) 2 and Charles TAYLOR, "Why Democracy Needs Patriotism," *ibid.* at 24.





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In his discussion of cosmopolitan citizenship, Kant downplays the possibility of generalized philanthropy.²² But he does insist on a form of hospitality or neighbourliness necessary to establish cosmopolitan law. In law, this is called comity. Indeed, he rails against the inhospitality of so-called civilized peoples who in visiting foreign countries and peoples have committed the most appalling acts of exploitation—especially pressing others into slavery. To the exploiters and colonizers, the only recognizable homeland was their own and its extension outward through conquest was but a manifestation of patriotism. The welcome reserved to a guest and the other-regard shown to the host are for Kant the guarantors of mutual respect and peaceful coexistence. Their absence removes the ground of any possible cosmopolitan citizenship.²³

The fifth moment in the unfolding of the self comes in remaining faithful and true to the identity one has created with another. The national citizen-self assumes the role of subject of the laws, investing trust in the equal treatment the laws will accord and faithfully fulfilling the obligations the law imposes. The cosmopolitan citizen-self remains faithful both to national laws and to the prospect of cosmopolitan law. Thus, for example, St. Paul invoked his status as citizen of Rome and subject of Roman laws in seeking fair judgment against the accusations of the Sadducees and Pharisees.²⁴ This invocation of Roman citizenship did not run counter to his cosmopolitan mission or indeed to his understanding of the narrow role of existing law.²⁵ But Paul's survival as a missionary depended upon his jurist's talent of exploiting the conflict of laws. The absence of fidelity to and of Roman law, the absence of overlapping Roman

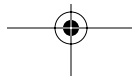


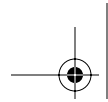
²² KANT, *Principles of Lawful Politics* (W. Schwartz tr.) (Scientia Verlag, 1988) at 83.

²³ For a more elaborate discussion of hospitality, see Richard JANDA, "Toward Cosmopolitan Law" (2005) 50 McGill L.J. 967-996.

²⁴ Acts 25:12 as well as 16:37, 22:25 and 23:27. See discussion in Michael WALZER, "Citizenship" in T. Ball et al. eds., *Political Innovation and Conceptual Change* (Cambridge: Cambridge University Press, 1989) 211 at 214-5.

²⁵ Galations 2:19-21, 3:1-29.





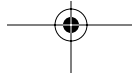
and church citizenship, would have left Paul at the mercy of religious persecution and thus would have confined the Nazarene sect to oblivion. More generally, the absence of trust in and of citizens erases common identity and creates a vulnerability to exclusion from citizenship.

The sixth moment in the unfolding of the self comes in seeking to provide for the well-being of another. The national citizen-self contributes to creating an identity with fellow-citizens that offers goods for all. The cosmopolitan citizen-self aspires to sharing goods with all the world's peoples. T.H. Marshall writes of "the urge toward a fuller measure of equality, an enrichment of the stuff of which the status [of citizenship] is made."²⁶ His emphasis upon the relationship between citizenship and social stratification echoes the ancient and aristocratic conception intertwining citizenship and station. Marshall himself observes that as late as the turn of the nineteenth century, if not subsequently, social inequality was regarded as salutary to the general welfare since it provided the greatest incentive for labour. However, he claims that through the extension of participation in offices and of the principle of equal application of the laws, both already inherent in citizenship, the social stratification of goods itself became susceptible to reconfiguration. While the absence of social welfare does not entail the absence of citizenship, the absence of its aspiration empties citizenship of purpose.

The seventh moment in the unfolding of the self comes in confronting the finality of one's own identity. The national citizen-self perpetuates national citizenship by exemplifying civic virtues in adherence to the laws. The cosmopolitan citizen-self inaugurates cosmopolitan citizenship by accepting some sacrifice to complete identification with a nation for the sake of a wider polity. In Plato's *Laws*, the Athenian insists that the highest form of good citizenship cannot be ascribed to the person who is the best and most loyal servant of the laws.²⁷ In addition, the virtuous citizen must

²⁶ T.H. MARSHALL, "Citizenship and Social Class" reproduced in Gershon Shafir, ed., *The Citizenship Debates: A Reader* (Minneapolis: University of Minnesota Press, 1998) 93 at 102.

