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ARTICLES

The Myth of Primordialism in Cicero's Theory of *Jus Gentium*

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Abstract

After setting out the importance of the notion of an international community in contemporary treaties, International Court of Justice judgments and *opinio juris*, this paper claims that we need to turn to Cicero's works in order to appreciate a sense of what an international community is. Cicero was the first jurist known to recognize and elaborate a theory of the international community and this through his concept of *jus gentium*. Cicero's theory of *jus gentium*, I argue, was neither a positivist theory nor a natural law theory. Instead, *jus gentium* dwelt in an intermediate position between posited state laws and the laws of nature. I find a problem, however, in that Cicero exempts certain types of society from the guidance and protection of the *jus gentium*. I document examples of the sort of society so exempted. In order to understand why Cicero exempts such societies from the protection of the *jus gentium*, I argue, Cicero's theory depends on a primordial condition where human beings, living an animal-like existence, lack a language and reason. Cicero posits that human beings must leap from such a primordial condition into a civilized world where language is shared. Cicero associates a civilized world with communication, deliberation, reason, and law, particularly the *jus gentium*. His theory of *jus gentium* thereby hierarchizes societies and begs that we ask whether such a hierarchy remains presupposed in contemporary international law and international legal theory.

Key words

Cicero; exclusions from universal jurisdiction; *jus gentium*; myth; primordialism

The idea of an 'international community as a whole' has been taken for granted in diverse treaties, judicial decisions, and *opinio juris*. As an example, the recent State Responsibility Articles manifest continued reference to the 'international community as a whole'.[1] Treaties have increasingly acknowledged the existence of an 'international community as a whole'.[2] So too, the International Court of Justice is

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1 J. Crawford, *The International Law Commission's Articles on State Responsibility* (2002).

2 See, e.g., 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between Organisations (21 March 1986), UN Doc. A/CONF.129/15 (20 March 1986) (not yet in force as of 16 March 2009), Art. 53; Vienna Convention on the Law of Treaties, 1155 UNTS 331 (23 May 1969), Art. 53; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International

increasingly deferring to the existence of the 'international community as a whole'. Not least in this regard are the well-known dicta in *Barcelona Traction*.[3] *Barcelona Traction* is not an aberration, though.[4] Despite the sustained deference to the 'international community as a whole', little attention is exhibited in judicial decisions and contemporary law journals to explain the identity and character of this 'international community as a whole'. Too many jurists, it seems, take it for granted that one will know the international community as a whole when one sees it. At a minimum, the international community is considered greater than the sum of its members, the sovereign states being its members. Why the international community is greater than the aggregate of its rules or why the norms of the international community possess legitimacy independent of the domestic laws of its members has yet to be explained. This is not a new issue. Plato raised the issue in the 'Speech of the Laws' in the *Crito* and the *Gorgias*. Hegel, too, addressed the issue in his works.[5] Why can the international community be harmed independently of any harm to its particular members?[6]

In an effort to identify the international community as a whole, contemporary international law and international relations studies not infrequently begin with Hugo Grotius (1583–1645).[7] In this endeavour, contemporary commentaries offer

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Criminal Court, Rome Statute of the International Criminal Court, UN Doc. A/Conf.183/9 (17 July 1998), para. 9, preamble; 1979 International Convention against the Taking of Hostages, 1316 UNTS 205 (17 December 1979), para. 4, preamble; 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1035 UNTS 167 (14 December 1973), para. 3, preamble.

3 *Barcelona Traction, Light and Power Company, Limited (New Application 1962) (Belgium v. Spain)*, [1970] ICJ Rep. 3, paras. 33–34, at 32 (5 February).

4 See, e.g., *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Provisional Measures, [2000] ICJ Rep. 182 (Order of December 8); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, [1971] ICJ Rep. 16 (21 June); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep. 226, para. 83, at 258 (8 July); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, [1996] ICJ Rep. 595, paras. 31–32, at 615–16 (11 July); *East Timor (Portugal v. Australia)*, [1995] ICJ Rep. 90, at 172, 213–16 (30 June); *South West Africa, Second Phase (Ethiopia v. South Africa; Liberia v. South Africa)*, [1966] ICJ Rep. 373 (18 July) (dissenting opinion of Judge Jessup); *Reservations to Convention on Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, [1951] ICJ Rep. 15, at 23 (28 May).

5 See W. E. Conklin, *Hegel's Laws: The Legitimacy of a Modern Legal Order* (2008).

6 See, e.g., *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, [1979] ICJ Rep. 7, at 19 (Order of 15 December), *and* Judgment, [1980] ICJ Rep. 3, para. 92, at 43 (24 May). See also especially *East Timor (Portugal v. Australia)*, *supra* note 4, at 102, 172, 213–16 (dissenting opinion of Judge Weeramantry); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, [1986] ICJ Rep. 14, para. 190, at 100 (27 June). *Prosecutor v. Anto Furundzija*, Case No. IT-95–17/1-T, Trial Judgment, 121 ILR 218, paras. 151–157, at 260–2 (10 December 1998).

7 G. Postema, 'Custom in International Law as a Normative Practice', in A. Perreau-Saussine and J. B. Murphy (eds.), *Nature of Customary Law* (2007), 279–306; B. Tierney, 'Vitoria and Suarez on Jus Gentium, Natural Law, and Custom', ibid.; P. Allott, *Eunomia: New Order for a New World* (1990), paras. 13.104, 16.2; M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989), 74–85; A. Pagden, 'Beyond Anarchical Society: Grotius Colonialism and Order in World Politics', (2004) 2 *Perspectives on Politics* 428; A. Brett, 'Natural Right and Civil Community: The Civil Philosophy of Hugo Grotius', (2002) 45 *Historical Journal* 31; J. Rabkin, 'Grotius, Vattel and Locke: An Older View of Liberalism and Nationality', (1997) 59 *Review of Politics* 293; H. Lauterpacht, 'Private Law Sources and Analogies of International Law', in H. Lauterpacht, *International Law: Collected Papers of Hersch Lauterpacht*, ed. E. Lauterpacht (1975), II, 173, at 188–91; see also ibid., 307–65 ('The Grotian Tradition in International Law'). See also H. Bull, *The Anarchical Society* (1977); H. Bull, 'The Emergence of a Universal International Society', in H. Bull and A. Watson (eds.), *The Expansion of International Society* (1984), 117, at 117–20; A. Watson, 'European International Society and Its Expansion', ibid., 13, at 13–17.

conflicting readings of Grotius's theory of *jus gentium*.[8] In this endeavour, jurists and legal theorists have sought Grotius's notion of the character of an identifiable international law, such as a customary norm or a treaty provision, rather than the legitimacy of such an identifiable law. The legitimacy of the norm begs that we ask, 'Why is the norm binding?' The legitimacy of an international law begs the question whether there is an international community which is independent of any state-posited discrete law or the aggregate of such discrete laws.[9] To the extent that jurists have focused on the legitimacy question, Grotius is taken as a natural-law thinker without a rigorous analysis of what Grotius understood by 'nature' or of how such an understanding figured in his theory of the international community.[10]

Despite Grotius's reliance on Cicero (106–43 BCE),[11] however, inadequate contemporary attention has focused on Grotius's intellectual debt to him. Cicero, I shall argue, was neither a positivist theorist in the strict sense that international law was constituted from state-authored laws nor a natural law theorist in the sense that international law intellectually transcended historically contingent human norms. Cicero offered a sense of nature which hardly matches the familiar Kantian formalism that we have taken for granted in recent years or a utopia of 'oughts' that we discard as unreal. Rather, Cicero nested international law in the social actuality, by which I mean the context-specific ethos which legal forms recognized.

That said, Cicero did carry the positivist/universalist dichotomy into his discussion of civil law versus natural justice (*Rep.* 3.31), civil law versus nature, statutory law versus equity, human versus divine law, and written codes versus unwritten customs. Cicero's extant works, however, suggest a third form of law. This is what he calls, on the first known occasion in Western thought, *jus gentium*. Cicero locates the *jus gentium* as intermediate between the state-centric posited laws and the 'true laws' of the cosmos. Most importantly for my purposes, Cicero associated the *jus gentium* with a sense of the international community as a whole. My claim is that the international community that Cicero claims for *jus gentium* depends on his image of an unstable primordial society lacking in a shared language and reason. The belief in a primordial society marks the possibility of a hierarchy of societies. This image of primordialism is so important that Cicero excludes some societies from recognition and protection by the *jus gentium*. Such societies, according to Cicero, manifest the characteristics of the primordial world. Interestingly, Vitoria, Grotius, Pufendorf, Locke, Rousseau, Kant, and Hegel elaborated theories of international law

8 See ibid. for the diverse readings of Grotius's theory. See also Lauterpacht's exasperation over the different readings of his day in Lauterpacht, *supra* note 7, at 189.

9 See, e.g., Postema, *supra* note 7.

10 See, e.g., M. D. A. Freeman (ed.), *Lloyd's Introduction to Jurisprudence* (2001), 108–11; M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, reissue with new epilogue (2005), 47, 55–6, 131–5. An exception is P. Garnsey, *Thinking about Property: From Antiquity to the Age of Revolution* (2007).

