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# Traveling the Boundaries of Statelessness: Global Passports and Citizenship

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# TRAVELING THE BOUNDARIES OF STATELESSNESS: GLOBAL PASSPORTS AND CITIZENSHIP

BERTA ESPERANZA HERNÁNDEZ-TRUYOL<sup>1</sup>  
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## I. INTRODUCTION

The mere mention of a formal global citizenship – an official, internationally recognized status with some legal effect – confounds even the most liberal citizenship thinkers.<sup>3</sup> Scholars who acknowledge the deterritorialization of citizenship hesitate endorsing a formal legal status as a “citizen of the world.”<sup>4</sup> For those who believe that the sole site of citizenship lies in the nation-state, such

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<sup>3</sup>It should be mentioned that this definition differs from the typical use of “global” citizenship in scholarship, where it has occasionally been taken as synonymous with “postnational” or “transnational” citizenship; these latter concepts, however, deal with the informal means by which citizenship has moved beyond the bounds of the nation-state, while we mean to deal instead with a hypothetical formal method of doing the same thing. Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 449 (2000). Because the postnational forms of citizenship include such factors as the growth of economic globalization, international political action, and worldwide sociocultural exchange, all of which receive various levels of institutional recognition, they cannot be said to be “formal” in the same sense as a hypothetical global passport might be. Alejandro Portes et al., *The Study of Transnationalism: Pitfalls and Promise of an Emergent Research Field*, 22 ETHNIC & RACIAL STUD. 217, 221, 223 (1999). That said, postnationalist thought is critical to the analysis herein, and it will be discussed more fully below. See *infra* Part II.C.

<sup>4</sup>See Bosniak, *supra* note 3, at 448.

proposition is intrinsically contradictory.<sup>5</sup> Historically, the most serious objection to the concept of global citizenship has been the corollary need for a world government which objectors assume, without offering any empirical support, will be a tyrannical one.<sup>6</sup>

Notwithstanding the lack of support for a formal global citizenship, in recent years much scholarship has suggested that the world is nevertheless informally moving in that direction. Despite the historical reality that citizenship is centered on the nation-state, as a factual matter citizenship is increasingly non-national in character.<sup>7</sup> For example, the growth of dual and multiple citizenship, the international human rights regime, and the development of a formal European Union citizenship all represent ways in which citizenship concepts are evolving in an increasingly deterritorialized way.<sup>8</sup>

Such movement away from a state-bound conception of citizenship appears to remove concerns about a formal global citizenship and the tyranny of its government. This movement is occurring *de facto*, and significantly this has

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<sup>5</sup>According to the conventional definition of the term, citizenship has “little meaning except in the context of a state.” Gertrude Himmelfarb, *The Illusions of Cosmopolitanism, in FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM* 74 (Joshua Cohen ed., 1996) [hereinafter FOR LOVE OF COUNTRY].

<sup>6</sup>Interestingly, the assumption about the tyranny of a world government is often made but rarely justified. Its modern philosophical grounding seems to be in Kant, who feared that such a government would become a “universal monarchy.” Fernando R. Teson, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 87 (1992). The concept was powerfully reinforced by Hannah Arendt when she wrote that “[a] world citizen, living under the tyranny of a world empire, and speaking and thinking in a kind of glorified Esperanto, would be no less a monster than a hermaphrodite.” HANNAH ARENDT, *MEN IN DARK TIMES* 89 (1968). But historical context is important here. Kant wrote at the end of the 1700s, during a period where humankind was just beginning to rebel against the absolute monarchies which had dominated the early modern era (and Kant was clearly part of that rebellious, republican movement); Arendt, on the other hand, was a German-born Jew writing after the experiences of the Second World War nearly subjected the world to the same tyrannical domination she wrote of. See Teson, *supra*, at 69 (identifying Kant as a “philosopher of the ordinary people”); Seyla Benhabib, *The Pariah and Her Shadow: Hannah Arendt’s Biography of Rahel Varnhagen*, 23 POL. THEORY 5 (1995) (discussing Arendt’s relationship to her identity as a German Jew in the context of her biography of Varnhagen). What remains unanswered is whether a present day world government – founded on an ideal of universal affirmation, much like the United Nations (however infeasible such a government might be) – would inevitably be doomed to tyranny.

<sup>7</sup>Bosniak, *supra* note 3, at 453-54.

<sup>8</sup>*Id.* at 457-62. See also Linda Bosniak, *Multiple Nationality and the Postnational Transformation of Citizenship*, 42 VA. J. INT’L L. 979, 981-82 (2002) (discussing the claim that multiple citizenship represents a form of postnationalism); Yasemin Nuhoglu Soysal, *Changing Parameters of Citizenship and Claims-Making: Organized Islam in European Public Spheres*, 26 THEORY & SOC’Y 509, 512-13 (1997) (discussing the transnationalization of human rights); J. H.H. Weiler, *Bread and Circus: The State of the European Union*, 4 COLUM. J. EUR. L. 223, 242-43 (1998) (describing how European Union citizenship can be viewed as a form of “supranationalism”, and noting that “there is another more tantalizing and radical way of understanding the [EU’s citizenship] provision, namely as the very conceptual decoupling of nationality from citizenship.”).

occurred in the absence of a formal global nation-state. Thus, the remaining venue for analysis concerning the feasibility and desirability of a global citizenship is the question of the relationship of citizenship to state sovereignty. If indeed citizenship is denationalized, it is necessary to determine what entity will have the ultimate power over, and responsibility for, a particular individual with multiple alliances, including both national and global ones.<sup>9</sup> An independent global citizenship without a local component and in the absence of the much-feared global government creates two concerns. One, an individual may imperil the rights of others, without a structure that can impose sanctions for the heinous conduct.<sup>10</sup> Two, an individual's rights may be imperiled, and there may be no entity to provide protection.<sup>11</sup>

This essay proposes a model of a formal global citizenship that will alleviate these concerns and prove both practically and theoretically feasible. The model flows from the concept of dual or multiple nationality and offers global citizenship only as an elective nationality. Such citizenship would co-exist with the nationality acquired by birth or naturalization, thereby guaranteeing that at least one nation-state always has the ultimate responsibility for the individual. At the same time, by providing for careful considerations on who may acquire global citizenship, the value and meaning inherent in citizenship can be preserved and enhanced.<sup>12</sup> Indeed, the idea of a global citizenship that is a formalized development emerging from the human rights tradition can be a foundation for the attainment of full personhood by those marginalized or disempowered within their own or foreign national borders – the poor, racial and ethnic minorities, indigenous populations, and women who at present lack equal status in any local or global community.

To appreciate the interplay between the proposed formal global citizenship and the citizenship tradition, our discussion will first review citizenship theories grounded in the nation-state. We then will turn to critiques of these traditionalist

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<sup>9</sup>See Louis W. Goodman, *Democracy, Sovereignty and Intervention*, 9 AM. U. J. INT'L L. & POL'Y 27, 27 (1993).

<sup>10</sup>Because of the lack of a government to enforce rights over a global citizen, as we have defined the concept here, such citizens might be said to be "stateless" within the traditional meaning of the term, even though stateless persons are commonly defined as individuals with no nationality. See Zsuzsanna Deen-Racsmány, *The Nationality of the Offender and the Jurisdiction of the International Criminal Court*, 95 AM. J. INT'L L. 606, 616 (2001) (discussing the problem of stateless offenders).

<sup>11</sup>Bemma Donkoh, *A Half-Century of International Refugee Protection: Who's Responsible, What's Ahead?*, 18 BERKELEY J. INT'L L. 260, 266-67 (2000) (discussing the protection of stateless persons, and noting that the United Nations High Commissioner for Refugees has been charged with intervening on the behalf of such persons).

<sup>12</sup>Preserving the value of citizenship necessarily implies that it should not be granted universally to all people, despite what the phrase "global citizen" might suggest. Rather, a supranational global citizenship body will be necessary to process applications for global citizenship. Such an organization might be developed under the auspices of the United Nations, but given widely variable national acceptance of dual nationality, it is unlikely that global consensus could be achieved. A less universal, but more feasible alternative is to establish the global citizenship body through a multilateral treaty, thus permitting states to recognize it only if state law allows their citizens to maintain dual nationality status. Specific characteristics of such a body (and the treaty creating it) are necessarily conjecture, but the basic structure will be explored in Part III.A.

approaches which suggest that not all questions of citizenship can be dealt with in national terms. The conflict between these two approaches is clear in the case of dual nationality, which provides the foundation for our global citizenship model. With that foundation in place, in Part III, ‘Towards a Formal Global Citizenship,’ we turn to the theoretical and practical aspects of the proposed model, particularly in the area of statelessness. Finally, we can see the real-world impact of these practical benefits in the ongoing case of the Guantánamo prisoners.