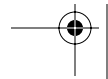
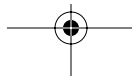
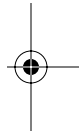
²⁷ PLATO, *Laws*, Book VII 822.



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acknowledge and act upon what the city's founder had taught to be praiseworthy while eschewing what had been taught to be blameworthy. The virtuous citizen can thereby help to teach the city how to endure in a way that the laws alone cannot. The laws cannot assign rules and proscriptions to the infinite variety of human circumstance and directly instruct about virtues and vices. But the exemplification of virtues can provide a pattern or model to instruct new citizens. Gandhi's teachings, actions and sacrifice surely inaugurate contemporary cosmopolitan citizenship. The absence of such exemplary citizenship would leave no inheritance to the polity.

These seven moments in the unfolding of the self and citizen-self, captured by the ideas of identity, authority, reciprocity, alterity, fidelity, well-being and duration, can be likened to the colour spectrum. When visible light is diffracted, it is arranged into seven distinct colours (violet, indigo, blue, green, yellow, orange, and red) that shade continuously into one another and together compose the spectrum. There are an infinite variety of combinations of shades, but a fixed range of wavelengths within which the combinations are established and distinct spectral colour manifested. There are a number of useful ways in which the spectrum can be described or characterized. While composed of seven distinct colours, it can also be described as a range of colours from the blue to red at the ends of the spectrum and thus divided between two poles. A field of colour can be described using the four polar opposites of blue and red, light and dark. Colour is perceived by the eye through the combination of three primary colours corresponding to the function of neural receptors. It can also be characterized as constituted through the interplay of hue, saturation and luminosity that together prescribe its specific manifestations. By analogy, the self can also be described as bounded by two poles (birth and death), within a field of four polar opposites (birth/death, virtue/vice), perceived through the interplay of three primary attributes (as generated, as generative and as sustained), and constituted through the interplay of three dimensions (freedom, being, time) that together prescribe its specific manifestations. Similar analogies could be drawn to the musical scale, in which the eighth note is a reiteration of the first, and to the seven parts of speech (noun, verb, adverb, adjective, preposition, conjunction, interjection—





with pronoun, transitive or intransitive verb, and infinitive understood as forms of other underlying parts of speech). A suggestive table of these relationships is set out in an appendix to this paper.

IV. PATHOLOGIES OF PLURALISM

A. From Cosmopolitan Citizenship to Pathogenic Pluralism

We can now examine with greater precision what it might mean for an individual not to engage citizenship in general and cosmopolitan citizenship in particular. Jean-Guy Belley postulates that the individual called upon to function within a synaptic democracy can become simultaneously overcharged by the task of negotiating identity among many sites of normativity and stripped of choice by the obligation to fulfill a predetermined set of tasks and functions. Having less reflexive capacity than the artificial persons within which she exercises citizenship, the individual may seek refuge in forms of solipsism or ideology. Lajoie invokes the threat of anomie. Anomic individuals become “dysfunctional,” losing autonomy and becoming both alienated and dysteleological.

The flight from citizenship is not strictly a contemporary phenomenon associated with the surcharge of normative orders. The stuff of classic drama is often found in the abandonment of citizenship out of an unbearable tension between self and national citizen-self. Consider Oedipus, fleeing the citizenship of his birth, conceiving and fleeing that birth again. Consider Hermione in *The Winter's Tale*, torn between boundless grief for a lost child and the public role of regal authority she must re-assume, cloistering herself in solitude. Consider Faust, seeking out youth and eschewing his social rank to the point of bargaining away his soul. Consider Aida and Radames, torn between birth and love, self-destructively escaping their *patria*e. Consider Hamlet, having lost faith in the King and Queen but unable to gain it in himself, repairing to the conceit of folly. Consider Lear, torn between fading kingship and growing progeny, withdrawing to the chasm on the heath. Consider Antigone, torn between fidelity to the city and fidelity to the dead, finding refuge in her prayers. Each abandonment of citizenship asserts the trajectory of values of a prior, other self at the various





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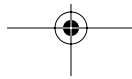
moments of its unfolding. The “dysfunction” arises when that other self wrestles with higher authority by seeking to remain inviolate in her solitude or seclusion.