11 See, e.g., H. Grotius, *On the Law of War and Peace* (1964), 2.2.1, 2.2.2. Although one might assert that Grotius cites everyone for his positions, it is the case that passages from Cicero, and from Cicero to Augustine, were known and used in medieval and early modern education. For his part, Vattel deferred to Cicero's *jus gentium* on the very first page of the preface to E. de Vattel, *The Law of Nations* (1863 [1797]), vii.

which were dependent on the myth of the lawless primordial world which Cicero privileged in this first suggestion of a *jus gentium*.[12]

My limited aim in this article is to explain how Cicero worked his belief in a primordial world into his theory of *jus gentium*. My effort hopes to shed light on issues arising from the referent of the 'international community as a whole' which has taken hold of contemporary international law discourse. To this end, I shall, in my first section, briefly document the texts where Cicero explicitly cites the notion of *jus gentium*. In section 2 I shall highlight Cicero's sense of a commonwealth, since the *jus gentium* builds on his view of the commonwealth. In section 3 I shall address what is the authorizing origin of Cicero's sense of *jus gentium*. Section 4 will privilege how Cicero reads into the primordial and civilized societies the role of language and reason. In section 5 I shall privilege several types of society which Cicero excludes from recognition and protection in the *jus gentium*. In my final section I shall link Cicero's theory of *jus gentium*, including its exclusionary character, to Cicero's mythic pre-legal world where human beings are said to live an animal-like existence without language or reason. Certain societies, such as those of nomads, tribal groups, mercantile societies, tyrannies, revolutionary societies, and pirates, mimic the primordial world and therefore must be excluded from the *jus gentium*, Cicero argues. The *jus gentium* constructs a legal reality that reflects a hierarchic relation among societies. Social groups may only be recognized as legal persons and thereby protected by *jus gentium* if they have developed from primordialism into a centralized legal order.

1. Textual sources

Cicero explicitly addresses *jus gentium* in three extant references.[13] In the first passage, *jus gentium* has been translated in a manner that extends to the relations among states (*jus inter gentes*) and that functions as a set of legal standards with which to evaluate the content of posited laws:

12 For Grotius's adoption of the myth see Garnsey, *supra* note 10, at 138–40. For Vitoria's adoption, see Vitoria, 'On the American Indians', in Vitoria, *Political Writings* (1991), 231, at 1.6 (250), 3.8 (290–1). For Pufendorf, see Garnsey, *supra* note 10, at 141. For Hobbes's adoption, see W. E. Conklin, *Invisible Origins of Legal Positivism* (2001), 75–6, 80–2, 92. For Locke's adoption, see J. Locke, *Second Treatise of Government*, ed. C. B. Macpherson (1980), ch. 1, paras. 11, 14; ch 8, para 108. Locke asserts that this primordial condition may have been historically prior to law (ch. 8, paras. 100–112). For Rousseau's adoption, see J. J. Rousseau, 'A Discourse on the Moral Effects of the Arts and Sciences', in Rousseau, *The Social Contract and Discourses*, trans. G. D. H. Cole (1913), 117, at 120; 'A Discourse on the Origin of Inequality', ibid., 144, at 154, 158; 'A Dissertation on the Origin and Foundation of the Inequality of Mankind', ibid., 160, at 163–76, 187–8. For Kant's adoption see Conklin, *supra* note 5, at 70 n. 29, 172–5, 153–6. For Hegel's adoption, see ibid., 57–82, 315–16. For H. L. A. Hart's adoption, see Hart, *The Concept of Law* (1994), 87, 92–6, as examined in Conklin, *Invisible Origins*, *supra*, 207–11, 214–15.

13 Unless otherwise stated, all translations from *De Officiis* are from Cicero, *On Duties*, ed. M. T. Griffin and E. M. Atkins (1991). All translations from *De Republica* and *De Legibus* are taken from Cicero, *On the Commonwealth and On the Laws*, ed. J. E. G. Zetzel (1999). Translations of all other texts from Cicero are from the Loeb series. Abbreviations of Cicero's works are drawn from the *Oxford Classical Dictionary* (1996): *Cael.* = *Pro Caelio*; *Fin.* = *De Finibus*; *Inv.* = *De Inventione Rhetorica*; *Leg.* = *De Legibus*; *Nat. D.* = *De Natura Deorum*; *Off.* = *De Officius*; *Para. Sto.* = *Paradoxa Stoicorum*; *Part. Or.* = *Partitiones Oratoriae*; *Prov. Cons.* = *De Provinciis Consularibus*; *Rep.* = *De Republica*; *Top.* = *Topica*; *Tusc.* = *Tusculanae Disputationes*.

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> The same thing is established *not only in nature, that is in the law of nations* [*jus gentium*], *but also in the laws of individual peoples*, through which the political community of individual cities is maintained: one is not allowed to harm another for the sake of one's own advantage. (*Off.* 3.23, emphasis added)

This textual reference has been translated in different ways: 'the law of nations' (Griffin and Atkins),[14] 'the common rules of equity' (Miller, in the Loeb translation);[15] finding the term lacking an English translation, Schiller simply leaves the term *jus gentium* in the Latin.[16]

In the second passage, Cicero clearly distinguishes the *jus gentium* from the domestic posited laws:

> I see that because custom is so corrupted such behaviour is neither thought dishonourable nor forbidden by statute and civil law. It is, however, forbidden by the law of nature. For there is a fellowship that is extremely widespread, shared by all with all (even if this has often been said, it ought to be said still more often); a closer one exists among those of the same nation, and one more intimate still among those of the same city. For this reason our ancestors wanted the law of nations [*jus gentium*] and the civil law to be different: everything in the civil law need not be in the law of nations, but everything in the law of nations ought also to be a part of civil law. (*Off.* 3.69)

Cicero describes the *jus gentium* as encompassing boundless space: the *jus gentium* is 'extremely widespread shared by all with all' (*Off.* 3.69) and 'shared by all with all' (*Rep.* 33). In this second passage of *De Officiis*, *jus gentium* is variously translated into English as 'the law of nations' (Griffin and Atkins note above) and 'universal law' (Miller in the Loeb),[17] and left untranslated (Schiller). Miller's 'universal law' leaves one's interpretation open as to whether Cicero intended *jus gentium* to signify international law between states or whether it signified a law relating to all human beings independent of a state. *Jus gentium* is also left untranslated in the most extensive English commentary about *jus gentium*: L. Coleman Phillipson's *The International Law and Custom of Ancient Greece and Rome*.[18] Van Warmelo translates *jus gentium* as 'the law of nations' (para. 25) and then in later passages as 'sometimes called *jus naturale*'.[19]

Let us examine three possible readings of *jus gentium*.

The second textual context, to begin with, suggests that a widespread fellowship is shared among human beings. This fellowship generates the *jus gentium*. The principles of the *jus gentium* ought to guide and bind the content of the domestic posited laws.

In the third passage, Cicero considers a second theory of *jus gentium*: those common principles or customs shared among all peoples (*jus non scriptum*). As he puts it,

> [T]he general principles of law (*jus*) have to be explained to us. And that is divided into two principle spheres, natural and statute law; and the force of both of these is

14 Cicero, *On Duties*, *supra* note 13.
15 Cicero, *On Duties*, trans. W. Miller (1913).
16 A. A. Schiller, *Texts and Commentary for the Study of Roman Law: Mechanisms of Development* (1936), Vol. I, 174.
17 Cicero, *supra* note 15, 339.
18 L. Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (1979 [1911]).
19 P. van Warmelo, *An Introduction to the Principles of Roman Civil Law* (1976).

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> again distributed into divine law (*divinum jus)* and human law (*humanum jus*), one of which refers to equity (*aequitas*), the other to piety (*religio*). (130) Moreover, the force of *aequitas* is twofold: one part of which is upheld by ideas of truth and justice and the good (*aequum et bonum*), the other relates to the requiting of things done, which is called gratitude in the case of a kindness, revenge in the case of injury. And these things are common divisions of the law, those things which are written and those which without writing are upheld by the law of nations (*jus gentium*) or the customs of our ancestors. Also, part of the written law is private, part public. Public is a statute (*lex*), resolution of the senate, treaty; private is accounts, pact, agreement, stipulation. Moreover, those [laws] which are unwritten owe their force either to custom or to the agreements and, as it were, common consent of men. Indeed, it is prescribed above all that we enforce our customs and laws (*leges*) in accord with the law of nature (*jus naturae*). (*Part. Or.* 37.129–130)

Here, the *jus gentium* is associated with the customs of our ancestors. But the *jus gentium* is not synonymous with customs. Rather, the customs must accord with the *jus gentium* and the latter, in turn, with the law of nature. Cicero offers a similar division of various forms of law in *De Inventione* (*Inv.* 2.68). The *jus gentium* is only enforceable if it accords with the law of nature. We are led to conclude in this context that the *jus gentium* is an intermediate category of law. It lies between the written statutes and unwritten customs on the one hand and the law of nature on the other.

Just so that we do not take it for granted, as do contemporary jurists, that the *jus gentium* is synonymous with the law of nature, the *jus gentium* is historically contingent and the law of nature is constituted from a metaphysics of empty abstractions, intellectually distanced from social phenomena. As Cicero expresses this difference, '[t]he rights of nature themselves are, however, relatively unimportant for this sort of controversy because they are not involved in the civil law and are somewhat remote from the understanding of the vulgar; they may, however, frequently be brought in for a comparison or to enlarge on some topic' (*Inv.* 2.67). This social emptiness of the law of nature, in contrast with the *jus gentium*, is best expressed in Cicero's commonly cited reference to the 'true law' which is 'constant and eternal' (*Rep.* 3.33). The true law encloses *orbis terrarum* (the whole world), *gentes hominum* (the human race), and *cunctae gentes* (all peoples). Returning to the second passage concerning *jus gentium*, Cicero ends the passage with a reference to the 'true law' and 'genuine justice', which are said to transcend both written laws and unwritten customs. The human laws are mere 'shadows and sketches' of the true law: '[w]e, however, do not have the firm and lifelike figure of true law and genuine justice: we make use of shadows and sketches' (*Off.* 3.69). In this second passage, *jus gentium* is described as 'firm', 'lifelike', 'true' (*veri iuris*), and constitutive of a justice that is 'genuine' (*germanaeque jus titiae*). *Jus gentium* in this context seems to possess permanence in time and place. The 'mere shadows and sketches' of law suggest that there is a universal and omniscient legal order that is independent of the state. This universal law, not the *jus gentium*, is the law of nature.