## II. CITIZENSHIP THEORY AND GLOBAL CITIZENSHIP

There are two broad conceptualizations of citizenship: citizenship-as-legal-status and citizenship-as-desirable-activity.<sup>13</sup> The first conceives of citizenship as a formalized relationship between a community and its members, while the second talks about participation and identification as the defining characteristics of citizenship.<sup>14</sup> Citizenship-as-legal-status is a legal and political understanding of citizenship; citizenship-as-desirable-activity is a philosophical and moral one. One critique of this dichotomy is that the two categories overlap a great deal, in that certain moral understandings of citizenship imply support for corresponding legal definitions of citizenship. For example, the cosmopolitan’s moral embrace of humankind as the basic unit of value, rather than the members of one’s own family, community, or nation, implies the postnational legal conception of citizenship, which transcends states as the sole means of granting or defining citizenship.<sup>15</sup> The analysis is often more complex, however; a cosmopolitan may embrace the betterment of humanity as a moral virtue for which to strive, but in accordance with the cosmopolitan mantra “think globally, act locally,” such a cosmopolitan may prefer the civic republican approach to citizenship-as-legal-status, which advocates devotion to the community in which one resides.<sup>16</sup> Below, we discuss the legal and philosophical views of citizenship as separate. It is noteworthy that while their presentation below preserves the separations that have historically developed, they do not exist in isolation.

### A. The Legal View: Citizenship-as-Legal-Status

In the wake of World War II, modern citizenship theory developed the idea of “passive” or “private” citizenship.<sup>17</sup> This view of citizenship stresses the importance of membership in society by guaranteeing rights to certain persons who are

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<sup>13</sup>Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352, 353 (1994).

<sup>14</sup>*Id.*

<sup>15</sup>We should remark at this point that our choice of “cosmopolitanism” to refer to philosophical trends grounded in the Stoics and Kant is a potentially risky one, given that the term was at one time associated with anti-Semitic meaning. JEAN-FRANCOIS LYOTARD, *THE POSTMODERN EXPLAINED: CORRESPONDENCE 1982-1985* 47 (Julian Pefanis & Morgan Thomas eds., Don Barry et al. trans., 1992). Throughout this work, we use cosmopolitanism to mean the idea that human beings can form part of a unitary community that should be nurtured, rather than any connotation that might imply tribalism or ultranationalism.

<sup>16</sup>See Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1007, 1042-46 (2001).

<sup>17</sup>Kymlicka & Norman, *supra* note 13, at 354-55.

members—the citizens—and denying them to noncitizen “outsiders.”<sup>18</sup> These rights are passive, as they are acquired without any effort on the part of the individual citizen.<sup>19</sup>

In passive citizenship, a strong welfare state is necessary to assure a citizen's rights by helping all citizens feel like equal members of society, and permitting the poor to exercise their political rights on a par with the rich.<sup>20</sup> Significantly, this is also the basis of criticisms of passive citizenship. By guaranteeing rights without requiring active participation in the state, passive citizenship makes citizens dependent on the state for their political identities; this is the “New Right” view of citizenship.<sup>21</sup> Instead of guaranteeing rights for all citizens regardless of their participation in society, the New Right seeks to reduce the welfare state and to develop a system of mutual obligation that assures the grant of full and equal rights only to those who make an economic contribution to society.<sup>22</sup> However, when this view was put into actual practice, reducing the welfare state did little to make the poor more responsible citizens, and succeeded only in reducing their ability to participate economically in society.<sup>23</sup>

The tensions exhibited by the passive citizenship and New Right models gave rise to a series of new approaches to citizenship-as-legal-status which charted a middle course involving “a balance of rights and responsibilities.”<sup>24</sup> Two of the novel approaches have had a marked impact on recent citizenship thought, particularly with respect to globalization—the civic republican and civil society models. Civic republicanism’s virtues lie in a “committed engagement in the life of the polity” and a “willing commitment to the common good” as contrasted with the atomistic, solely self-interested goals of the liberal rights-based approaches.<sup>25</sup> Civic republicanism’s harshest criticism is grounded on the observation that, while it treats political participation (rather than personal attachments) as an ideal and perfect goal, such is not the reality for the overwhelming majority of humankind.<sup>26</sup> In contrast, the civil society model stresses the ultimate importance of participation in the political community. However, it also suggests that the exchange of membership responsibilities for guaranteed rights is learned in the personal spaces associated with

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<sup>18</sup>*Id.*; see also T.H. MARSHALL, CLASS, CITIZENSHIP AND SOCIAL DEVELOPMENT 71-73 (1964).

<sup>19</sup>*Id.* This is also substantially similar to Gerald Neuman’s definition of unilateral liberalism, though he approaches the matter from the standpoint of naturalization; the choice to naturalize is that of the individual, but once that choice is made, the rights attendant to citizenship are guaranteed. See Gerald Neuman, *Justifying U.S. Naturalization Policies*, 35 VA. J. INT’L L. 237, 238-39 (1994).

<sup>20</sup>Kymlicka & Norman, *supra* note 13, at 354-55.

<sup>21</sup>*Id.* at 355-56.

<sup>22</sup>*Id.* at 356.

<sup>23</sup>*Id.* at 356-57.

<sup>24</sup>*Id.* at 360.

<sup>25</sup>Neuman, *supra* note 19, at 240, 245.

<sup>26</sup>Michael Walzer, *The Civil Society Argument*, in DIMENSIONS OF RADICAL DEMOCRACY: PLURALISM, CITIZENSHIP AND COMMUNITY 89, 92 (Chantal Mouffe ed., 1992).

civil society—church, family, and other elective associations.<sup>27</sup> The critique of the civil society model warns that the virtues learned in those spaces may be intolerance, discrimination, and suspicion of one’s fellow man, all of which are at odds with the democratic nature considered ideal in our polity.<sup>28</sup> In addition, the civil society model may be misguided in relying on voluntary associations to provide civic virtue because, quite simply, these organizations do not exist to teach virtue to their members.<sup>29</sup> Rather, they exist to promote and protect the status quo.

Citizenship-as-legal-status raises one more tangential dilemma: the interrogation of the importance of maintaining the value of citizenship. Even if we presuppose the decline of nation-state sovereignty, states themselves still exist, and “[t]he state still stands for something, as do the societies that states represent.”<sup>30</sup> Societies have an interest in preserving their uniqueness, and to do so, states must remain closed groups.<sup>31</sup> Modern conceptions of state citizenship might be likened to a club, where an admissions committee decides who should be members, what the requirements for entry are, and the rights and responsibilities to be derived from such membership.<sup>32</sup>

### B. *The Philosophical View: Citizenship-as-Desirable-Activity*

The citizenship-as-desirable-activity model treats citizenship as a matter of personal identification and belonging. One such view is advocated by cosmopolitanism which, as a philosophy, was created by the Stoics, revitalized by Kant, and is inherent in many of the international legal developments of the past century.<sup>33</sup> Although cosmopolitanism “has been used to describe a wide variety of important views in moral and socio-political philosophy,” at its center all versions agree with a central idea: “all human beings, regardless of their political affiliation, do (or at least can) belong to a single community, and that this community should be cultivated.”<sup>34</sup> Cosmopolitanism raises numerous concerns, two of which can be designated as ethical/moral and cultural.<sup>35</sup> Ethical or moral cosmopolitanism “is a

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<sup>27</sup>*Id.* at 104.

<sup>28</sup>Kymlicka & Norman, *supra* note 13, at 363-64.

<sup>29</sup>*Id.* at 364.

<sup>30</sup>Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1479-80 (1997).

<sup>31</sup>Yaffa Zilbershats, *Reconsidering the Concept of Citizenship*, 36 TEX. INT’L L.J. 689, 696 (2001).

<sup>32</sup>*Id.* at 696-97.

<sup>33</sup>A full discussion of the history of cosmopolitanism is beyond the scope of this paper, but for just such a review, see generally Derek Heater, *Cosmopolis, The Way to Peace?*, 9 PEACE REV. 315 (1997).