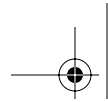
To attribute dysfunction to the individual is to miss the drama of these stories. Nor can one simply attribute dysfunction to Oedipus’ Thebes, Hermione’s Sicily, Faust’s Wittenberg, Aida’s Ethiopia and Radames’ Egypt, Hamlet’s Denmark, Lear’s Britain or Antigone’s Thebes. The individual and her setting are antagonistic, impeding each other from asserting authority. Misalignment of authority occurs not only when the individual flees from citizenship, but also when citizenship flees from the individual. The self-mastery and possession of the laws sought by Faust has its direct counterpoint in the self-effacement through the laws of Joseph K. The resolution of all these dramas would come with the alignment of authority in the individual and her setting and the end of the reciprocal master-slave relationship. The pathologies of national citizenship thus arise out of impediments to the communion of the individual and the national citizen.

The transition from national citizenship to cosmopolitan citizenship involves detaching oneself from the exclusive hold of a primary community and reattaching oneself to and redefining oneself through identification with the aesthetic of a universal community.²⁸ Specific pathologies of pluralism arise from the impediments to this transition. They consist in the features of the self, the nation, and the cosmopolitan polity—as well as their interplay—that curtail the coming into being of a sense of self that feels able autonomously and legitimately to assert solutions to the ambivalences of multiple justice claims. They can also be characterized as absences of connection between the integrity of the individual and the cosmopolitan citizen.

Before outlining these pathologies, four preliminary observations about the problems of transition to cosmopolitan citizenship are in order. First, if the integrity of self and national citizen-self is fraught

²⁸ See FRYE, *supra* note 14 at 130.





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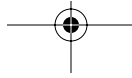
with tension and drama, the further passage to cosmopolitan citizenship at first appears inherently unbearable and self-destructive. To abandon the ambition of free, unrestricted, self-definition through a nation, which is an ambition to hegemony, and to subordinate one's community to a universal community seems to entail being denuded of power and dignity.²⁹ It appears that one is called upon to become but a part of a synapse in the body politic and to forego any aspiration of self-legislation and self-perfection—as illusory as that aspiration was within the nation.

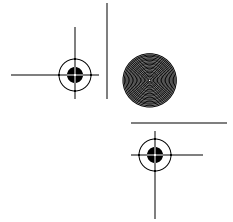
Second, if convinced that one is foregoing self-legislation, one can characterize the making of the laws, their *poesis*, as beyond any individual power, imagination or responsibility and in this sense self-contained; that is, law is characterized as auto-poetic.³⁰ Such a conception renders the very idea of citizenship obsolete, since the process of law's creation is severed from self-creation. Cosmopolitan citizenship would be revealed as an empty simulacrum, since our place within overlapping legal systems is to be acted upon by the law rather than to be the agents of the law. On this view, while legal systems may originally have been of our creation, in their reflexivity they have taken on lives of their own and eclipsed their makers. Cosmopolitan citizenship gives up the ghost to the machine.

Third, if cosmopolitan citizenship appears to involve a critical abandonment of agency to law, one is compelled to reflect on the relation between law's pathology on the one hand and its creativity, authority and legitimacy on the other. Do legal norms always emerge as nemesis to pathology, like Athene at the end of the *Oresteia*? Does law in this sense require a prior pathology, from which come efforts to build community upon the overcoming of dysfunction? Is the creative act of lawgiving itself a patho-logos, a speech about the sources of suffering and dysfunction in the polity? Does its authority derive from giving a definitive account of dysfunction?

²⁹ Simone WEIL, (George Panichas ed.) *The Simone Weil Reader* (1977). See also FRYE, *supra* note 14 at 100-101.

³⁰ Niklas LUHMANN, *Law as a Social System* (Oxford: Oxford University Press, 2004).





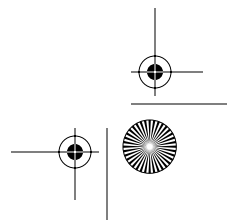
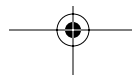
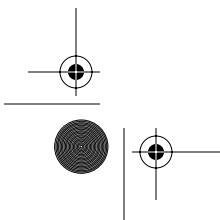
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Does its legitimacy depend upon its capacity to shed light on dysfunction and to guide away from it?