Cicero describes the *jus gentium* as unwritten: *jus gentium* 'preserve[s]' unwritten norms (*Part. Or.* 37.130). The unwritten norms are said to be constituted from 'the conventions and virtual consensus of mankind'. The 'natural principle' is preserved by the social conventions. Cicero's highlighting of customs leads him to conclude in *De Oratore* that the ideal orator (lawyer) must understand not only the

particular posited civil laws but also 'the history of the events of past ages, particularly, of course, of our state, but also of imperial nations and famous kings' (*De Or.* 34. 120). The *jus gentium* is historically contingent from the very vocabulary that Cicero uses. *Lex* designates the patrician source of laws and *jus* denotes the plebeian source. Accordingly, *jus gentium* goes hand in hand with Cicero's recognition of the commercial expansion by the plebs throughout the whole of the Mediterranean.[20] The *jus gentium*, in Cicero's view, is associated with Roman law in that 'it is incredible how disordered, and well-nigh absurd, is all national law other than our own; in which subject it is my habit to say in everyday talk, when upholding the wisdom of our own folk against that of all others, the Greeks in particular' (*De Or.* 1.197). A knowledge of Roman law is thereby 'indispensable' for a competent lawyer.

Cicero fleshes out a third notion of *jus gentium* (natural law) in detail in terms of the Good in Book 3 of *On the Commonwealth*.[21] In another text, *De Inventione*, Cicero once again appeals to a metaphysical sense of nature to compare or widen the scope of the identity of a law (*Inv.* 2.67). In a further passage, Cicero expands on the division of various forms of law (*Inv.* 2.68). When Cicero does so, he asserts that one cannot identify a law by being confined to the posited laws of civil codes and customs. The intermediate principles of law, which trump civil laws of the state-like entity, include equity ('the straightforward principle of truth and justice, the fair and good' as well as corrective justice), for example. Cicero advises that equity ensures to each his own (*Top.* 2.9) and then that equity is grounded contingently by statute, contract, and custom (*Top.* 23.90), as well as by nature where two natural principles are established: 'to give each his due and the right of revenge' (*Top.* 23.90).[22]

It is important that one appreciate how the translation of *jus gentium* suggests that this third form of law has the individual peoples for its objects. This higher-ordered character of the *jus gentium* is reinforced by the grammatical context where Cicero uses the term *jus gentium*. The more recent denotation of 'the laws of all peoples' suggests that 'all peoples' are the object of the *jus gentium*.[23] Such a reading of the term opens up to the view that *jus gentium* supports the idea of universal human rights. The term is more complicated than that, however, because Cicero grammatically contextualizes *jus gentium* as an objective genitive ('for nations/peoples') rather than subjective genitive ('by the nations/peoples').[24] Gaius (130–80 CE) also contextualizes *jus gentium* in the objective genitive in his *Institutes* two centuries later, although a recent translation misses the objective genitive.[25] As such, the *jus gentium* of which Cicero writes is '*for* the peoples' (objective genitive), not '*of* the peoples' or '*by* the

20 Schiller, *supra* note 16, 166–7.

21 Here, Cicero divides laws into civil justice and natural justice (*Rep.* 3.31). Cicero makes the same distinction in the *Laws* through the words of Marcus (*Leg.* 2.13): '[l]aw, therefore, is the distinction between just and unjust things, produced in accordance with which human laws are constructed which punish the wicked while defending and protecting the good.'

22 For an example of equity by nature see *Off.* 3.67.

23 See *infra* note 25. (Contemporary international law texts frequently adopt this denotation.)

24 I am grateful to Sabine Grebe for bringing this point to my attention.

25 See Gaius, *Institutes*, 1.1; 3.93; 3.154. W. M. Gordon and O. F. Robinson interpret the *jus gentium* as 'law of all peoples' in order to displace the international law sense of 'law of nations' in favour of the commonly accepted private laws of all peoples. See Gordon and Robinson, *Institutes of Gaius* (1988). International law treatises have picked up this democratic sense of *jus gentium*, which was unintended by Cicero, for reasons I shall explain in my text below.

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peoples' (subjective genitive). The objective genitive, which is consistent with Walter Miller's Loeb translation as 'universal law', suggests that the *jus gentium* involves duties by the ruler rather than rights possessed by particular nations or peoples. The latter are beneficiaries of the *jus gentium*. This paternal character to the *jus gentium*, contrary to contemporary law treaties, is hardly consistent with any suggestion that the *jus gentium* emanates 'from' all peoples. The objective genitive is consistent with the role of the guardian in Cicero's ethical philosophy: the patron, in this case the Roman *res publica* (which, I discuss in a moment, hardly resembles the contemporary state), has duties towards clients. The patron acts in the interest of the clients. Since the *jus gentium* concerns the law *for* different groups of inhabitants, the originating centre of the laws is not some objectivity, such as the human species (per nature), nor natural morality as 'oughts', but the absence of an externally positing source of the *jus gentium*.

2. *Res publica*

This is the point where Cicero incorporates his sense of the *res publica* into his understanding of *jus gentium*. Cicero explains that when he retrieves and attempts to understand Roman history, 'communities and governments were constituted especially so that men could hold on to what is theirs' (*Off.* 2.73). Cicero is preoccupied, in addition to addressing the establishment of private property, with 'public things'. *Res* signifies 'thing'. And *publica* signifies 'public'. *Res publica* is generally translated as 'the public's thing' or, as with Zetzel, as 'the concern of the people'. Unlike the early modern and contemporary view, the protection of property, a thing, is a public matter. A public matter arises from a shared language which allows human beings to reason and deliberate about things. Since this capacity to reason is natural for human beings, the *res publica* emanates from the 'innate instinct' of human beings to bond together socially by virtue of their capacity to communicate and reason through language. The bonding marks the sociability of human beings with each other. This bonding is, therefore, natural. The highest form of such sociability is said to be the *res publica*. The *res publica* manifests a bonding throughout 'this celestial order' or 'this whole cosmos' (*Leg.* 1.23) or what the Stoics considered a *societas generis humani* (society of humankind). This bonding even links humans with the eternal god (*Leg.* 1.21, 1.23). Any particular human being is all the more 'grand and glorious' because he is a member of the fellowship of the cosmic order. What begins as parental love extends into friendship with strangers and then into the whole human species (*Fin.* 65). All cosmic parts are linked by such a bond (*Nat. D.* 2.115). And this bonding constitutes a community *in and for itself*.

One errs if one describes Cicero's theory of *jus gentium* as a law which guides states in an international community of equal sovereign states. To be sure, Cicero is concerned with the role of institutions in supporting the *res publica*. This focus on institutions, something with which constitutional and international lawyers are preoccupied today, misses the relation of the *res publica* with social bonding, however. So, for example, Cicero gives weight to a 'mixing' or 'tempering' of three institutional forms: the *imperium* (executive), *consilium* (a wise aristocratic

advising council regarding policy) and *libertas* (freedom of the citizen) (*Rep.* 1.69, 1.41, 2. 69, 2.56–57). The *res publica*, though, is not a formal state, such as Vattel and Kant argued, nor a state as the ethnic nation-state, as Hegel claimed. *Res publica* is what Cicero better describes as a 'commonwealth' and I shall henceforth use this term in order to ensure that the reader does not fall into the trap of likening his *res publica* to a modern state. Cicero emphasizes that 'the commonwealth is the concern of a people' (*Rep.* 1.39a).[26] A 'people', though, is an aggregate of neither interest groups nor ethnic groups nor self-reflective and autonomous individuals, as we usually assume today. Individuals 'associate with one another' through legal agreements and 'community of interest'. This community is generated from the shared language and reason which emerges from this 'natural herding together of men' in the primordial social condition.

Once one appreciates the relation of the commonwealth with the natural emergence of human beings from an animalistic pre-legal condition, Cicero can evaluate and hierarchize societies according to the extent to which they manifest a social bonding for the *res publica*. If inhabitants lack the natural social fellowship which bonds them together, their social relations obstruct what is natural: the communication and reasoning about the public things. As Scipio exclaims in *De Republica*, 'who would call that state a "concern of the people", that is a commonwealth, at a time when everyone was crushed by the cruelty of one man and there was no single bond of law or agreement or association of the group, which is what is meant by "people"?' (*Rep.* 3.43). Quoting from Cicero, Augustine also highlights, as noted above, how some societies are alien to a commonwealth if they are tyrannical or ruled by a faction or if their laws contradict the natural drive of inhabitants to bond socially with each other. So a commonwealth does not exist by virtue of its claim to exist as a legal entity. Nor does a commonwealth exist because other legal entities recognize it as an equal. The legal relations of organized societies depend on the extent to which each society manifests the natural tendency to manifest a social bonding for the public things. The public's deliberation and enactment of laws are merely *indicia* of the extent of such social bonding. The *res publica* represents *communitas*.

Jus gentium, then, does not represent an international community that is an aggregate of individual legal entities, whose consent, express or implied, is needed for the *jus gentium* to exist. Nor do domestic laws exist by virtue of states whose institutions posit laws. Nor can we say that the *jus gentium* represents an abstract or metaphysical objectivity of laws whose purity arises from an emptiness of social–cultural content. The *jus gentium* is generated from the ethos of context-specific experiences. The collective memory, such as Cicero draws from Roman social history, is an important feature of such an ethos. The *jus gentium* manifests and guards the extent to which inhabitants reciprocally recognize each other in their social relationships. Some institutional structures and some peoples will not have reached

26 See also Augustine, *City of God against the Pagans*, with trans. and ed. R. W. Dyson (1998), 2.21, where Cicero is understood as describing the commonwealth as 'the property of the people'. See also ibid., 19.21, where Augustine quotes Cicero as explaining that 'a community of interest' makes 'a gathering of men' into a 'people'.

such sociability. And there may well be a higher form of sociability than that represented by the commonwealth, even an international commonwealth. *Jus gentium* manifests, guides, and protects the sociability which it is in humans' nature to be. The principle of this innate sociability is that 'one is not allowed to harm another for the sake of one's own advantage' (*Off.* 3.23). If we obey nature (as I have outlined it above) in particular, neither an individual nor a political entity will ever try to seek what is another's or claim title to an object which the individual or entity has stolen.