<sup>34</sup>Pauline Kleingeld & Eric Brown, *Cosmopolitanism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2002), at <http://plato.stanford.edu/entries/cosmopolitanism/> (last visited August 29, 2003).

<sup>35</sup>*Id.*; Bernard Yack, *Cosmopolitan Humility*, BOSTON REV., Feb.-Mar. 1995, at 17. A third strand is political cosmopolitanism, which centers around the notion of international political arrangements ranging from advocates of a world state to those who favor international political institutions that direct their attention to particular issues. See Kleingeld



perspective committed to the well-being of humanity at large, rather than any particular community of persons.”<sup>36</sup> A cultural cosmopolitan, on the other hand, has been described as one who “learns Spanish, eats Chinese, wears clothes made in Korea, listens to arias by Verdi sung by a Maori princess on Japanese equipment, follows Ukrainian politics, and practices Buddhist meditation techniques.”<sup>37</sup>

Cosmopolitans have heralded globalization as a final vindication of an ancient ideal—the “citizen of the world” originally envisioned by the Stoics.<sup>38</sup> In the development of a system of international law that respects human rights, ethical cosmopolitans see the incorporation of Kantian ideals.<sup>39</sup> Similarly, a multivariate culture, with elements of numerous cultures involved in one’s daily life, is a direct result of the increased international trade and travel that has come along with globalization.<sup>40</sup> But cosmopolitanism is not without its critics. Cultural cosmopolitanism has been lambasted as destructive of the very cultural diversity it purports to protect, and as possibly encouraging extreme nationalism or tribalism.<sup>41</sup> By encouraging the homogenization of culture, such universalism threatens to destroy the very things that make cultures unique.<sup>42</sup>

Ethical cosmopolitanism has received its share of criticism as well. In opposition to the moral universalism espoused by cosmopolitanism are statist or nationalist philosophies.<sup>43</sup> These philosophies propose that cosmopolitanism is misguided because individuals cannot conceive of humanity as a whole, let alone interact with it; rather, individuals interact only within their immediate communities and thus their

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& Brown, *supra* note 34. The largest critique of political cosmopolitanism addresses the impossibility of supplanting nation-states with a world-system of governance. *Id.*; see also discussion *supra* note 6.

<sup>36</sup>See Kleingeld & Brown, *supra* note 34 (defining moral cosmopolitanism as “a ‘moral’ commitment to helping human beings as such.”).

<sup>37</sup>Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REFORM 751, 754 (1992); see also Kleingeld & Brown, *supra* note 34 (rejecting “attachment to parochial culture,” encouraging “cultural diversity and appreciat[ing] a multicultural mélange” while “reject[ing] strong nationalism.”).

<sup>38</sup>See Bosniak, *supra* note 3, at 448.

<sup>39</sup>David Held, *What Hope for the Future?: Learning the Lessons of the Past*, 9 IND. J. GLOBAL LEG. STUD. 381, 382 (2002) (“Immanuel Kant wrote over two hundred years ago that we are ‘unavoidably side by side.’ A violent challenge to law and justice in one place has consequences for many other places and can be experienced everywhere.”). Held goes on to state that “[c]osmopolitan principles are not principles for some remote utopia; they are at the center of significant post-Second World War legal and political developments, from the 1948 UN Declaration of Human Rights to the 1998 adoption of the Statute of the International Criminal Court.” *Id.* at 399.

<sup>40</sup>See Berta Esperanza Hernández-Truyol, *Human Rights, Globalization and Culture*, in MORAL IMPERIALISM: A CRITICAL ANTHOLOGY 353, 361 (Berta Esperanza Hernández-Truyol ed., 2002).

<sup>41</sup>*Id.*; see also *supra* notes 15 and 37.

<sup>42</sup>Hernández-Truyol, *supra* note 40, at 361.

<sup>43</sup>See Chander, *supra* note 16, at 1007.



conception of self is necessarily locally grounded.<sup>44</sup> The flaw in this argument is that individuals should be no more able to conceive of and identify with a billion of their fellow citizens (as a citizen of India or China might possess) than they should be able to relate with six-and-a-half-billion of their fellow humans.<sup>45</sup> A connected question is why persons who happen to be our fellow citizens—a largely accidental group of cohorts—should take precedence over those with whom we consciously identify.<sup>46</sup> Rather than engage these questions directly, the trend has been to extol the virtues of the nation-state as the ideal focus for one’s moral engagement with one’s fellow humans; in doing so, states acknowledge globalizing trends but deny that they have replaced the state.<sup>47</sup>

### C. Recent Critiques

Recently, scholars focusing on the postnationalization, transnationalization, denationalization, or globalization of citizenship have challenged the idea that citizenship must necessarily be grounded in the nation-state, the notion underlying traditional legal conceptions of citizenship.<sup>48</sup> With postnationalization the focus is on a variety of international activities that in isolation constitute only scattered instances of cross-border activity, but as a whole represent a major shift in understanding citizenship.<sup>49</sup> Rather than defining citizenship as a relationship between an individual and a state, postnationalism embraces a much broader array of interactions between individuals, states, and NGOs.<sup>50</sup> These interactions are present in a number of recent developments: an increase of dual and multiple nationality;<sup>51</sup> the development of an international human rights regime;<sup>52</sup> the internationalization of political activity through NGOs;<sup>53</sup> and a sense of transnational belonging held by

<sup>44</sup>Bosniak, *supra* note 3, at 496-97.

<sup>45</sup>CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2003), available at <http://www.cia.gov/cia/publications/factbook> (last visited August 23, 2003).

<sup>46</sup>Martha Nussbaum, *Patriotism and Cosmopolitanism*, in FOR LOVE OF COUNTRY, *supra* note 5, at 3, 7 (“The accident of where one is born is just that, an accident.”).

<sup>47</sup>Bosniak, *supra* note 3, at 498-99.

<sup>48</sup>*Id.* at 449 n.6. “Postnationalism” speaks of these trends in citizenship theory.

<sup>49</sup>*See id.*

<sup>50</sup>*See id.* at 450. In general terms these include “cross-border organizing efforts in the areas, for example, of human rights, the environment, arms control, women’s rights, labor rights, and the rights of national minorities.” *Id.* at 474.

<sup>51</sup>Soysal, *supra* note 8, at 512. *But see* Bosniak, *supra* note 8, at 1003 (arguing that multiple nationality is not destroying the nation-state as the locus of citizenship, but simply multiplying it).

<sup>52</sup>*But see* Bosniak, *supra* note 3, at 467-69 (arguing that one should be careful in placing too much emphasis on the development of international human rights as a form of postnationality, as the regime actually does fairly little to protect the individual).

<sup>53</sup>Peter J. Spiro, *Globalization, International Law, and the Academy*, 32 N.Y.U. J. INT’L L. & POL. 567, 571 (2000) (recognizing that “non-state actors enjoy expanded formal rights of participation in intergovernmental standard-setting processes and often perform delegated monitoring and enforcement functions.”).

many individuals, especially among immigrant communities that retain ties to their country of origin.<sup>54</sup> Postnationalism does not discount the viability or significance of conventional nation-state citizenship; rather, it conceives of these more traditional concepts as one facet of a “citizenship that is multiple and overlapping.”<sup>55</sup>

The significance of these trends is a subject of much debate. Some suggest that the increase of extranational modes of citizenship represents a decline of state sovereignty.<sup>56</sup> Others, however, point to the rise of new nation-states following the collapse of old empires, and nationalistic impulses on the part of many groups around the world, as evidence that the nation-state remains strong despite these globalizing trends.<sup>57</sup> Some seek to resolve this tension by charting a middle road, suggesting that postnational forms of citizenship can exist and retain significance without necessarily derogating the importance of national citizenship.<sup>58</sup> We propose a third way which, rather than attempting to chart a middle course, rejects the either/or posture and takes a both/and approach. We posit that, while globalization does erode sovereignty, it merely changes rather than devalues the nation-state. Thus, while the question of whether postnationalism represents a global citizenship in lieu of a national one is contested intellectual terrain, under our third way a codification of these postnational trends through a formal global citizenship still requires the assent of states from which more conventional ideas of citizenship are derived. Therefore, we conceive of a formal global citizenship as existing in tandem with, rather than as a replacement for or in opposition to, national citizenship.