Fourth and finally, it appears to be that the processes of change in art, science and law—their historicities, if you will—operate differently. Artistic expression exhibits a periodicity that takes on the form of succeeding movements, schools, and meta-aesthetic presuppositions often within the work of the artist over a lifetime. It is all but impossible to characterize this periodicity as advancement or progress. Rather, it reflects the successive efforts to imagine the world anew and to give its unknown expression. Today's institutionally affirmed art is yesterday's unintelligible composition. Thus the great artist redefines and re-conceives the boundaries of perception. She lives out the liminal rationality of artistic expression.

By contrast, unlike in the arts, the perfect and predictable reproduction of knowledge is taken to be a hallmark of scientific vitality. The accepted markers of creativity in science denote advancement and progress in which achievement builds upon achievement and the last word that is spoken is retained because it has yet to be surpassed. Whereas a scientific revolution can dramatically transform prior understandings of a field, it also functions to reorganize, reclassify and re-appropriate past achievements. Thus, the great scientist extends and redefines the boundaries of perception. She lives out the liminal rationality of advancement.

Historicity in law appears to function differently altogether. It cannot be said that a transition to cosmopolitan citizenship resembles the progress attributed to the natural sciences, nor the epiphanal periodicity of artistic expression. There can be advance in legal institutions in the sense that greater fitness for contemporary purpose can be achieved through the evolution of legal categories, sources, institutions, and norms. For example, one speaks of the WTO as an advance on the former GATT framework since it has achieved greater institutional capacity to manage the sets of relationships that arise in a contemporary global economy. Historicity of law involves both an adjustment to and a reconstruction of a composite of social change in general, including notably change in technology and culture. Thus, legal change reflects that dimension of human creativity that allows us to redefine social relationships





through processes characterized by advances in learning and through processes characterized by rebellion or counterpoint.³¹ I am thus suggesting that legal creativity is a kind of second-order creativity since it necessarily responds to other processes of creation or change as they are manifested in social relationships. The jurist recognizes and characterizes the contemporary social boundaries of perception. She lives out the liminal rationality of *justesse*. It is with this in mind that the transition to cosmopolitan citizenship should be considered.

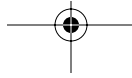
B. Seven Moments of Pathology

This section will explore the pathologies of the transition to cosmopolitan citizenship using the famous typology: the seven deadly sins. In somewhat stylized fashion I identify a characteristic sin or pathology for each of the seven moments in the unfolding of the cosmopolitan citizen-self, discussed earlier. Each of these pathologies can generate its own normativity, and can thus be a way in which illegitimate pluralism is manifested.

1. Pathologies of Rejection (anger)

A transition from national to cosmopolitan citizenship involves being freed from the grip of exclusive identity and embracing a form of identity that is fluid and fashioned from many sources. This transition can be experienced as becoming fragmented and inauthentic because it can be paradoxical. Both the confrontation with pluralism from the standpoint of a largely exclusionary national or religious identity, and the parallel insistence on pluralism and accommodation of difference in the face of exclusive identity claims, produce paradox. At one and the same time as implicitly or even explicitly rejecting pluralism, the exclusionary identity will depend on pluralism for its legitimacy by insisting that its voice be considered a protected right and afforded public space. At one and the

³¹ Patrick GLENN, *Legal Traditions* (Oxford: Oxford University Press, 2000).



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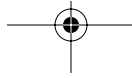
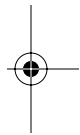
same time as proclaiming inclusion of exclusionary communities, pluralism will be used to trump and defeat those exclusive claims.

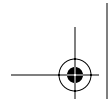
When the adherent to a religious faith relies on a pluralism that she rejects, she will do so in anger. When the pluralist sets out to exclude exclusionary claims, he can do so in anger as well. Anger is the animus of rejection, directed against oneself or directed against another. It is experienced as a violation of identity, menacing the core of what one is. Hatred intensifies the personification of that breach. The other that drew me into or made me aware of paradox is rejected and even subject to hatred. In the case of self-hatred, my own failure to overcome paradox, my inability to transcend my own divisions and countervailing tendencies, gives rise to anxiety and auto-aggression.

Anger undermines the legitimacy of the evolution from national to cosmopolitan citizenship, particularly as plural identities condense around ambivalence and give rise to forms of rejection. This overlapping convergence of mutually antagonizing identities is toxic. It is a quagmire, because it provides no footing for a common set of affirmations or civic exchange of opinion. Hatred directed against the outsider must necessarily obscure her common identity as a citizen. What could be shared in overlapping customs, manners and traditions becomes instead what prevents affinity and allegiance.