This social fellowship of the commonwealth renders an indispensable and intimate relation of the *jus gentium* with the ethos of a community. If this is so, then one can hardly conclude that the *jus gentium* is limited to self-sufficient states, nor can we conclude that the *jus gentium* exists in an objectivity distant from the social–cultural practices of an ethos. It is apparent that Cicero offers a theory of *jus gentium* which is neither the consequence of the posited laws of a state nor the consequence of the transcendent justice of particular laws. Because sociability is innate in human beings,

> it is wrong to pass laws obviating this law; it is not permitted to abrogate any of it; it cannot be totally repealed. We cannot be released from this law by the senate or the people, and it needs no exegete or interpreter like Sextus Aelius. There will not be one law at Rome and another at Athens, one now and another later; but all nations at all times will be bound by this one eternal and unchangeable law, and god will be the one common master and general (so to speak) of all people . . . and the person who does not obey it will be in exile from himself. (*Rep.* 3.33)

Jus gentium possesses a trans-state character, and yet this character is generated from the contingent social–cultural ethos in which one finds oneself. We are left with the question, 'to what does Cicero attribute the authoritative source of *jus gentium*?'

3. The authoritative source of *jus gentium*

In order to appreciate Cicero's sense of *jus gentium* one needs to dissociate his thought from the traditional contemporary views about the sources of international law.

3.1. *Jus gentium* and written laws

The *jus gentium* is not coded in writing. Indeed, *jus gentium* may override the statute posited by a state institution: 'it is wrong to pass laws obviating this law [*jus gentium*]' (*Rep.* 3.33). As with customs, *jus gentium* may proscribe certain conduct even though statute law permits it (*Off.* 3.69). As Cicero writes, '[f]or this reason our ancestors wanted the *jus gentium* and the civil law to be different: everything in the civil law need not be in *jus gentium*, but everything in the *jus gentium* ought also to be a part of the civil law' (*Off.* 3.69). And again, through the voice of Marcus in Cicero's *De Legibus*, 'the legislation that has been written down for nations in different ways and for particular occasions has the name of law more as a matter of courtesy than as a fact . . . It is generally agreed that laws were invented for the well-being of citizens, the safety of states, and the calm and happy life of humans' (*Leg.* 2.11). In this vein,

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'the most stupid thing of all' is to believe that a civil law is binding only because it has been ratified by the people (*Leg.* 1.42).

3.2. *Jus gentium* and unwritten customs

If the *jus gentium* is not written in a code, is it constituted from unwritten customs? Several contemporary analyses of *jus gentium*, drawing primarily from Grotius, suggest that *jus gentium* is constituted from customs.[27] It is the case that Cicero is aware of several characteristics of customary law, characteristics which are shared even today.[28] Cicero explicitly distinguishes *jus gentium* from customary norms, however. Although both customs and *jus gentium* may be unwritten, *jus gentium* is distinguished from the *mores majorum* (customs of the ancestors). A custom is usually considered the object of identity by the official. The custom is not the object of deliberation such as is a legislated enactment. If an absence of reflection characterized the norms of *jus gentium*, then Cicero might as well have described the *jus gentium* as manifesting the physical nature of the primordial world. Cicero rejected such a view, however (*Pro Sestio* 13.91; *Inv.* 1.2). *Jus gentium* only exists after a society has leapt into a community (such as the cosmos) where beings experience language and reason (*Off.* 1.50, 1.11, 1.51).

Reason, then, distinguishes the primordial from the legal development of a society. This is the point where Cicero explains the nature of *jus gentium.* What, then, does reason involve? Cicero explains that reason

> enables him [human beings] to perceive consequences, to comprehend the causes of things, their precursors, and their antecedents, so to speak; to compare similarities and to link and combine future with present events; and by seeing with ease the whole course of life to prepare whatever is necessary for living it. (*Off.* 1.11)

In *De Legibus* Cicero also describes reason as 'drawing inferences, making arguments, refuting others, conducting discussions and demonstrations' (*Leg.* 1.30). Primordialism lacks reason. First, Cicero describes it as lacking a verbal language. Even though a language may vary as to the presentation of a concept, ideas will be identical or have an essence (*Leg.* 1.30). In *De Republica*, Cicero explains that if beings lack reason (and beings can only reason if they share a common language), this lack excludes such beings from the protection of *jus gentium* (*Rep.* 3.3). Second, a society is excluded from protection if it lacks a written history. For one thing, written records allow conversations to be made with absent individuals. For another, past events could be preserved by writing. Tribes and nomadic peoples generally had an oral tradition of communication and history. Third, reason incorporated the mathematics needed to understand astrology and the cosmos. Deliberation, rather than the positing of rules, is especially important for all peoples to survive (*Rep.* 1.41). The three elements of reasoning bonded individuals together. Without the elements of reasoning, tribes, pirates, rogue states, and nomadic peoples, for example, lacked the bonding necessary to form a state. They acted from the passions of the body rather than from the

27 Postema, *supra* note 7.
28 E.g., time must lapse for a custom to be binding (*Inv.* 2.22.67). A custom must also be publicly approved.

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reason that human beings share with the gods. That being so, when souls depart from the body, they 'circle around the earth and only after having been harried for many generations do they return to this place' (*Rep.* 6.29). Such is the situation with peoples who lack a commonwealth.

Thus because Cicero privileges the relation of *jus gentium* with reason – the one trait that grounded the universality of *humanitas* – *jus gentium* could not protect all societies or inhabitants of the Roman epoch. Rather, the universalist pretension of the *jus gentium*, as earlier described, excluded traditional societies that lacked a centralized state. We are told that tribal rulers acted from emotion of the body rather than from the conscious consideration of strategy of Roman military leaders. The *jus gentium* also excluded political entities that, although of the form of a state, were so corrupt as to lack written rules, a centralized legal and governmental order, courts, and the like. So too, the claim of a special law, *jus gentium*, to protect all peoples universally did not apply to human beings who, like pirates, lacked a commonwealth.

3.3. *Jus gentium* and nature as biological

If *jus gentium*, in Cicero's view, is neither coded nor generated from customary norms, then had we best describe it as synonymous with the law of nature? After all, leading contemporary scholars claim or take for granted that Cicero provides a theory of natural law. Some texts seem to suggest such a reading of *jus gentium* (*Leg.* 2.13; *Off.* 3.23; *Inv.* 2.53, 2.161, 2.22.65). At first sight, the social bonding that characterizes the commonwealth seems to draw from nature as a biological phenomenon. Cicero explains in *De Finibus*, for example, that

> human nature is so constituted at birth as to possess an innate element of civic and national feeling, termed in Greek *politikon*; consequently, all the actions of every virtue will be in harmony with the human affection and solidarity I have described, and Justice in turn will diffuse its agency through the other virtues, and so will aim at the promotion of these. (*Fin.* 5.23.66)

The 'solidarity of mankind' is generated by the 'actual affection' of blood relations in a family (*Fin.* 5.23.65). The problem is that, as Seneca points out, the site of one's birth is accidental.[29] After all, one could be born in a primordial condition or outside the territorial border of a commonwealth.

One coherent theme undermines the association of *jus gentium* with nature as biological, however. This theme concerns Cicero's distinction between the nature of a human being and the nature of an animal. Nature has created us so differently from animals that a human being would rather die than be transformed into a human body with an animal's mind (*Rep.* 3.4.1c). In the *Laws*, Cicero continues this distinction: 'the one thing by which we stand above the beasts, through which we are capable of drawing inferences, making arguments, refuting others, conducting discussions and demonstrations – reason is shared by all, and though it differs in the particulars of knowledge, it is the same in the capacity to learn' (*Leg.* 1.30). Cicero

29 Seneca, 'On the Private Life', in Seneca, *Moral and Political Essays*, ed. John M. Cooper and J. F. Procopé (1995), 165–80, Pref 4(1) at 172.

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considers animals incapable of sharing a language. Nature has conferred on human beings the capacity to communicate through a language. Language bonds individuals into a social whole: 'the modulation of the voice and the power of speech . . . is the greatest force in promoting bonds among humans' (*Leg.* 1.27). This social bond is 'pleasing' and 'mutual' (*Rep.* 3.3). In *De Officiis* Cicero especially emphasizes the generation of social bonding once beings gain a language (*Off.* 1.50–51). Once human beings can understand each other, they can communicate, debate, and make judgements (*Off.* 1.50). The highlight of communication is friendship: 'everything is common among friends' (*Off.* 1.51). The *jus gentium* comes into play because *jus gentium* manifests and protects the social bonding generated by a shared language and by reason. Because language and therefore social bonding are natural, the *jus gentium* is described as natural.

The consequence of the distinguishing trait of human beings' nature is that human laws are products of reason, not of the appetites of the natural body. The latter characterizes beasts. 'Law is the highest reason, rooted in nature . . . secured and established in the human mind . . .' (*Leg.* 1.18). Reason draws from the mind; animals act from the passions of the body. Nature has conferred mind and body on humans and animals respectively. We cannot associate justice, fairness, and goodness with animals because animals cannot communicate with each other (*Off.* 1.50).

3.4. *Jus gentium* and nature as social fellowship

So it is not from nature as a biological fact that one can explain why *jus gentium* is natural. Rather, the *jus gentium* is the consequence of a social bonding that naturally develops from the capacity to speak and reason. So, for example, the family offers a social environment where family members grow into social fellowship through their experiences. Children are loved by parents and family, Cicero argues. This parental love is then assimilated by the partners in marriage. Because speaking and reason are shared among such groups, the natural bonding is assimilated into the extended family, marriage, friendships, the neighbourhood, citizenship, 'and lastly . . . the whole of the human race' (*Fin.* 5.23.65). The social bonding among strangers manifests the same sense of love as the love of one's children and one's marital partner (*Rep.* 3.391). Love produces a natural bond and, without a natural bond, 'all social bonds are destroyed'. The cosmos manifests this very love which is generated with the birth of a human being (*Nat. D.* 2.115). This love, as the feature of the common fellowship, may not be exhibited in some political entities or in the relations of such entities with each other. Once again, some political entities may not be recognized as members entitled to the protection of *jus gentium*.