#### D. Dual Nationality

The concept of dual nationality is of utility in conceiving of global citizenship as coexisting rather than competing with national citizenship.<sup>59</sup> To be sure, dual nationality is also contested terrain in the citizenship field.<sup>60</sup> As such, it has both theoretical and practical ramifications for a formal global citizenship model. Governments tend to disfavor dual nationality because it creates an individual “of

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<sup>54</sup>Maria Patricia Fernández-Kelly, *Immigration, Poverty and Transnationalism*, in MORAL IMPERIALISM: A CRITICAL ANTHOLOGY, *supra* note 40, at 337, 344.

<sup>55</sup>Bosniak, *supra* note 3, at 450.

<sup>56</sup>*See generally* SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* (1996); Saskia Sassen, *Economic Globalization and the Redrawing of Citizenship*, in MORAL IMPERIALISM: A CRITICAL ANTHOLOGY, *supra* note 40, at 135.

<sup>57</sup>Schuck, *supra* note 27, at 10. *See generally* STEPHEN D. KRASNER, *SOVERIGNTY: ORGANIZED HYPOCRISY* (1999).

<sup>58</sup>*See* Bosniak, *supra* note 8, at 1003.

<sup>59</sup>The basic definition of dual or multiple nationality is “[t]he simultaneous retention of more than one nationality.” STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1219 n.12 (3d ed. 2002). While theoretically simple, the reality is somewhat more complex, because “every sovereign state decides who its own nationals are”, “the typical law provides alternative, multiple routes to nationality,” and “the rules vary from state to state.” *Id.* at 1219.

<sup>60</sup>“Until very recently, the nearly unbroken scholarly tradition has been to tolerate dual citizenship but not to applaud it.” *Id.* at 1221.

divided, and often conflicting, loyalties and duties.”<sup>61</sup> Dual nationals may lead to international tensions when two countries attempt to exert control over them, and create security problems in times of war, such as the possibility of sabotage or treason on behalf of one nation (and nationality) against the other.<sup>62</sup> Because citizenship is a domestic, not an international, concern, nations are free to limit their citizens’ ability to obtain dual nationality, and many have done just that. Of the countries responding to a 1998 survey, only about half (66 out of 128) had some form of dual nationality.<sup>63</sup> At the same time, states (even some of which permit dual nationality) have made efforts to limit dual nationality on the international level through bilateral and multilateral agreements, such as the Convention on the Reduction of Cases of Multiple Nationality.<sup>64</sup>

While dual nationality as a paradigm is often disfavored formally, restrictions against such status are often systematically ignored, giving way to the reality that around the world people, beyond their multiple informal allegiances to more than one nation-state, frequently enjoy formal allegiances to two or more nations. In the United States, for example, citizens who naturalize elsewhere violate the oath of allegiance and may be expatriated (i.e. lose their citizenship).<sup>65</sup> The U.S. Supreme Court, however, has held that even a citizen who knowingly and voluntarily applies for citizenship in another country cannot lose his or her U.S. citizenship unless that individual expressly intends to renounce it.<sup>66</sup> This tacit acceptance of dual nationality evidences “the transformed nature of citizenship in a postnational world, a world in which national affiliations no longer clearly trump other associational

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<sup>61</sup>David S. Gordon, *Section V Civil Rights: Dual Nationality and the United States Citizen*, 102 MIL. L. REV. 181 (1983).

<sup>62</sup>Spiro, *supra* note 30, at 1414-15. Though not strictly a case of dual nationality, the bombing of the UN building in Baghdad provides a chilling example of the effect divided loyalties can have. Iraqi security guards employed by the UN—their loyalty potentially split between the ousted Hussein regime and the occupying government overseen by the UN—are being investigated as potential co-conspirators in the attack. See Gareth Smyth, *Iraq’s Political Groups Seek Role in Security: Aftermath of UN Bombing*, THE FINANCIAL TIMES (LONDON), August 23, 2003, at 6.

<sup>63</sup>Eugene Goldstein and Victoria Piazza, *Naturalization, Dual Citizenship and Retention of Foreign Citizenship: A Survey*, 75 INTERPRETER RELEASES 1613, 1629-32 (1998).

<sup>64</sup>Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, May 6, 1963, 634 U.N.T.S. 221 (stating “that cases of multiple nationality are liable to cause difficulties and that joint action to reduce as far as possible the number of cases of multiple nationality, as between member States, corresponds to the aims of the Council of Europe.”).

<sup>65</sup>For the oath of renunciation and allegiance, see Immigration and Nationality Act, 8 U.S.C. § 1448 (1997); for means by which nationality can be lost, see Immigration and Nationality Act, 8 U.S.C. § 1481 (1997).

<sup>66</sup>See *Afroyim v. Rusk*, 387 U.S. 253, 255 (1967).

attachments . . . .”<sup>67</sup> The rise of dual nationality shows a domestic trend, rather than a global phenomenon.<sup>68</sup>

Currently, there is vigorous ongoing debate as to what extent the increasing incidence of dual nationality is a sign of weakening state sovereignty.<sup>69</sup> What is patent, however, is that dual nationality is a status with increasing importance—both to individuals and to nation-states—which appears with increasing regularity in the present world. Moreover, dual national status can at times provide “unique advantages in terms of freedom of movement and of economic establishment,” garner dual nationals “international protection from both governments,” and offer opportunities for political participation in both locations of loyalty.<sup>70</sup>

### III. TOWARDS A FORMAL GLOBAL CITIZENSHIP

#### A. Theoretical Ramifications

Notwithstanding the lack of universal support for dual nationality, it is a useful paradigm for interrogating the viability and desirability of a formal global citizenship. For example, countries that prohibit their own citizens from maintaining dual nationality are unlikely to support a formal global citizenship that may be perceived to interfere with their unfettered sovereign claim over such citizens. The global citizenship to be proposed is likely to require the consent of sovereigns through a multilateral treaty, thus permitting objecting countries to refuse recognition of global passport holders. However, in light of the *de facto* globalized citizenship model that has emerged through the human rights system, a formalized global citizenship should be aspirationally universally embraced.<sup>71</sup> The formal global citizenship we propose will avoid the basic problem with dual nationality—the interplay of supremacy between two sovereign bodies (traditionally, nation-states).<sup>72</sup> The model proposed would neither create nor require a global government which would inevitably struggle with individual nation-states for ultimate authority over individuals. Consequently, even those nations that discourage dual nationality might find formal global citizenship a workable model.

Global citizenship is a model based on the idea of the universality of human rights to which all people are entitled by virtue of their humanness. Formally, it has four basic characteristics.

- 1) A formal global citizenship must protect the trappings of personhood by being grounded in human rights norms. Insofar as states may infringe

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<sup>67</sup>Spiro, *supra* note 30, at 1416.

<sup>68</sup>Bosniak, *supra* note 8, at 998 (“To the extent that dual or multiple nationality is increasingly tolerated today, this tolerance is a function of states’ own decisions.”).

<sup>69</sup>*See id.* at 992-95; Zilbershats, *supra* note 31, at 725-33.

<sup>70</sup>Gordon, *supra* note 61, at 181; Fernández-Kelly, *supra* note 54, at 347.

<sup>71</sup>*See, e.g.,* Hernández-Truyol, *supra* note 40, at 353; Boaventura de Sousa Santos, *Toward a Multicultural Conception of Human Rights*, in *MORAL IMPERIALISM: A CRITICAL ANTHOLOGY*, *supra* note 40, at 39.

<sup>72</sup>Zilbershats, *supra* note 31, at 732.

on these rights, global citizenship must endeavor to advance the cause of those who hold it on the international plane.

2) A formal global citizenship must defer to the nation-state as the site of the individual's "primary" citizenship. This is chiefly a matter of making global citizenship palatable, both theoretically, since many citizenship theories require the primary focus of one's political energies on the polity, and practically, since nations are unlikely to agree to any structure that significantly derogates from their sovereignty.

3) Formal global citizenship must be established by multilateral treaty. This is important, since it permits nations to opt out of the formal global citizenship apparatus if they so choose. Such a treaty must also by its terms prevent the passage of global citizenship from person to person, requiring instead that they actively seek it. By doing so, global citizens can be assured that world citizenship does not simply represent a valueless status granted on everyone in the world (as the name might otherwise imply). At the same time, because those possessing global citizenship must make a conscious effort to acquire it, its possession will maintain significance for them.