2. Pathologies of Disrespect (gluttony)

The expression of identity through the participation in offices is directly engaged by the transition from national to cosmopolitan citizenship. Old national institutions have their roles and responsibilities challenged and sometimes absorbed by new transnational or regional ones. Pathology arises when there is an over-reaching in the exercise of civic functions, either as national institutions attempt to expand their functions to transnational issues or as transnational institutions seek to assume responsibility over matters for which they have yet to achieve competence. In both cases, institutions fail to respect their jurisdiction and over-extend their powers.





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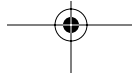
For the individual cosmopolitan citizen who seeks to participate in offices across a range of normative orders, the failure to perform one's myriad, at times overwhelming, responsibilities, and perhaps more importantly an inability to see how the exercise of those responsibilities produces some tangible good for diverse communities, undermines self-respect. Over-arching values and the self-image necessary to sustain them become implausible and non-reproducible. This can produce a substitute and diversionary over-investment in non-civic pursuits, which further saps the commitment to the offices one should execute. Here is the dysfunctional citizen described by Jean-Guy Belley. A lesser pathology arises where the cosmopolitan citizen specializes her citizenship, becoming informed and engaged about only a sliver of the public space.

A democratic deficit arises in transnational settings, not only because institutions are insufficiently representative and afford inadequate occasion to participate in offices, but also because taking up one's responsibilities seems a Herculean task. Coming to the town hall is one thing, engaging in deliberations about global governance quite another. Just as the bread and circuses of an older empire served to manufacture consent when meaningful republicanism had waned, so too the contemporary panoply of games and spectacles, goods and services is ever more avidly consumed the more elusive civic participation becomes.

3. Pathologies of Imbalance (envy)

A compact of citizens requires reciprocity: the understanding that each gives to and takes from the relationship. The transition to a cosmopolitan compact in which power and obligation are asymmetrically distributed can engender envy and resentment. This is true not only for those with less power, although it may be felt by them with greater virulence. It is also true of the citizens of an imperial power who at times will envy those who do not bear the burden of authority and conflict.

The dysfunctional cosmopolitan citizen will most envy that perhaps fictional other who manages to achieve balance among all the spheres of justice within which she functions. The dysfunc-





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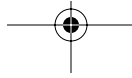
tional citizen will always sense imbalance and always feel envy, sometimes conjoined with shame. On the other hand, those for whom citizenship remains circumscribed by nation or religion might envy the cosmopolitan citizen, who moves in spheres that are foreign to them. This is how it will appear if they cannot see their identities as contributing to that of a cosmopolitan citizen and affording to themselves a privileged means of exercising such citizenship. If cosmopolitan citizenship is the preserve of a transit lounge aristocracy for whom the masses are voiceless Helots, it will be pregnant with envy.

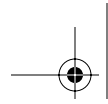
A polity that enjoys an asymmetry of authority in global governance, however democratic that polity may be, will also breed envy. Even if it seeks to spread participatory citizenship elsewhere and enters into compacts and agreements with whatever willing partners it can find, its unequal power and influence can vitiate reciprocity. If its citizens have a priority in the global order, and if the global order is an instrument for the interests of its citizens, cosmopolitan citizenship does not exist. The claimed porous and overlapping character of sovereignty in a globalized world will be revealed as a phenomenon for others and not for it. Even if it does not seek to gain territory, it will be decried as an empire and rejected as a partner. Envy will prevail over reciprocity.

4. Pathologies of License (lust)

The hospitality necessary to build cosmopolitan bonds among strangers can be abused by guest and host alike. The stranger who takes advantage of hospitality can become a source of risk and threat.³² The guest can take advantage of hospitality to act with license to destroy the host, unencumbered by a feeling of common identity. The host, master within her own domain, can act with license to remove the threat, which, if the source of threat is indiscernible, can put an end to hospitality for any stranger. Similarly, the host who abuses hospitality to exploit the guest will sense no restrictions against letting passions run, particularly if the guest is

³² Ulrich BECK, *La société du risque* (Paris: Alto, 2001).