When social relations do exhibit love through social bonding, the shared fellowship recognizes that, as Philus puts it in *De Republica*, '[o]ur home is not the one bounded by our walls, but this whole universe, which the gods have given us as a home and a country to be shared with them' (*Rep.* 1.19). The 'true law is right reason' (*Rep.* 3.33), so often taken in isolation from Cicero's works, falls into place once one appreciates the natural emergence from primordialism of the capacity to speak and reason. There will be 'one eternal and unchangeable law' which binds 'all nations at all times'. The 'innate' capacity to bond through language and reason

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entertains the possibility of only one justice. Such is described as 'right justice' (*Leg.* 1.42). In another passage in *De Legibus*, Cicero puts the point this way: the 'law was not thought up by human minds . . . it is not some piece of legislation by popular assemblies; but it is something eternal which rules the entire universe through the wisdom of its commands and prohibitions' (*Leg.* 2.8). And what is eternal? Jupiter (*Leg.* 2.10).

It bears repeating that this divine-like eternal law is hardly the *jus gentium*, though. The *jus gentium* is socially contingent. The eternal law is hypothesized as so pure that it is purged of all social contingency. Without the capacity to communicate and to reason through a shared language, according to Cicero, it would be impossible to find a good man (*Rep.* 3.38a).[30] That being so, the ethos of a community generates a drive for inhabitants to join together into a commonwealth.

If *jus gentium* is connected to the law of nature, the nature that Cicero has in mind is hardly something that is outside human control. The *jus gentium* arises because of the social fellowship which human beings possess in their nature as beings of language. Once we appreciate that *jus gentium* goes hand in hand with a capacity for sociability among human beings as opposed to animals, the duties conferred by *jus gentium* are natural in that the duties are 'the *feeling* which renders kind offices and loving service to one's kin and country' (*Fin.* 5.23.66, emphasis added). Such felt experiences also embrace our memories of friendships and experiences with others. The *jus gentium* is nested in nature but nature draws from 'the common bonds' of human beings with each other (*Leg.* 1.28).

4. Language and reason

Laws are the consequence of the advent of language. With language, beings can reason about ideas (*Off.* 1.11). And once we can reason, we can author laws and agree to be bound by such laws. With language and reason, nature 'drives him to desire that men *should* meet together and congregate, and that he should join them himself' (*Off.* 1.12, emphasis added). Dialogue and deliberation, associations and institutions are possible among humans. A common fellowship provides comfort and necessaries of life to one's fellows (*Off.* 1.12). The blood relations in the family also generate the sociability that characterizes the grounding of *jus gentium* (*Fin.* 5.23.65). The blood relations of the family are thereby displaced by civic friendship in marriage, marriage only being possible by a law. Indeed, marriage is 'prior in order of time and is the root of all family affections' (*Fin.* 4.7.17).

Even strangers are members of the common fellowship. Accordingly, nature induces that one have duties towards the stranger. Cicero suggests examples of such a duty to strangers: to share fresh water, to share fire with the stranger, to offer trustworthy advice to the stranger (*Off.* 1.52).[31] In the next section, I shall

30 Equity and good faith are the two important doctrines in the law relating to how the *praetor peregrinus* dealt with foreigners.

31 That said, Cicero admits that the performance of such duties does not harm one's own interests (*Off.* 1.52).

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identify examples of moral duties that arise from the social bonding generated by virtue of the human capacity for language. The common fellowship, induced by the natural capacity of humans to speak, continues when Cicero suggests that sociability deepens as beings live in a neighbourhood, a state-like political and social entity, an entity amongst political allies and 'lastly by embracing the whole of the human race' (*Fin.* 5.65). Again, Cicero considers the highest form of common fellowship in his day to be the *res publica*. The *res publica*, like the family, the neighbourhood, and relations with strangers, is generated from the 'innate instinct' of human beings to communicate and reason through language. The laws of the *res publica* are natural in this sense of being the natural emergence of social associations and deliberation. If a society lacks deliberative institutions, it may possess a commonwealth in form only. Such an empty form is considered unnatural. If a social group lacks a commonwealth in its social–cultural ethos, then the group inhabits a lower stage of human development. It is lower in the hierarchy of social development because it approaches the primordial world.

There is another factor which suggests that the *jus gentium* is not synonymous with the laws of nature, namely that several passages contradict synonymity. In *De Inventione*, for example, Cicero writes that human laws derive 'only in a slight degree from nature' (*Inv.* 2.53.162). More generally, *jus gentium* is humanly constructed at an early stage of human development, not at its *telos* in the laws of nature. This is so once human beings emerge from the primordial to the legal world. Once such beings become civilized by virtue of their speech, reason and laws, they can develop and aspire to sharing reason with the gods (*Leg.* 1.21). This is so because gods also share reason. The shared reason with gods is 'right reason'. Humans reach their natural *telos* once they share reason with gods (*Leg.* 1.23). Right reason is 'the first bond between human and god', Cicero continues in this well-known passage of *De Legibus*. This shared reason with gods also results in the sharing of the procedures of justice, of the same commonwealth and 'this whole cosmos' (*Leg.* 1.23). Those beings who gain right reason also acquire the *auctoritas* to enact and enforce civil laws as well as to enforce the *jus gentium*. That said, if human beings live outside the social fellowship which is naturally generated by the sharing of language and reason, they do not yet qualify as members of the cosmos. Because the cosmos is generated from the capacity to speak and reason, so vital to human existence according to Cicero, there will be entities and human beings who have failed to access the social fellowship that reaches its full fruition in the cosmos. Human beings may possess the capacity to develop sociability and yet remain in the primordial world of un-humanity.

In sum, it is apparent that Cicero's *jus gentium* is not self-consciously posited in written codes by officials. Nor is the *jus gentium* located in the law of nature which guides the actions of the gods as well as humans, however. The *jus gentium* manifests and protects the rule and order of the natural development towards the cosmos. The cosmos, in turn, is ultimately accessed through the laws shared by humans and the god. Here, Cicero is heavily influenced by the Stoics. The cosmos slowly grows from birth into social fellowship. The ultimate social fellowship is represented in the cosmos. Order prevails in the cosmos. Social–political groups, individuals and

political entities that undermine that order remain outside the protection of the *jus gentium*.

5. Examples of *jus gentium*

Cicero's sense of *jus gentium* might be better understood by retrieving several of his examples of it.

5.1. The *jus gentium* of just and unjust war

One context of *jus gentium* concerns the motive for entering war. The *jus gentium* only condones a just war (*Leg.* 2.34). 'When, then, we are fighting for empire and seeking glory through warfare, those grounds that I mentioned a little above as just grounds of war should be wholly present' (*Off.* 1.38). To begin with, war should only be the last resort, when reason no longer may sway the enemy (*Off.* 1.35). Further, *jus gentium* requires that a commonwealth must explicitly declare war against an enemy before beginning armed conflict (*Off.* 1.36). Cicero considers a war unjust if it is begun for vengeance or for the imperial domination of others: '[t]hose wars are unjust which are undertaken without cause. For aside from vengeance or for the sake of fighting off enemies no just war can be waged . . . No war is considered just unless it is announced and declared and unless it involves recovery of property' (Isidore, *Etymologies* 18.1.2–3, quoted from *Rep.* 3.35a). So, too, a war is unjust if it is generated from 'madness rather than for a legitimate cause' (*Rep.* 35a). Further, a war is unjust if not defensive in nature (*Off.* 1.38, 2.27). The cause is defensive, for example, if the war is initiated to recover stolen property (*Rep.* 3.35a). With a defensive war, a commonwealth initiates war in order simply to survive. Wars of conquest had been pursued in Cicero's time with insufficient attention to the extent of cruelty against the enemy.

Cicero distinguishes a war of conquest from a war for the protection of allies. By recognizing a political state-like entity as an ally, Rome considered the entity as having emerged from the primordial world. Social fellowship and therefore peace is generated from the relations of Rome with such an entity. 'But as long as the empire of the Roman people was maintained through acts of kind service and not through injustices', Cicero explains, 'wars were waged either on behalf of allies or about imperial rule; wars were ended with mercy or through necessity' (*Off.* 2.26). The 'fair and faithful defence of our provinces and of our allies' was thereby a just cause for war. 'In this way', he continues, 'we could more truly have been titled a protectorate than an empire of the world' (*Off.* 2.27). This protective role of the commonwealth over other political entities manifested the character of the patron towards his client. Cicero complains, however, that Rome had rejected this protectorate character of a just war 'completely' after the victory and confiscation of property by Publius Cornelius Sulla in 82 and 46 BCE. This was so, according to Cicero, because of the 'great cruelty' exercised against Roman citizens.

Once a war has been begun, each warring party must abide by certain norms consistent with the *jus gentium*. If a soldier has been dismissed from the army, he must not fight as a mercenary (*Off.* 1.37). More seriously, Cicero is critical of the later

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Roman republic of his day because Rome's armies saw no limit to the violent means against enemy state-like entities (*Off.* 2.2, 2.27–28, 2.23, 2.29). For example, according to Cicero, the Romans were not justified in destroying Corinth in 146 BCE (*Off.* 3.46, 1.35).

In another context of *jus gentium*, foreign affairs had to be conducted in good faith. A treaty bound the parties: *pacta sunt servanda*. Cicero disparagingly criticizes state-like entities that bargained in bad faith or that signed a treaty and then surreptitiously contravened it. As Cicero explains, '[i]n my opinion, our concern should always be for a peace that will have nothing to do with treachery' (*Off.* 1.35, also 3.46). A commonwealth must perform its duties in good faith. Further, the commonwealth has a duty after a war to recognize the former enemy's inhabitants as having legal status with rights and duties: 'those who were not cruel or savage in warfare should be spared'. (*Off.* 1.35). Cicero lists a series of examples when Rome admitted the enemy into Roman citizenship: the Tusculani, the Aequi, the Volsci, the Sabini, and the Hernici (*Off.* 35). As an example of the natural basis of *jus gentium*, Cicero offers that 'one is not allowed to harm another for the sake of one's own advantage' (*Off.* 3.23). If we obey the unwritten norms of *jus gentium*, we will never try to attempt to steal what is another's or claim title to an object which one has stolen.