4) Formal global citizenship will require a structure to review petitions for global citizenship, but one that would include both substantive and procedural normative standards that would not encroach on sovereign prerogatives of states such as taxation, conscription, or prosecution. A workable global citizenship model must provide for an admissions committee and admissions procedure to consider applications and any disputes that may arise surrounding them.

Each of the citizenship theories discussed above creates hurdles that any workable model of global citizenship must overcome. These problems exist because, fundamentally, the traditional views of citizenship assume the nation-state to be the ultimate site of citizenship, and insist on the high value of political participation, either in the nation-state or in some component thereof. The agreeability of a formal global citizenship with such ideas depends heavily on the value placed on such political participation. For example, the passive citizenship model stresses the rights guaranteed to citizens, and sees political participation as a benefit to be derived from these rights.<sup>73</sup> In the model presented here, the global citizen will ultimately derive rights from the nation-state—not only by possessing a nation-state citizenship as one's "primary" citizenship but also by virtue of the nation-state's acquiescence to formal global citizenship through a treaty or other international agreement—and consequently, the role of the nation-state in passive citizenship is secure. Only insofar as the global citizen enjoys unequal rights in comparison to other global citizens might problems exist.

The New Right approach, however, complicates matters by adding to the equation the responsibilities of the citizen to participate actively in the community.<sup>74</sup>

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<sup>73</sup>See Kymlicka & Norman, *supra* note 13, at 354.

<sup>74</sup>*Id.* at 356.

The New Right model is grounded in the need to be an economic participant. Given the reality that a global citizenship favors and facilitates free movement, being an economic participant is more likely for global citizens.

Civic republicanism, however, presents a much greater problem than the passive citizenship and New Right approaches. In requiring a commitment to the polity as opposed to individual goals, civic republicans require not only the location of citizenship in the nation-state, but also the focus of individuals' political energies on only one nation-state.<sup>75</sup> It is the civic republican's position that dual nationality itself is only valuable insofar as it encourages participation in a polity where one resides but could not otherwise participate.<sup>76</sup> Under a civic republican model, dual citizens should not be permitted to exercise political rights in both venues.<sup>77</sup> Civic republicanism also demands the preservation of the value of citizen status, which has significance for both national and global citizenship. Formal global citizenship must simultaneously offer its own value, and avoid infringing on the value of nation-state citizenship.

Given that civic republicanism does not embrace dual nationality except in very specific circumstances, it cannot be reconciled with a global citizenship based on dual nationality. On the other hand, as a practical matter, the lack of a global government in which to participate makes it perfectly plausible to devote the whole of one's political energy to the nation-state of one's primary citizenship. Civil society theory, in contrast, is fully compatible with a formal global citizenship. By preventing the transmission of formal global citizenship by blood (*jus sanguinis*) or soil (*jus soli*), gaining global citizenship essentially represents another form of elective association.<sup>78</sup> The value learned from electing to associate with a world community is responsibility to the global rather than simply the local. Consequently, civil society theory may also comport well with cosmopolitan philosophy. And, as with civic republicanism, because there is no global government to distract the political activities of a global citizen, an individual's political energies can be directed solely towards the state where he or she holds primary citizenship.

From a philosophical standpoint, the global citizenship structure proposed here might appear inherently cosmopolitan; after all, it would quite literally create "citizens of the world." But statist doctrine has its place, not so much in elevating the nation-state as an ideal mode of moral engagement but in cautioning against the excesses of cosmopolitanism. In advocating ethical/moral and cultural universalism,

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<sup>75</sup>David A. Martin, *New Rules on Dual Nationality for a Democratizing Globe: Between Rejection and Embrace*, 14 GEO. IMMIGR. L.J. 1, 22 (1999). ("[E]ncouraging full engagement in a single polity is a valid goal, consistent with healthy democracy (and especially so within a civic republican conception of democracy).").

<sup>76</sup>David A. Martin, *The Civic Republican Ideal for Citizenship, and for Our Common Life*, 35 VA. J. INT'L L. 301, 310 (1994).

<sup>77</sup>See *id.* at 315.

<sup>78</sup>Literally meaning "right of the blood", *jus sanguinis* transfers to an individual the nationality of their parents, no matter where they happen to be born. LEGOMSKY, *supra* note 59, at 1193. In contrast, *jus soli*, meaning "right of the land", grants to an individual the nationality of the country born in, no matter the nationality of the person's parents. *Id.* These two principles are the means by which one might acquire citizenship on birth; the third method, naturalization, is how one acquires citizenship after birth. *Id.* at 1203.



cosmopolitanism runs the risk of becoming ethically and culturally tyrannical. It is therefore vital to keep in mind, when considering the ethical cosmopolitan focus on humankind as a whole, that humankind is at some basic level comprised of individuals.<sup>79</sup> On a moral level, then, it is important to concentrate on the moral good in protecting individual needs for sustenance and personal development as the root motivation underlying international human rights initiatives, rather than stressing the moral benefits of such rights to humanity as a whole.<sup>80</sup> By giving individuals global significance in a genuine institutional framework, a world citizenship could do much to further this goal.<sup>81</sup> Similarly, we must remain wary of cultural cosmopolitanism, which might grant no special defense to minority cultures in the face of cultural universalism.<sup>82</sup> Indeed, if we hope to gain from global citizenship the sorts of cultural benefits discussed in this essay, it is imperative that minority cultures be defended zealously. And again, global citizenship, by providing members of such cultures with a global voice that they might lack when subsumed within a nation-state, could further this goal.

To be sure, the human rights model provides a template for the creation of this global voice by granting to individuals certain rights which are presumptively non-derogable.<sup>83</sup> Arising in response to the experiences of World War II and the Nazi war atrocities, the human rights regime fundamentally redefined the relationship of the individual to the nation-state by making human beings subjects, rather than simply objects, of international law.<sup>84</sup> Significantly for the model presented here, this redefinition resulted in a concept of personhood beyond traditional definitions grounded in territory or citizenship.<sup>85</sup> Though human rights have had a clear impact on sovereigns *vis-a-vis* individuals, many times the rights guaranteed are ignored when expedient for the sovereign.<sup>86</sup> The formal global citizenship model can, however, provide a practical as well as symbolic corollary to the rights theoretically guaranteed by the international human rights system.

#### B. Formal Global Citizenship and the Stateless

A formal global citizenship grounded on human rights principles in the context of a postnational system fundamentally divorced from the nation-state permits a greater number of individuals to enjoy their theoretically non-derogable rights. The separation of the citizen from the nation-state and the nation-state from the citizen

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<sup>79</sup>This essential distinction is, it might be hypothesized, at the root of the cosmopolitan mantra “think globally, act locally”. See Chander, *supra* note 16, at 1043-44.

<sup>80</sup>See generally Held, *supra* note 39, at 398-99.

<sup>81</sup>See Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48, 51 (discussing the importance of an institutional framework in the furtherance of human rights goals).

<sup>82</sup>Waldron, *supra* note 37, at 762.

<sup>83</sup>International Covenant on Civil and Political Rights, Dec. 16, 1966, art 4., 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>84</sup>Hernández-Truyol, *supra* note 40, at 353.

<sup>85</sup>*Id.*

<sup>86</sup>The Guantánamo situation is an excellent example of this. See *infra* Part IV.



gives rise to an interaction which is deterritorialized, relational, and identity-based. This identity-based model allows legal discourse between individuals and states on social and cultural grounds, where previously the interrogation would end when the legal status (that is, nationality) of the individual was determined. The deterritorialized aspect of this interrelation creates a functional national relationship based, not on the nation's view of the individual, but rather the individual's view of themselves.

Consequently, the chief beneficiaries of global citizenship are the stateless.<sup>87</sup> Some have suggested that dual nationality could be of benefit to the stateless by providing an alternate site of citizenship in the event one nationality is lost.<sup>88</sup> Continuing the analogy to dual nationality, global citizenship could be of value to the stateless by giving them a “fall-back” position. It should be stressed, though, that even for the stateless, global citizenship would not provide a “primary” citizenship—rather, it would provide a secondary citizenship while awaiting the resolution of the individual's primary nationality. This status might also lend legitimacy to the claim of responsibility by the United Nations High Commissioner for Refugees over stateless persons, mandated by the 1961 Convention on the Reduction of Statelessness.<sup>89</sup> This would be especially true if the global citizenship agency was organized under the auspices of the United Nations.