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already viewed as a threat. All passions are unleashed in a paradoxical embrace of the threatening host or stranger as the one who defines one's own identity by incorporating difference.³³ Where the object of passion does not share a common identity, and so becomes simply a thing or a prop for fantasy, passion turns to lust.³⁴

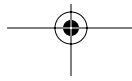
For the dysfunctional cosmopolitan citizen, there are more and less extreme ways in which the pathologies of license might be manifested. One apparently benign but insidious way is to take license with the other's identity in the name of hospitality. This might be called the sin of essentializing. One makes accommodation for the stranger knowing better than the stranger who the stranger is and how she must behave. Attracted, even seduced, by what is exotic in the other, one obliges the other to dance to one's own tune.³⁵

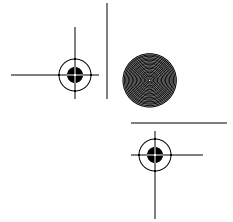
A polity can no longer play host to strangers when "unknown unknowns" are only threats and not occasions to learn about others. If hospitality, or comity, loses its function in assuring cosmopolitan self-control, a hell of passions can be unleashed. On the other hand, comity can be onerous and restrictive of the host's freedom of action, particularly when it delays the response to perceived threat. Thus, comity is also abused when those who insist on it fail to account for threats to the host. Within the dynamic at play between self-control and abuse lurks the temptation to take pleasure in the exercise of power. Because comity involves vulnerability for domestic and foreign power alike, there is a temptation to exploit the relationship so as to gain the upper hand and be free in future to pursue one's own will. Should such strategic behaviour remain unchecked, it would expunge cosmopolitanism.

³³ Carl Schmitt develops this theme in *The Concept of the Political*, trans. George Schwab (New Brunswick, NJ: Rutgers University Press, 1976).

³⁴ See Susan SONTAG, "Regarding the Torture of Others" *New York Times Magazine*, May 23, 2004.

³⁵ Robert BARSKY, in *Arguing and Justifying*, (Burlington: Ashgate, 2000), discusses the refugee claims process as a matter of constructing the other to meet one's own image of what the refugee must be, which in turn obliges the refugee to play that part, producing "abuse" of the refugee claims process.





5. Pathologies of Arrogance (pride)

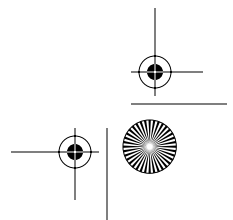
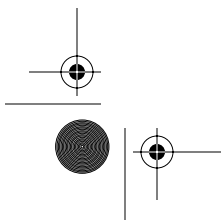
The history of cosmopolitanism is littered with millennial projects.³⁶ Indeed, to give expression to the idea of being a citizen of the world may always be a form of pride or arrogance. Whereas cosmopolitanism denotes global equality of status, to proclaim that one has achieved cosmopolitan citizenship betokens superiority and a completeness not achieved by others. Thus, for example, the apparently embrace and descriptive concept of globalization spawned a great divide between those for whom it was matter of everyday experience, and those for whom it symbolized their own marginalization. A particularly noxious form of arrogance arises when one comes to believe that the national project is the cosmopolitan project; that if only the rest of the world could become like us, a new world order would be achieved. Here is pride overflowing.

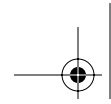
Taking up the responsibilities of cosmopolitan citizenship requires the utmost humility, since one can never truly be the amalgam of all identities, concerns and needs. But the individual must have a measure of confidence so as to decide how to exercise the offices that citizenship confers. In the face of a diversity one cannot fully imagine, let alone comprehend, one will bluff understanding, if only to advance toward a decision.³⁷ Insofar as the bluff works, and decisions are made, it is possible to believe in one's own subtlety and sophistication. Pride sets in.

It seems to be a constant of human affairs that sooner or later, bluffs are called and pride is unmasked. Even those with the greatest power run up against the limits of their capacity and foresight. Believing they can act alone for the world—an anthropocentrism that extends to the custody of Nature itself—they must eventually call upon the world even to be able to secure their own national interests. This might signal a return to equilibrium once hubris has

³⁶ Armand MATTELART, *Histoire de l'utopie planétaire* (Paris: Éditions La découverte, 1999).

³⁷ Pierre BOURDIEU, *La distinction: critique sociale du jugement* (Paris: Les Éditions de Minuit, 1979).





been cut down to size. But then again, the defeated pride of one might spur on the pride of another.