5.2. Crimes against humans

Jus gentium also addresses the duty of a commonwealth towards the cosmos as a whole. A crime against the cosmos cannot be 'purified' by the courts (*Leg.* 1.40). After all, Cicero cautions, courts have not always existed and they have often been corrupt. Nor can a crime against the cosmos be purified by legislated enactments. If such crimes were punished by civil authorities, the latter could always repeal the law: 'what worry would trouble the wicked if the fear of punishment were removed?' (*Leg.* 1.40). The punishment for a crime against the cosmos is the unconscious: 'the pain of conscience and the tortures of deceit', Cicero emphasizes in this passage. An overriding duty to protect the cosmos suggests that wars may be unjust. In addition, though, human beings are members of the cosmos: the commonwealth merely manifests the social fellowship generated from the shared language and the capacity to reason by individual human beings. As such, the duty to protect the cosmos suggests that there may be 'crimes against humans' (*scelerum in homines*) as well as injustices against 'the gods' (*in deos inpietatum*) (*Leg.* 1.40). If a crime is committed against humans, the harm cannot be compensated, according to Cicero. As he explains, '[b]ut there is no purification for crimes against humans and for acts of impiety' (*Leg.* 1.40). This is so because the crime offends the cosmos as a whole rather than an individual social member of the cosmos. And a crime against the cosmos violates the very idea of social fellowship that is generated in the nature of human beings.

Here we find Cicero's idea of the international community as greater than the aggregate of discrete entities of the community. And the law of the international community is greater than the aggregate of the discrete rules. In one passage in the *De Officiis*, Cicero explains that war itself contravenes the social fellowship among the beings of the cosmos because war replicates the struggle of beasts in the primordial

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world (*Off.* 1.34). Further, since the commonwealth is the closest manifestation of the identity of the cosmos, a serious crime is an act or omission that undermines the legal order of the *res publica*. Finally, a heinous harm caused to an individual human being, as a member of the cosmos as a whole, will also cause harm to the cosmos as a whole. Such a crime against humans would be an act that all human beings would agree is offensive (*Leg.* 1.32).

5.3. The punishment for violating the *jus gentium*

This takes us to another example of the *jus gentium*. If a state or an individual has committed a crime against humans, what is the punishment? When Cicero comes to describing the punishment for violating the *jus gentium*, he suggests two features. First, Cicero explains through Marcus again that 'it was a function of law to persuade rather than to compel all things through force and threats' (*Leg.* 2.14). Second, Cicero follows a tradition that Sophocles describes through Antigone and that Plato's Socrates describes in the *Apology*: namely that the punishment wreaks havoc in the subconscious of the offender (*Rep.* 3.33). In one passage, Cicero describes how the punishment chases and hounds the corrupted like 'the Furies'. The pain is that of 'conscience and the tortures of deceit'. This punishment distinguishes *jus gentium* from a contravention of a statute for, in the latter case, 'the wicked' would have nothing to worry about since the human laws could be repealed or ignored (*Leg.* 1.40). Cicero goes so far as to suggest, if I may repeat, that

> the person who does not obey it [the true law] *will be in exile with himself*. Insofar as he scorns his nature as a human being, by this very fact he will pay the greatest penalty, even if he escapes all other things that are generally recognized as punishments. (*Rep.* 3.33, emphasis added)

The perpetrators experience torturous guilt (*Leg.* 1.40). Once a crime against humans has been committed, reparation is not possible because the crime has offended the cosmos.

5.4. Duty to protect

Finally, *jus gentium* is exemplified in the duties which human beings reciprocally owe one another. In this respect, Cicero writes in *De Republica* that 'justice instructs us to spare everyone, to look after the interests of the human race, to render each his own, to keep hands off things that are sacred or public or belong to someone else' (*Rep.* 3.24b). The duty between human beings continues even if one might profit by harming the other (*Off.* 3.23). Even the master owes duties to the domestic *alieni*. In this respect, Cicero insists that Rome had a duty to establish an empire in order to protect those inhabitants which lacked the protection of a commonwealth. Augustine quotes Cicero as explaining that wicked people would have been worse off if they had not been conquered by the Romans.[32] In addition, Cicero accepts a minimal standard with which Romans must treat the foreigner. As noted, the law of war sets out a minimal standard of the means and objectives regarding treatment of the enemy

32 Augustine, *supra* note 26, 19.21, at 951.

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during war. Despite Cicero's acknowledgement of the shift of signification of the word *hostis*, the Roman state owed a duty to be courteous to foreigners and to allow foreigners to enjoy the city (*Off.* 3.47). Even foreigners could be friends. When the posited laws were silent, Cicero continues, 'everything is common among friends' (*Off.* 1.51). Social relations with foreigners especially required good faith. Good faith is relevant in many different contexts: guardianships, business fellowships, trusts, commissions, purchases, sales, and hiring or letting (*Off.* 3.70).

5.5. Duties of the master to domestic *alieni*

Cicero offers a further example of the *jus gentium*. By virtue of the laws of the *paterfamilias*, the father had *auctoritas* over members of his household. The latter had the legal status of *alieni*. This authority over a dependent, according to Gaius, exemplified the *jus gentium*. As Gaius writes, 'for we can observe the same thing everywhere; owners hold the power of life and death over slaves and owners get whatever slaves acquire'.[33] Slavery involved a duty by the civilized being to the less civilized. So, too, Rome had a duty to establish an empire for the same reason. Augustine quotes Cicero as explaining that the empire needs slaves (*Rep.* 3.36). The empire can enslave peoples 'on their behalf', he continues. 'The conquered will be better off because they would be worse off if they had not been conquered' (*Rep.* 3.36). Some human beings and groups of inhabitants are ready to be conquered and enslaved, once again, because they lack the development that accompanies speech, reason, and law. This consequence of the natural development of *jus gentium* did not continue into the late Republic and early Principate. Masters, for example, could not lawfully inflict 'immoderate or groundless cruelty on their slaves'.[34] Gaius continues in this paragraph that a master could not kill his slave 'without good grounds' according to an edict of Emperor Antoninus Pius. Further, if the master exercised 'intolerable' cruelty towards a slave, the slave could be sold against the will of the master.

5.6. Duties to foreign *alieni juris*

In his effort to elaborate ethical duties towards others, Cicero rarely mentions that one has duties to foreigners from another commonwealth. Such foreigners often sojourned within the territorial border of Rome or of the empire. When Cicero does address the matter, he frames duties towards the *alieni juris* in terms of a minimal standard. This duty contrasts with the exception to the *erga omnes* in *Barcelona Traction*, as noted earlier.[35]

As an example, Cicero criticizes extreme cruelty committed against enemies, he recognizes laws protective of humanity, and he objects to the banishment of foreigners (*Off.* 1.51). The main constraint on the foreigner is that the foreigner must not hold himself out, as was the common practice in Cicero's day, as if a citizen (*Off.* 3.47). Further, if a political entity were tyrannical, the inhabitants, although

33 Gaius, *Institutes* 1.52, *supra* note 25.
34 Ibid., 1.53.
35 *Barcelona Traction*, *supra* note 3.

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they lived under the form of a commonwealth, would be effectively without a commonwealth, or, to use the contemporary term, stateless. The tyrant should be amputated as if he were the limb of a body. The minimal standards of duty to foreigners inhabiting Rome or the empire extended to a general duty of one human being towards another human being, despite the fact that one might profit by harming the other (*Off.* 3.23). Cicero adds in this latter passage that '[t]he same thing is established not only in nature, that is in the law of nations [*jus gentium*], but also in the laws of individual peoples, through which the political community of individual cities is maintained' (*Off.* 3.23). The kernel of Cicero's idea is remarkably similar to Kant's categorical imperative except that Cicero grounds his idea in the social ethos rather than in the noumenal realm of a priori reasoning (*Tusc.* 1.13.30). The attitude of concern for others is an intimate feature of being a member of the cosmos (*Leg.* 1.23–24). Human beings share this feature with god.

The Roman citizen even owed duties to the foreigner by virtue of the stage of a shared social development of the enemy and the Roman. Cicero explains, for example, that the word *hostis* had indeed taken on the signification of 'enemy' by his day, emerging from the idea of courteous respect towards the foreigner at the time of the Twelve Tables of Roman law (451/450 BCE) (*Off.* 1.37). Cicero describes *hostis* as 'so tender a name' to describe the stranger in earlier centuries. The 'harsher' connotation of *hostis* in Cicero's day had displaced the association of *hostis* with courteous respect: 'for the word has abandoned the stranger, and now makes its proper home with him who bears arms against you' (*Off.* 1.37). Despite the shift of signification of the word *hostis* from courtesy to enemy, the Roman state owed a duty to allow foreigners to enjoy the city (*Off.* 3.47). Even foreigners could be friends because they shared a common bonding through language: '[t]he *most widespread fellowship* existing among men is that of all with all others. Here we must preserve the communal sharing of all the things that nature brings forth for the common use of mankind' (*Off.* 1.51, emphasis added). The civilly posited laws defined the legal status of communal and private possessions. In circumstances where civilly posited laws did not determine a discrete status, Cicero continues, 'everything is common among friends (*Off.* 1.51).

A further theme, one which is associated with the office of the *praetor peregrinus*, is the importance of good faith when Romans dealt with foreigners who lived on Roman territory. Cicero suggests that good faith is relevant in many different contexts: guardianships, business fellowships, trusts, commissions, purchases, sales, and hiring or letting (*Off.* 3.70). Good faith may work in two ways, both of which draw from a commercial transaction.[36] On the one hand, duties are owed to an individual by an individual. One owes a duty not to harm the foreigner, for example. And one owes a duty to act in good faith. On the other hand, there are duties to others by virtue of one's membership in the commonwealth. Such duties are posited by civil laws. The duties proscribe conduct such as perjury, treason, and other acts against the commonwealth. Since the commonwealth is the highest form

36 See, e.g., Cicero's description of such a situation when M. Marius Gratidianus sold a house to G. Sergius Orata (*Off.* 3. 67).