A formal global citizenship goes further. The deterritorialized conception of nationality cannot directly solve the problem of statelessness, but conceiving of nationality in such terms is of great utility to those seeking redress for international wrongs. Identifying individuals with nations that share their cultural or social norms permits a stateless individual to bring to their plight to the attention of a nation. In doing so, internationally recognized processes and human rights can be enforced, and problems of fundamental justice for the stateless can be obviated. This combines two theoretical aspects of citizenship—the identification aspect of cosmopolitan philosophy, and the human rights aspect of postnational theory—to provide a single, functional aspect of a legal status as a nation's citizen, the right to petition the government of that nation to uphold one's interests on the international plane. Of course, to uphold a concept of justice requires that the individual must be able to designate a nation or nations with which they most closely identify, to prevent the nation with control of the stateless individual from dictating the individual's interests to them. Conversely, the nation designated by the individual must have the freedom to take up their cause or not as they see fit, as is traditional on the international plane. In short, what is guaranteed by formal global citizenship is not the right of the stateless individual to their human rights, many of which are non-derogable; it is instead the right of states to come to the aid of stateless individuals who identify with them.

#### IV. GUANTÁNAMO BAY AND GLOBAL CITIZENS

To be of utility, a formal global citizenship must first be practical. It must provide real people with actual advantages they would not enjoy in the absence of

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<sup>87</sup>As mentioned above, the term is one that applies to individuals with no nationality. *See* discussion *supra* note 10.

<sup>88</sup>*See, e.g.,* Martin, *supra* note 76, at 311.

<sup>89</sup>*See* Donkoh, *supra* note 11, at 266-67.

global citizen status. Recent events provide us an all-too-real lens through which to examine the practical benefits of a formal global citizenship, particularly with regard to the plight of the stateless.

By now the events of September 11th, 2001 are known worldwide. On that day, a group of terrorists equipped with box cutters seized control of four planes and used them to launch attacks against the World Trade Center towers in New York and the Pentagon in Washington, D.C. The United States quickly linked these attacks to the terrorist network Al Qaeda, and used that link to justify a “war on terror.” The initial action in this new kind of war was the launch of Operation Enduring Freedom on October 7th, 2001 against Al Qaeda and the Taliban group, in effective control of much of Afghanistan, that harbored them. What is not as widely known as these facts is the aftermath of Operation Enduring Freedom, and the human rights crisis that has subsequently developed. Though the U.S.-led offensive was over in a matter of weeks, it took over 600 prisoners, most of whom are now held at the U.S. naval base at Guantánamo Bay, Cuba.<sup>90</sup> Now, more than two years later, the status of most of these individuals remains unclear.

This situation is particularly distressing when examined from a human rights perspective. The prisoners at Guantánamo have been held in cramped, chain-link cages and are allowed only 20 minutes of activity three times a week.<sup>91</sup> They are limited in their communication with each other and with the outside world, with censorship of their letters commonplace.<sup>92</sup> Additionally, at least three juveniles are held at Guantánamo Bay in a facility called Camp Iguana, all “boys between the ages of 13 and 15.”<sup>93</sup> The United States government asserts that the prisoners at Guantánamo, as well as those at Baghram Air Force Base in Afghanistan and on the island of Diego Garcia in the Indian Ocean (both of which have also been used to house prisoners) are well-cared for, and their physical and spiritual needs have been attended to.<sup>94</sup> However, there have been at least two deaths and a number of suicide

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<sup>90</sup>The precise number of individuals currently held at Guantánamo is unclear; the U.S. has prohibited unrestricted access to the prisoners and has not been particularly forthcoming with information about their status. The most recent estimates put the number at 680, hailing from 40 different countries. See Sarah Lyall, *Death Penalty Ruled Out for Two British Detainees*, N.Y. TIMES, July 23, 2003, at A4.

<sup>91</sup>Ted Conover, *In the Land of Guantánamo*, N.Y. TIMES June 29, 2003, Section 6 at 40.

<sup>92</sup>Letter from Michael Ratner, Center for Constitutional Rights, to Santiago Canton, Executive Secretary, Inter-American Commission on Human Rights 8-9 (Mar. 4, 2003), at <http://www.ccr-ny.org/v2/reports/docs/OASTotureLetter.pdf> (last visited August 23, 2003) [hereinafter CCR Letter].

<sup>93</sup>Conover, *supra* note 91.

<sup>94</sup>For example, prisoners at Guantánamo are provided with prayer caps, oils, beads, copies of the Koran, and access to a Muslim chaplain; they are also provided with “a diet that is similar to that of the soldiers who guard them”, prepared in accordance with the appropriate Islamic procedures. Neil A. Lewis, *Detainees from the Afghan War Remain in a Legal Limbo in Cuba*, N.Y. TIMES, Apr. 24, 2003, at A1. However, conditions at Baghram Air Force Base in Afghanistan may be a good deal worse. See *infra* note 99. The status of any prisoners held at Diego Garcia remains unknown, as the base is off-limits to all but military personnel. See CCR Letter, *supra* note 92, at 8.

attempts at the camps over the last two years.<sup>95</sup> Additionally, many of the assertions made by prisoners in their correspondence, or by former prisoners, allege specific instances of maltreatment. Some reports suggest that prisoners are “made to stand hooded, their arms raised and chained to the ceiling, their feet shackled, unable to move for hours at a time, day and night,” sometimes while forced to remain naked.<sup>96</sup> One prisoner claims to have not seen the sun for most of a year.<sup>97</sup> These conditions have, unsurprisingly, led many prisoners to deteriorate in physical and mental health.<sup>98</sup> There are also some assertions that captors have taken more active roles in inflicting physical and psychological damage.<sup>99</sup>

The United States has taken a stance that suggests the Guantánamo prisoners are unequal to non-captives in both legal and human rights; in essence, that they lack personhood as conceived of in the traditional citizenship sense. While the Guantánamo prisoners have received some modicum of respect for their cultural rights (such as the accommodation of their religious beliefs), two areas that have particularly suffered are the legal and civil rights of the prisoners. For example, no Guantánamo captive has been permitted to consult with an attorney, and none has yet been charged with any crime.<sup>100</sup> Many have been moved from country to country while their *habeas corpus* petitions were still pending.<sup>101</sup> This is the benefit of

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<sup>95</sup>Both deaths were at Baghram Air Force Base, and one was classified as a homicide; the other remains unexplained. See Carlotta Gall, *Threats and Responses: Prisoners; U.S. Military Investigating Death of Afghan in Custody*, N.Y. TIMES, Mar. 4, 2003, at A14. The documented suicide attempts were at Guantánamo, and by late June the number was 28 attempts by 18 prisoners. Conover, *supra* note 91. One prisoner is in a persistent vegetative state as a result. *Id.*

<sup>96</sup>Gall, *supra* note 95.

<sup>97</sup>CCR Letter, *supra* note 92, at 2.

<sup>98</sup>*Id.* A number of prisoners at Guantánamo Bay are suffering from serious depression which has required psychiatric medication in some cases. See Conover, *supra* note 91.

<sup>99</sup>Most accusations of physical or mental abuse have emanated from Baghram, where one section, operated by the CIA, is off-limits to even the Red Cross. Vikram Dodd, *The UK Businessmen Trapped In Guantánamo*, The Guardian (London), July 11, 2003, available at <http://www.guardian.co.uk/alqaida/story/0,12469,995989,00.html> (last visited August 23, 2003). One portion of Baghram is “commonly associated with accusations of torture by US agents”, and one technique has come to be referred to by the sinister title “torture light”. *Id.* This is substantiated by U.S. officials, who suggested after the capture of Khalid Shaikh Mohammed that the CIA would “use every means at its disposal, short of what it considers outright torture, to try to crack him”. Eric Lichtblau and Adam Liptak, *Questioning to Be Legal, Humane, and Aggressive, The White House Says*, N.Y. TIMES, Mar. 4, 2003, at A13. What is unclear, of course, is whether “what it” – that is, what the CIA considers torture comports with the U.S. and international definitions of that term.

<sup>100</sup>See Lyall, *supra* note 90. The sole attempt to try any of the prisoners—specifically, six prisoners, including two Britons and one Australian—before a military tribunal was met with a storm of criticism, largely from Britons who feared their countrymen could receive the death penalty. *Id.*

<sup>101</sup>See, e.g., CCR Letter, *supra* note 92, at 2, 4. This appears to be part of what might be termed a “shell game” on the part of the U.S. government to keep prisoners out of the jurisdictional reach of any court.