6. Pathologies of Acquisitiveness (greed)

Will it ever be possible to imagine that securing the welfare of all is everyone's obligation? The bonds of family and immediate community must remain stronger than the bonds of common humanity, and indeed it represents a breach of parental obligation to prefer an unknown other to one's own child. Yet, maintaining barriers to the flow of capital between nations so as to ensure that wealth continues to be accumulated by those who have it goes beyond caring for one's own: it displays greed. On the other hand, the transnational corporate legal order, itself built on acquisitiveness, seeks to eliminate barriers to the flow of capital so as to exploit the comparative disadvantages of impoverished labour. The assumption that this can effect an improvement in welfare depends entirely upon whether there is a sufficient saturation in labour supply to prompt competition for labour among investors. Otherwise, once one pool of labour has been picked clean, capital will shift to the next.

The dysfunctional cosmopolitan citizen is tempted to address social welfare by retreating to gated communities and leaving poverty at the gate. Philanthropy can provide some tonic, yet even the philanthropic individual who bestows more than tokens can reinforce acquisitiveness. The choice of a charitable object will often favour institutions from which one has derived real or imagined benefit. And even if a gift is other-regarding, those others need not be unknown others a world away. In the philanthropist's heart, local and national public goods will tend to trump global public goods.

The failure of states to finance global public goods is emblematic of collective greed and impedes the emergence of a collective polity, however loosely connected that polity may be³⁸. Since by definition part of the benefit of global public goods does not go to a

³⁸ See Inge KAUL, Isabelle GRUNBERG and Marc STERN (eds.), *Global Public Goods* (Oxford: Oxford University Press, 1999).





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nation's citizens, nations will tend to under-invest in them. Yet this is self-defeating, since a nation will end up relying on the quality of the global public good provided by others. Greed thus undermines the collective action necessary to form a cosmopolitan community.

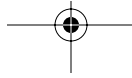
7. Pathologies of Neglect (sloth)

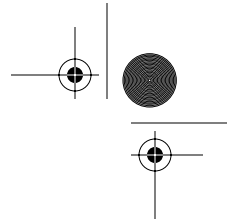
The great exemplars of cosmopolitan citizenship should inspire us to emulate them and to redouble our own meagre efforts. But their singular, larger than life, contributions can at times discourage even those who seek to fulfill their civic duties in good faith. Such ordinary citizens may come to believe that anything short of the heroic makes no difference. Or they may launch quixotic efforts at cosmopolitan citizenship that are unarmed for the complexities of acting within plural legal orders, and upon encountering defeat, remain languid.

There is a particular form of sloth that sets in for the dysfunctional cosmopolitan citizen. Overwhelmed by the overlap of identities and endless range of potential responsibilities, she simply fails to exert herself. She shows disinterest in all of the offices of citizenship, having convinced herself that participation in any particular one is pointless. Thus she retreats completely into the private sphere. She allows her citizenship to become virtual—simply a list of consumed services on offer by a range of suppliers.³⁹ The state takes the heaviest toll of inaction because it will systematically fail to fulfill expectations of national citizenship, according to which it should meet all needs and perform all services. Since it is now but one of many legal orders working in a network of relationships, its citizens become baffled about how to take the measure of what it can provide.

The failure to rouse leadership in democracies and their concomitant failure to exemplify the cosmopolitan project is perhaps the most corrosive of pluralism's pathologies. Liberal pluralism can fool itself into believing that what it proclaims is achieved by

³⁹ Richard JANDA and Dann DOWNES, "Virtual Citizenship" (1998) 13 *Can. J. L. & Soc.* 27.





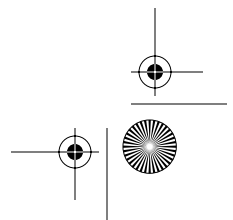
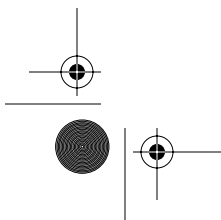
incantation rather than by vigilance and assiduity. The uncritical exercise of authority has always been the indolent course. Democracy has high transaction costs of consultation, participation, accountability and planning. *La pensée magique* according to which democracy will simply appear full blown if artificial obstacles to it are cleared away is itself a form of sloth. It forgets the effort and sacrifice of those who made democratic orders possible. An insouciant democracy allows itself to be captured by pluralism's pathologies. If the virtues of democratic citizenship take on a resoundingly hollow ring, no one will answer the call to fulfill civic duties.