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of common fellowship known to Cicero and since nature induces human beings to enter into social fellowship, the latter duties are natural. One citizen owes such duties to another citizen of the commonwealth. No civil laws of a state-like political entity can take such duties away by positing laws in the form of statutes or judicial decisions. This is especially so if the entity is characterized by tyranny, oligarchy, or mob rule. Indeed, any state-like political entity with such characteristics is no longer a commonwealth and its laws are not binding, Cicero writes (*Leg.* 1.42; *Rep.* 3.43, 3.45, 5.1). In addition, duties are not owed to nomadic groups, tribes, pirates, and mercantile cities because they represent a primordial world. Although a state-like entity, the organization is not a commonwealth and its laws are of and by criminals. The ruler of a political association that fails to be a commonwealth cannot be trusted. One must assume that his military tactics are uncivilized. The laws of war will not apply to him. His treaties will lack good faith.

Conversely, the citizen of another state-like political entity may possess legal standing before the Roman institutions. The foreigner may carry on business contracts with Roman citizens and have the contracts enforced by the *praetor peregrinus* (*jus commercium*). He may marry Roman citizens (*jus connubii*). Such a foreigner is a *peregrinus*, who may live in Rome but possess citizenship in another state-like entity: '[i]t is the duty of the foreigner or resident alien to do nothing except his own business, asking no questions about anyone else, and never to meddle in public affairs, which are not his own' (*Off.* 1.124). The *peregrinus*, although a foreigner to whom natural laws are owed, must defer to the legal status of the Roman citizen. In his defence of Caecina, for example, Cicero explains that the law of exile differs in Rome from the law of exile accepted in other state-like entities (*Cael.* 34.100). The key issue concerning exile is how *jus gentium* is related to the *auctoritas* of the state-like entity.

6. The exclusionary character of Cicero's *jus gentium*

Against the above background, we have a paradox. Although the *jus gentium* manifests and protects the cosmos, Cicero explicitly excepts some societies from the protection of the *jus gentium*. I shall now identify several of these exceptions and then proceed in the next section to explain why his theory of *jus gentium* rests upon a mythic primordial world.

6.1. A revolutionary state-like entity

First, although Cicero gives great weight to the commonwealth as a sign of social development towards the *jus gentium*, he also recognizes that the commonwealth may evolve into corruption and tyranny. For a commonwealth could be a mere shell with a tyrant for its ruler. In such a case the rule of law does not constrain the ruler and the ruler governs in a way not unlike the image of the kings in the 'wasteland' beyond the territorial border of the Roman Empire. In such a situation, the state is excluded from protection of the *jus gentium*. Similarly, Cicero considered a revolutionary state-like entity as outside the *jus gentium*. In *On Duties*, Cicero condemns 'men greedy for . . . revolution' (*Off.* 2.3). Such leaders had changed the commonwealth beyond recognition. Indeed, any radical change of institutions or

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political beliefs by rulers would risk lowering the status of that commonwealth in the hierarchy of civilization to the point that it no longer exists. The commonwealth can be 'removed, destroyed, extinguished' and, in such a circumstance, the cosmos is weakened (*Rep.* 3.34b). *Jus gentium* has a territorial-like boundary after all.

6.2. A tyrannical state

Second, tyrannical states are exempt from the protection of the *jus gentium*. The Rome of Cicero's day was one such state, according to Cicero. The reasoning behind this is that the inhabitants of a tyranny were effectively lacking in the protection afforded by a commonwealth. As such, there was an absence of the common fellowship which a state exemplified. Cicero is critical of the later Republic precisely because, aside from its tyrannical character, it had embarked on offensive wars. Rome conducted wars without any limit to the ways in which Roman soldiers treated the enemy nations (*Leg.* 1.40). Cicero exemplifies the principle in terms of the Athenian decision not to set fire to the whole Spartan fleet because such conduct was dishonourable (*Off.* 3.49).

6.3. A commonwealth in form only

A political entity, which exists in form only, is also exempt from the protection of the *jus gentium*. Such a political entity might mimic the form of the centralized institutions of a commonwealth. However, an entity would lack the rule of law, the protection of private property, the adjudication of private disputes by judicial reasoning, and the like. Carthage was such a political entity in form only, according to Cicero (*Off.* 3.100).

6.4. Stateless societies

This takes us to the most important exception to the *jus gentium*: societies which lacked the character of a commonwealth, especially if there were no centralized institutions of a state-like entity. Today, we would describe such societies as stateless. A stateless society lacks centralized institutions such as courts, legislatures, a disciplined army, and the like. The most important feature of such centralized institutions, according to Cicero, is the opportunity of citizens to debate, deliberate on, and reflect about laws. A law can be the product of self-conscious reflection by legislators and judges. Such a law is written. A stateless society lacks centralized institutions for such a deliberative character as well as for the enactment of written laws. Tribes, clans, pirates, and nomadic peoples exemplify stateless societies.

7. The myth of primordialism

The question that we must now address is, why does Cicero make such grand claims about the *jus gentium* and yet explicitly exclude societies from the protection of the *jus gentium*? One cannot find an explanation for the contradiction from the passages of Cicero's own discussion of *jus gentium* set out in my section 1. Rather, Cicero has an image of the primordial world before law came into existence. *Jus gentium* was the form of post-primordial social development.

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The key to Cicero's exclusion of stateless societies as well as revolutionary, tyrannical, and rogue state-like entities is that such societies and political entities exemplified a primordial world. Cicero describes the primordial world in several passages of his works. One such passage is from *De Inventione Rhetorica*:

> [T]here was a time when *men wandered at large in the fields like animals* and lived on the *wild* fare; they did nothing by the guidance of reason, but relied chiefly on *physical strength*; there was as yet *no ordered system* of religious worship nor of social duties; no one had seen legitimate marriage nor had anyone looked upon children whom he knew to be his own; nor had they learned the advantages of an equitable code of law. And so through their ignorance and error blind and unreasoning passion satisfied itself by misuse of bodily strength, which is a very dangerous servant. (*Inv.* 1.2, emphasis added)

This image of primordial conditions is also manifested in his speech *Pro Sestio*:

> For which of us, gentlemen, does not know the natural course of human history – how there was once upon a time, before either natural or civil law had been formulated, when men roamed, scattered and dispersed over the country, and had no other possessions than just so much as they had been able either to seize by strength and violence, or keep at the cost of slaughter and wounds?' (*Pro Sestio* 13.91).

The human beings in the primordial condition were likened to animals. In colourful metaphors not unlike Lucretius' description of the primordial condition, early beings were a 'savage fraternity' or 'woodland pack' which roamed the forests and fields (*Cael.* 11.26). Living like animals, human beings lacked 'civilisation and laws'. The first desire of each primordial inhabitant was to preserve her- or himself in such a condition (*Off.* 1. 11–14). Private property was not possible – it only became possible after long, and first, after *occupation*.[37] But with such first occupation, inhabitants became attached to land, speech was shared, villages were formed, and customs were accepted.

Why did the primordial world lack laws in such a condition? The critical characteristic of the primordial world, as I pointed out above, was that human beings lacked a language (*Off.* 1.50). Without a language, beings could not communicate with each other. Nor could they think about concepts. Cicero explains that reason therefore represents a higher-ordered faculty of perceiving social events, comprehending the causes of events, and foreseeing the consequences of acting one way rather than another:

> [Reason] enables him [the human being] to perceive consequences, to comprehend the causes of things, their precursors and their antecedents, so to speak; to compare similarities and to link and combine future with present events; and by seeing with ease the whole course of life to prepare whatever is necessary for living it. (*Off.* 1.11)

Reason overrides the bodily impulses of animals. Without language, reflection, or communication, human beings could not deliberate or reflect about laws. Nor could they even write down their laws in codes. In brief, they lived like animals because animals, according to Cicero, lacked a language.

37 Garnsey, *supra* note 10, 114–15.

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This absence of language and reason among animals and the animal-like human beings of the primordial condition sets the context for understanding why Cicero's *jus gentium* entertained that some societies would not be protected by *jus gentium*. On the one hand, animals were un-human in that they lacked a language and the ability to reason about concepts. And so, as with animals, all that matters is the physical strength of the inhabitant to possess and control things. As such, all things and all land constitute a *res nullius*, a point that is picked up by early modern jurists as the legal basis for the conquest and possession of the Americas. On the other hand, the beings in the primordial world, as those of North America were so described by Grotius, Pufendorf, Locke, Kant, and Hegel, slowly gained a language. Language bonded the former beings of the primordial condition together.

In *De Republica* Cicero describes the acquisition of language as an important stage of human development from the primordial world of isolated 'woodland packs' (*Rep.* 3.3). The acquisition is slow. At first there are 'disorganized noises'. Over time, beings attach words to their grunts and noises. These words bond them together into a mutually pleasing group. Signs denote concepts with which the inhabitants can reason and then converse with each other. The highest point is talk about numbers, in that numbers direct the inhabitants to the sky (metaphysics) rather than to their day-to-day survival.

All human beings of the primordial world had the capacity to learn what objects were signified by sounds, although their failure to do so left them in the primordial condition. Since human beings possessed this capacity to acquire a language, they could always develop from the primordial world *into* a civilized condition (*Fin.* 5.19.54; *Tusc.* 2.5.13). Animals could never do so because they lacked any language, according to Cicero. Human beings do begin to communicate with natural impulses not unlike those of an animal. However, human reason manifests impulses and sounds which are unlike the grunts of animals (*Off.* 2.11). Most importantly, once a language is acquired, the impulse to reason induces a desire for justice (*Off.* 1.12), truth, greatness of spirit (*Off.* 1.13), and moderation (*Off.* 1.14). The facility to communicate, reason, deliberate, debate, and think raises the possibility of the emergent civil society to be guided by laws.