Guantánamo to the United States; situated on the soil of a nominally hostile nation, it is technically extraterritorial, and therefore no U.S. court has jurisdiction to review the legal status of the prisoners there.<sup>102</sup> Additionally, the United States has designated the prisoners “unlawful combatants” in an attempt to deny them protections they would otherwise enjoy under the laws of war.<sup>103</sup> Perhaps worst of all is the simple fact that, while some of the Guantánamo detainees are dangerous terrorists, many have been identified as entirely uninvolved with the Taliban, Al Qaeda, or terror—and yet remain in captivity, with no legal recourse.<sup>104</sup>

The Guantánamo prisoners have also suffered a significant derogation of their presumably non-derogable human rights. It is, of course, difficult to determine which accusations that have been leveled at the United States regarding the conditions of captivity are accurate; however, even the conditions which the United States admits to may be adequate to make a case for degrading treatment, forbidden by the 1948 Universal Declaration on Human Rights (UDHR),<sup>105</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>106</sup> and by the applicable Geneva Conventions.<sup>107</sup> Other provisions of UDHR and ICCPR, such as the guarantees of a fair and impartial hearing and equality before the law, and the bars against arbitrary arrest and detention, may be violated by the conditions at Guantánamo.<sup>108</sup> The guarantee of personhood before the law may have been eroded by the legal status of the Guantánamo naval base.<sup>109</sup> Even the right to life guaranteed by UDHR and ICCPR may be imperiled if the United States proceeds with plans to build a death

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<sup>102</sup>See, e.g., *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). By terms of the Guantánamo Bay lease, Cuba maintains ultimate sovereignty even though the U.S. possesses total control; thus, it has been held that prisoners there are outside U.S. territory. *Id.*

<sup>103</sup>See Lewis, *supra* note 94. The Geneva Conventions guarantee certain rights and privileges to prisoners of war (among them the right to limited interrogations). *See id.* By simply redefining their detainees as “unlawful combatants” and the “war on terror” as not a war, the U.S. has effectively denied their captives these benefits. *Id.*

<sup>104</sup>One such individual is Mehdi Ghezali, the only Swedish prisoner held at Guantánamo. Swedish authorities have expressed to their U.S. counterparts the opinion that Ghezali had no involvement with illegal behavior before his arrest, and indeed the U.S. has agreed. *Id.* Despite this apparent agreement, the U.S. nevertheless refuses to release Ghezali because he is “not cooperating with the authorities.” Munir Ahmad and Tommy Grandell, *Eleven Pakistanis Freed From Guantánamo Bay After Two Years of Imprisonment*, THE GUARDIAN (LONDON), July 18, 2003, available at <http://www.guardian.co.uk/pakistan/Story/0,2763,1000589,00.html> (last visited August 23, 2003).

<sup>105</sup>*Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, art. 5, UN Doc. A/810 (1948) [hereinafter UDHR].

<sup>106</sup>ICCPR, *supra* note 83, art. 7. Note that under the terms of ICCPR Article 4, this is a non-derogable right. *Id.* art. 4.

<sup>107</sup>See Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3316, 75 U.N.T.S. 135. Of course, for this provision to apply to those captured in combat, they would have to be designated prisoners of war, which the U.S. steadfastly refuses to do.

<sup>108</sup>UDHR, *supra* note 105, arts. 7, 9-10; ICCPR, *supra* note 83, arts. 9, 14.

<sup>109</sup>UDHR, *supra* note 105, art. 6; ICCPR, *supra* note 83, art. 10.

row or execution chamber on the base.<sup>110</sup> In short, the U.S. treatment of the prisoners taken during Operation Enduring Freedom and afterwards has denied them their very existence as individuals deserving of the protections of the international human rights system, while at the same time denying them any legal recourse to recover the benefits of those rights.

These circumstances provide fertile ground upon which to interrogate the utility of a formal global citizenship. To be sure, the hypothetical global passport system developed above is not intended to protect terrorists or encourage their ease of travel. However, at least some of the individuals held at Guantánamo are, by all accounts, innocent of any wrongdoing, yet still face indefinite detention and an undetermined fate. Several countries have been vocal about their opposition to U.S. delays in determining the status of their citizens. Yet, the ultimate fate of Afghan and Iraqi nationals remains unclear and undetermined. Both of these nations have had their governments forcibly removed by the U.S. and its allies; in each case, the replacement government has no interest in securing the rights of its citizens. If perhaps not officially, these citizens are nevertheless *de facto* stateless.

For the Guantánamo prisoners, a formal global citizenship would help, through the action of an interested state, to secure the rights guaranteed to them by the UDHR, the ICCPR, and the Geneva Conventions. Statelessness is, by definition, the lack of any state to exercise sovereignty over an individual, or in the Guantánamo situation, the lack of any desire to exercise sovereignty. The United States has utilized the unique characteristics of Guantánamo to create a kind of *faux* sovereignty over the detainees held there, and has used that sovereignty to redefine their fundamental identity as that of something less than people. With no genuine international oversight (particularly for Afghans and Iraqis), this false sovereignty is essentially the *only* sovereignty over these individuals.

Formal global citizenship would allow Guantánamo captives to call upon a nation or nations that shares their cultural values, which could, in turn, attempt to protect their basic human rights by virtue of the deterritorialized, relational, and identity-based connections between them. For example, Iraqi nationals held in Guantánamo could call upon the government of Saudi Arabia to attempt to secure their release; given the warm relations between Saudi Arabia and the U.S. and the Saudi efforts to secure the rights and release of their own nationals, such an appeal is far more likely to succeed than a direct appeal to the U.S. or an indirect appeal to the U.S. through the occupying government in Iraq.<sup>111</sup> A global passport would also increase the legitimacy of the claims of international human rights organizations, such as the U.N. Office of the High Commissioner for Human Rights and the Inter-American Commission on Human Rights, to exercise some measure of oversight regarding the status of the detainees, their conditions of treatment, and the level of respect shown for their rights.

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<sup>110</sup>UDHR, *supra* note 105, art. 3; ICCPR, *supra* note 83, art. 6; see Matthew Hay Brown, *Gitmo Prisoners in No-Man's-Land*, THE CHARLESTON GAZETTE (WEST VIRGINIA), July 25, 2003, at P12A. Again, by the terms of ICCPR Article 4, the right to life is non-derogable. ICCPR, *supra* note 83, art. 4.

<sup>111</sup>See *Saudi Legal Experts Form Team to Defend Prisoners Held in Guantanamo*, THE BULLETIN'S FRONTRUNNER, Apr. 29, 2003 (recounting some of the efforts the Saudis have made to defend their nationals).

One case is of particular interest from the perspective of the global citizenship system presented here, as it involves a group of men who are likely to benefit, not simply from the stateless aspect of a formal global citizenship, but also from the possibilities it holds in the area of economics and freedom of travel. On November 8, 2002, four men—two brothers, Bisher and Wahab al-Rawi, and their business associates, Jamal El Banna and Abdullah El Janoudi—were arrested by Gambia's National Intelligence Agency (NIA) upon their arrival in Banjul, where they had set up a peanut processing plant.<sup>112</sup> Some days earlier, El Banna had been visited by British intelligence agents who indicated knowledge of his intention to travel to Gambia, but expressed no objections.<sup>113</sup> Nevertheless, El Banna, along with El Janoudi and Bisher al-Rawi, were arrested on November 2nd when they attempted to board a plane at Gatwick.<sup>114</sup> They were held for two days, apparently because one of the men had a battery charger in his luggage.<sup>115</sup> Though the men were released without being charged, the British allegedly informed the Gambians of the trip and advised the NIA to arrest the four men.<sup>116</sup> The four were questioned by Gambian and U.S. officials for approximately a month, during which time they were threatened with beatings and rape.<sup>117</sup> On December 5th, Wahab al-Rawi and Abdullah El Janoudi, both UK nationals, were released due to the intervention of the British high commissioner.<sup>118</sup>

Bisher al-Rawi and Jamil El Banna, however, remained in custody for approximately two months in Gambia thereafter, at which time they were transferred to U.S. custody and moved to Baghram Air Force Base in Afghanistan.<sup>119</sup> After an indeterminate amount of time there, they were moved to Guantánamo Bay, where they remain.<sup>120</sup> Britons in particular have taken issue with their government's treatment of the case; Bisher al-Rawi is an Iraqi national legally resident in the United Kingdom, while Jamil El Banna is a Jordanian with refugee status in the UK.<sup>121</sup> However, “the British government is washing their hands” of the two men, according to one MP, despite the fact that both of them lack any other government to represent their interests.<sup>122</sup> The MP, Edward Davey, suggested that the information

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<sup>112</sup>Dodd, *supra* note 99.