CONCLUSION

Cosmopolitan citizenship is neither inherently virtuous nor inherently pathogenic.⁴⁰ But it is inaccurate to conclude that virtue and vice are simply features of individual human motivation and thus that the settings in which citizenship is exercised are morally neutral. For example, a democracy that practices slavery, however virtuous its citizens may be, has a vice rooted in its legal personality. Indeed, civic virtue requires uprooting that vice from the polity. Thus, the exercise of civic virtue can draw upon and create legitimacy. But pathological, illegitimate legal orders can eclipse civic virtue.

Each of the pathologies of pluralism catalogued here are fully on display in contemporary law and politics. Each of the plural legal orders within which cosmopolitan citizenship is exercised strays toward illegitimacy. Ours is a pluralism in which exclusionary religious and ideological claims can leave no place for the truth claims and insights gained from other faiths. Ours is a pluralism in which nation-states can fail to elicit the democratic participation they claim to exemplify. Ours is a pluralism in which the community of nations can tend toward hegemonic authority rather than toward the balance of powers. Ours is a pluralism in which racially profiled strangers can be treated as a source of unimaginable dan-

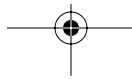
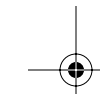
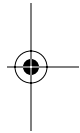
⁴⁰ Jürgen HABERMAS, *The Postnational Constellation* trans. Max Pensky (Cambridge: MIT Press, 2001).





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ger deserving unthinkable treatment. Ours is a pluralism in which those bluffing the knowledge and capacity to manage global affairs can act without their bluff being called. Ours is a pluralism in which corporate citizens unconfined by democratic accountability even to their shareholders can understand themselves to have limitless claims upon wealth. Ours is a pluralism in which simulacra of citizenship can hollow out any critical or emancipatory core to cosmopolitan citizenship.





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APPENDIX: TABLE OF CIVIC GOODS AND PATHOLOGIES

Origin		Public Goods										Private Goods	
Characteristic	Sharing	Selflessness	Cooperation	Externalization	Trust	Indivisibility	Imperishability	Charteristic	Origin	Charteristic	Origin	Charteristic	Origin
Citizenship	Birthright	Participation	Social contract	Community	Equal subjects	Social welfare	Model conduct						
Failure	Barrier to entry	Capture	Defection	Free rider	Loss of confidence	Part provision	Depletion						
Process	Request	Consultation	Mediation	Endorsement	Certification	Attestation	Constitution						
Agency	Donation	Volition	Devotion	Other-regard	Loyalty	Allegiance	Perpetuity						
Legal norm	Gift	Immunity	Privilege	Promise	Declaration	Oath	Personality						
Virtue	Gentleness	Kindness	Magnanimity	Love	Truthfulness	Generosity	Acknowledgement						
Vice	Rejection	Disrespect	Imbalance	License	Arrogance	Acquisitiveness	Neglect						
Sacrament	Baptism	Confirmation	Communion	Matrimony	Penance	Induction	Uction						
Category	Identity	Authority	Reciprocity	Alterity	Knowledge	Materiality	Duration						
Stage	Infancy	Childhood	Adolescence	Adulthood	Middle Age	Old Age	Senility						
Vice	Anger	Gluttony	Envy	Lust	Pride	Greed	Sloth						
Virtue	Restorative Justice	Temperance	Corrective Justice	Distributive Justice	Prudence	Equity	Courage						
Legal norm	Claim	Usus	Prestation	Right	Duty	Fructus	Abusus						
Agency	Affirmation	Participation	Predictability	Allocative efficiency	Reliability	Productive efficiency	Dynamic efficiency						
Process	Circle	Vote	Trial	Allocation	Audit	Registration	Designation						
Failure	Defamation	Entrenchment	Dominant position	Spillover	Information deficiency	Unclear title	Nonuse						
Symbol	Status	Share	Contract	Guarantee	Certificate	Deed	Award						
Characteristic	Privacy	Control	Rivalry	Internalization	Disclosure	Divisibility	Obsolence						