What it is critical to appreciate here is that an untranslatable gap separated the primordial and the legal world. The *jus gentium*, like the civil laws and the law of nature, is the consequence of a leap from the primordial world to the civilized one, where language, reason, and law prevail. Cicero makes this point in *Pro Sestio* (13.92) when he describes the radical difference between 'life refined and humanized, and that of savagery'. This difference was marked by the radical rupture between violence and law. 'Whichever of the two we are unwilling to use, we must use the other. If we would have violence abolished, law must prevail; that is, the administration of justice, on which law wholly depends; if we dislike the administration of justice, or if there is none, force must rule.' The administration of justice, of course, was represented by law courts. Those inhabitants who demonstrated 'merit and wisdom' assembled in one place, established common property, and established cities and then commonwealths. Reason uplifted human beings from the primordial condition (*Fin.* 4.13, 34).

The untranslatable gulf between savagery and law, though, raises the prospect of a hierarchy of societies. Some societies manifest the vulgarity of animals because they seem to lack a shared language or the capacity to reason. Others are considered more highly socially developed because they manifest written codes and act from moral duties. In this context, the commonwealth represents the progressive institutionalization of language and reason, because the commonwealth's institutions self-consciously author written laws and inhabitants deliberate about the content of the laws. Both political entities which are revolutionary, tyrannical, and rogue, and stateless societies lack the character of a commonwealth. The most conspicuous absence is that of institutions where deliberation and reflection and writing are manifested. As such, such societies historically and anthropologically remain in the primordial world. They can be considered barbaric and savage. As Cicero explains of the pirates, for example, they are the 'enemies of mankind' (*Off.* 3.107).

Conversely, Cicero admiringly applauds Caesar for conquering the Germanii and the Helvetii. Such tribes, lacking the character of a commonwealth, had to be subdued and taught to submit to the rule of law because the tribes had not acquired the signs of a legal order. How could the *jus gentium* protect stateless societies, such as tribes and pirates, once Cicero had imagined a primordial world of wild, savage and warlike tribes 'which no one who ever lived would not wish to see crushed and subdued' (*Prov. Cons.* 13.32–33)? Rome was entitled to confiscate all wealth and to take possession of all inhabitants from the primordial or pre-legal condition. The inhabitants were considered mere 'things' which could be sold to the highest Roman bidder. Their families could be dispersed throughout the empire. Communication among the family members would be strictly prohibited. After all, they lived in a condition like dogs and the Romans had a duty to elevate them to the civilized condition of laws.

The state manifested this pre-legal/legal dichotomy which permeates Cicero's works. Once human beings gain a language, they can come together in a bonding. Until such a condition, each strives to survive like an animal. It is not just that a commonwealth authors civil laws. A commonwealth, according to Cicero, represents the social fellowship which, we have seen, naturally grows from a family. Cicero explains that the Rome of his day had deteriorated into the primordial condition. As such, his own 'exile' was not really an exile because it was not authorized by law:

> For *what is a state? Every collection of uncivilized savages?* Every multitude even of *runaways and robbers* gathered in one place? *Not so*, you will certainly say. Therefore our community was not the state at a time when *laws had no force* in it, when the *courts of justice were abased*, when *ancestral custom had been overthrown*, when the *officers of government had been exiled* and the name of the senate was unknown in the commonwealth; that *horde of bandits and the brigandage* that under your leadership was a public institution, and the remnants of conspiracy that had turned from the frenzies of Cataline to your criminal insanity, was not a state. Accordingly I was not exiled from *the state*, which *did not exist*, but I was summoned to the state by the existence in our commonwealth of a consul, who had previously been non-existent, a senate, which had previously fallen, a free and unanimous people, and memories once more recalled of justice and equity that are *the bonds* of the state (*Para. Sto.* 4.27–8, emphasis added).

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The commonwealth represents how laws can be the object of deliberation, of the adjudication of disputes, and of the punishment of violators of the laws. As I noted above, such bonding, though, could only occur if the inhabitants share a language. With language, again, a being can reason. And with reason, beings will desire 'to meet together and congregate' with the idea of enacting laws for the benefit of others as well as of oneself (*Off.* 1.11).

We learned in sections 2 and 3 above that human beings bond together from the family to the neighbourhood to the state. We learn now that this bonding is natural because, in contrast with animals, human beings possess the capacity to gain a language. Language bonds beings together. With a shared language, inhabitants can also reason with each other. Once humans can reason, we can deliberate about concepts and then agree to be bound by them as laws. Without a shared language and without the resulting capacity to reason, human beings remain stuck in an uncivilized condition. Revolutionary, tyrannical, and rogue political entities exemplify such because they manifest an absence of deliberation and the rule of law. So too, tribes, pirates, nomadic groups, and maritime cities lack institutions for inhabitants to deliberate and write down laws to guide and govern their own actions. Since law, for Cicero, embodies just such reasoning and deliberation, the primordial condition – and its manifestations in Cicero's day – could not possibly possess the character of legality.

8. Conclusion

In sum, Cicero constructs a sense of *jus gentium* which is independent of civil laws posited by the state. Contrary to the commonly accepted view, Cicero also understands *jus gentium* as different from a sense of natural laws which universally apply to the whole cosmos. *Jus gentium* is an intermediate legal form between the state-centric posited laws on the one hand and the transcendent natural laws of a metaphysical objectivity on the other. *Jus gentium* is socially and historically contingent, and yet it rejects the authority of any state-like political entity which can override the principles of *jus gentium*. This intermediate form of international law is said to protect the cosmos, and yet the form excludes some societies from protection, let alone from legal recognition as legal persons. Cicero's theory of *jus gentium* represents neither positivistic nor natural law theory.

This intermediate form of law raises a series of issues. Despite its differences from the medieval, early modern, and modern senses of *jus gentium*, Cicero's exclusions from the protection of *jus gentium* continue to the present. I have argued why that is so elsewhere.[38] What is critical to appreciate is the question whether Cicero's exclusionary character of *jus gentium* is responsible for the imperialism and colonialism of the modern epoch. Further, does this exclusionary character continue to

38 W. E. Conklin, 'The International Community of Peremptory Norms' (under review). For an explanation concerning the exclusionary character of contemporary international law and for the hint of a more inclusive approach, see Conklin, 'A Phenomenological Theory of the Human Rights of the Alien', (2006) 13 *Ethical Perspectives* 411–67; and Conklin, 'Statelessness and Bernhard Waldenfels' Phenomenology of the Alien', (2007) 38 *British Journal of Phenomenology* 280.

the justifications for international and civil wars today? Is the contemporary trumping of peremptory norms over civil laws understood in terms of more than the usual contemporary citation of 'the international community as a whole'? If there is any message in the originality and rigour of Cicero's theory of *jus gentium*, it is that in order to grasp the subtle shift in contemporary international law from a state-centric law to an 'international community as a whole', we need to return to Augustan and post-Augustan political history and legal thought. The mere citation of the 'international community as a whole' begs deep and complex questions that remain empty unless and until we do so.

In particular, the key to this exclusionary character of *jus gentium* is Cicero's image of a primordial world. This primordial world is inhabited by beings which lack a language. Without a language, they cannot communicate with each other or reason in terms of concepts. Cicero's image of the primordial world is such that it historically and analytically precedes language and reason. Violence and arbitrariness determine events. Human beings live like animals which, Cicero believes, are incapable of having a language. Once the human being gains a language, s/he can socially bond with others. Such legal forms as contracts, property, government, and the state can become determinate. Discrete civil laws can be posited in writing. Such written laws, though, must be consistent with the *jus gentium*. For the *jus gentium* naturally emerges as beings gain a language and thereupon communicate with each other. As they communicate, they share experiences and thereupon bond together. This social fellowship displaces the animal-like existence of the primordial beings of pre-legality.

Unlike animals (according to Cicero), human beings possess the capacity to acquire a language. As such, they possess the potential to progress into a legal order. Such a legal order even possesses an international character, in that states must abide by the norms of *jus gentium* even during inter-state war. Duties are owed by the state to foreigners as well as to citizens. And the inhabitants owe duties to each other.

That said, Cicero entertains that some societies do not exhibit the necessary social fellowship which generates the *jus gentium*. As such, such societies, if they are societies, lack the capacity to possess a domestic legal order or to be recognized as members of the international legal order as a whole. The excluded society is foreign to the bonded cosmos. Cicero considers revolutionary, tyrannical, and rogue states as states in form only. Such states are outside the boundary of the social fellowship needed for *jus gentium*. Cicero also believes that pirates, nomadic peoples, and tribes lack the social fellowship needed for law to exist. Why such societies are excluded from the *jus gentium* arises from Cicero's claim about a primordial world where language and reason are said to be lacking.

There is one important feature of Cicero's theory of *jus gentium* which needs to be noted. Cicero represents *jus gentium* as a stage of social development. Contrary to contemporary juristic opinion,[39] this social reality is not some utopian vision beyond the capacity of human control. Nor is it emptied of social–cultural phenomena such

39 See, e.g., *supra* note 10.

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as one finds in Kant's sense of a priori moral and legal imperatives. Nor is it an appeal to subjective values. The *jus gentium* is generated from the emergence of social bonding through a shared language. Cicero considers this progress from the primordial condition 'natural', because he considers the acquisition of language by human beings to be natural in contrast with its absence among animals. The *jus gentium* guides, constrains, and fulfils human action in such a social bonding once humans have merged from the primordial condition. What is too often forgotten is that this social and legal reality depends on the pre-intellectual primordial world. Any group which still inhabits the primordial condition is thereby excluded from recognition by and the protection of *jus gentium*. The 'international community as a whole', with which I began this essay, may well also remain exclusionary precisely because of our continued presupposed leap from a primordial or pre-legal world (to use Hegel's and Hart's term) to the legal world guided by a shared legal language and analytic style of reasoning.