<sup>113</sup>See News Release, Amnesty International, UK: Government Must Act Now on Behalf of Guantánamo Detainees (July 11, 2003), at <http://www.amnestyusa.org/news/2003/uk07112003.html> (last visited August 23, 2003) [hereinafter AI Release].

<sup>114</sup>*Id.*

<sup>115</sup>*Id.*; Dodd, *supra* note 99.

<sup>116</sup>See AI Release, *supra* note 113. The British Foreign Office has since denied asking Gambia to arrest the four men. Dodd, *supra* note 99.

<sup>117</sup>Dodd, *supra* note 99.

<sup>118</sup>*Id.*

<sup>119</sup>AI Release, *supra* note 113.

<sup>120</sup>*Id.*

<sup>121</sup>Dodd, *supra* note 99.

<sup>122</sup>*Id.*



the Gambian and U.S. officials had on Bisher al-Rawi “must have come from the UK authorities”, and that their suspicions may have been aroused by al-Rawi’s hobbies, including “flying planes and parachuting.”<sup>123</sup>

Al-Rawi and El Banna could clearly enjoy the same benefits as other stateless individuals; as an Iraqi national, al-Rawi cannot count on the occupation government of England and the U.S. to do anything on his behalf, and similarly El Banna cannot hope for Jordan to intercede on his behalf when he fled that country because of persecution.<sup>124</sup> But additional benefits may have accrued to these two gentlemen had they held global passports as described above. For example, freedom of movement on their entry into Gambia would have doubtless been of great advantage. Had the Gambians had legitimate reason to suspect they had terrorist ties, they could have refused them entry and returned them to the United Kingdom. Further, any country which, in good faith, suspected the quartet of terrorist activity could have protested to the hypothetical global passport organization in an effort to prevent their acquisition of such a passport and the benefits that would arise from it.

In short, these men, like many of those they are held with, seem to be innocent of any wrongdoing. Yet, their situation is even more grim than many of those captured on the battlefields of Afghanistan; they were not taken captive as a direct result of the war on terror, and thus cannot hope to benefit from being classified as a prisoner of war. It would certainly seem that these men were singled out because of their interests, because of their religion, because of their race, or some combination of the three. By permitting them to appeal to a nation which shares their religious values or other cultural norms, rather than to nations which are either disinterested or openly hostile to their cause, some basic modicum of justice can be achieved, and they can enjoy the benefits of internationally recognized legal procedures.

#### V. CONCLUSION

In closing, it might be simplest to recount what the proposed formal global citizenship described here is not. It is not an easy solution to the various problems raised by citizenship scholars over the past six decades. Indeed, it does not comport perfectly with any citizenship theory. On the other hand, it is clear that in a postnational world, a global citizenship can become a reality, even without a world government. By being codified in treaty form, and by involving states in the administration of global citizenship, the model presented here peacefully co-exists with the sovereignty of nation-states. Especially because of the limited infringement on sovereignty, formal global citizenship presents no insoluble theoretical problem.

Additionally, though this essay touches only upon statelessness as the most immediate and tangible benefit to be gained from the formal global citizenship model, there are a number of other possibilities. For example, there are symbolic benefits to be gained in creating a formal global citizenship. The existence of a global passport and the ability to truly become a “citizen of the world” would make clear to skeptics that globalization is a reality.<sup>125</sup> Linked to globalization and the symbolic benefits of a formal global citizenship, is the growth of social change under

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<sup>123</sup>*Id.*

<sup>124</sup>*Id.*

<sup>125</sup>See Nussbaum, *supra* note 46, at 6-7. For a broader analysis of cosmopolitanism, see *supra* Part II.B.



the rubric of democracy.<sup>126</sup> This move toward social change on the international plane is evident in the increased demand for uniform international human rights, environmental, and labor norms.<sup>127</sup> By interrogating the fundamental validity of solely nation-based conceptions of citizenship while simultaneously preserving national sovereignty and cultural differences, global citizenship can encourage global discourse about such topics.<sup>128</sup>

We have also alluded to potential functional benefits in the areas of free movement of persons and economics. Freedom of movement—especially in this post-September 11th world, where concerns about immigration security are heightened worldwide—necessarily raises serious concerns about permitting terrorists or other security risks into a nation's borders. However, the seriousness of this problem depends largely on the definition of "freedom of movement" one chooses to employ. One definition that might be viable for a global passport holder leaves nation-states in control of entry. This definition incorporates as the components of free movement the rights to leave a country, to enter one's own country, and to move freely within a country once admitted, but not to enter the country of one's choosing.<sup>129</sup> To be sure, such a definition would have been of great value to Bisher al-Rawi and Jamal El Banna on their arrival in Gambia.

Another area fraught with potential benefits and dangers is economics.<sup>130</sup> Indeed, international businessmen like al-Rawi and El Banna—representatives of global economics—could, in happier times, stand to gain the most from holding a global passport insofar as it facilitates their travel. In many respects this would formalize traditional practice, as ties between the economic elite already exist informally by virtue of multinational corporations, international specialty groups, and the high mobility of the well educated.<sup>131</sup> Increasing freedom of travel for economic reasons, however, raises concerns regarding the increased transnationality of unskilled and semiskilled labor.<sup>132</sup> Another problem is one developing in the European Union: the freedom of the unemployed or impoverished to take advantage of the agreeable

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<sup>126</sup>Barry A. Gills, *Democratizing Globalization and Globalizing Democracy*, 581 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 160 (2002). By "democracy," Gills is referring to support for political and social change on a national and international level, as well as the creation of an international liberal economic order which is "universally inclusive". *Id.* In this universal economic order, Gills sees the birth of our current trend toward globalization, and suggests that a universal political system must accompany these economically-motivated developments. *Id.* at 160-61.

<sup>127</sup>*Id.* at 168.

<sup>128</sup>It might seem odd to suggest that global citizenship can at once question and preserve national sovereignty. The key word here is "solely", for while national sovereignty is still very much alive (witness the Guantánamo situation), the significance of postnational developments cannot be denied.

<sup>129</sup>Chander, *supra* note 16, at 1029 n.120.

<sup>130</sup>*See generally* Sassen, *supra* note 56.

<sup>131</sup>*Id.* These bonds have been described as "[t]he denationalized fellowship and commonality that link many members of the transnational capitalist and managerial classes." Bosniak, *supra* note 3, at 492.

<sup>132</sup>*See* Fernández-Kelly, *supra* note 54, at 341-43.

welfare provisions of other states.<sup>133</sup> Resolving these issues in the context of a global citizenship will not be easy and we do not purport to solve these problems here.

The full breadth of the benefits that may accrue from a formal global citizenship remains to be seen, but real people can enjoy immediate betterment through such an apparatus. By relying on deterritorialized, relational and identity-based conceptions of citizenship, a formal global citizenship can render the stateless functional citizens and permit them to seek the vindication of their human rights through nations who share their cultural or social values. We have seen how such a conceptualization of global citizenship can be of real, practical benefit to individuals such as the detainees held in Guantánamo Bay who might otherwise have no one to defend their rights on the international plane. The model of formal global citizenship proposed here is intended to be an incremental, rather than radical, step in globalization. The aim is to provide real, practical benefits to individuals while paving the way to further international cooperation, and, at the same time, to provide the fulfillment of an ancient ideal by permitting an individual to truly become a “citizen of the world.”<sup>134</sup>

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<sup>133</sup>Theodora Kostakopoulou, *Nested “Old” and “New” Citizenships in the European Union: Bringing Out the Complexity*, 5 COLUM. J. EUR. L. 389, 407-409 (1999). Article 18 of the Treaty of Amsterdam (guaranteeing freedom to reside in member-states to all Union citizens) continues to exist in unhappy tension with Article 39 (which seems to limit this right to those actively seeking employment). *Id.*

<sup>134</sup>Nussbaum, *supra* note 46, at 2.