Ethics and International Law: Integrating the Global Justice Project(s)

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Academic discourse on global justice is now at an all-time high. Within two domains in particular -- ethics and international law -- scholars are undertaking new inquiries into age-old questions of building a just world order. Debates about global justice address, in the broadest sense, what duties or responsibilities global actors owe one another, regardless of national borders, and how institutions, formal and informal, can give concrete expression to those prescriptions. They encompass a plethora of subjects, from the scope of human rights protections to the legitimacy of state borders, from the terms of international trade and intellectual property to the generational dilemmas of environmental law. The range of opinions about global justice is equally vast, from outright rejection of the concept, through disagreements over the role of distributive justice within global justice, to visions of reform and reconstruction that reject key underpinnings of the current international system.

These two disciplines are uniquely competent to advance our understanding of global justice and the means to achieve it. Ethics, in the form of political and moral philosophy, poses the most fundamental questions about responsibilities at the global level and aims to produce a tightly reasoned set of frameworks and principles regarding the possibility of a just world order. International law, with its focus on legal norms and institutional arrangements devised by global actors, provides a path, as well as illuminates the obstacles, to implementing theories of the right or of the good; indeed, it turns out to have its own internal morality as well. Yet despite the
complementarity of these two projects, neither is drawing what it should from the insights of the other. The result is ethical scholarship that often avoids, or even misinterprets, the law; and law that marginalizes ethics even as it recognizes in some sense the importance of justice. The cost of this avoidance is a set of missed opportunities for both fields, as much ethical scholarship fails to consider, or oversimplifies, the complex practical arrangements agreed by states; and international law loses out on theoretical frameworks for prescribing, interpreting, and implementing international norms.

This article seeks to help transform the limited dialogue between philosophers and international lawyers working on global justice into a meaningful collaboration. Through a critical stocktaking of the contributions of the two disciplines, examining where they do and do not engage with the other, it offers an appraisal of the causes and costs of separation, as well as an argument for and path to an interdisciplinary approach. It thus serves as a review of significant literature but with a clear argument and programmatic goal as its main purpose. Thus, Part I examines the approaches of contemporary international law to global justice, while Part II turns to recent work in moral and political philosophy. Part III offers a brief discussion of trends within international relations scholarship to address matters of global justice. In Part IV, I offer ways to bridge the gaps between law and ethics, including a set of lines of inquiry that would benefit from collaboration of the fields.

Before beginning, several starting points are in order. First, as I hope will be clear below, law and philosophical ethics do and should ask different questions about global justice; my appraisal and proposal does not seek to blunt those inquiries or merge them into one giant field of “global justice.” Second, each field is characterized by diverse perspectives, and so it is important not to overgeneralize across and within fields. Third, and relatedly, my review is
necessarily selective. I focus only on contemporary work in the field, leaving aside ancient, classical, and indeed many recognizably modern scholars, and even then do not purport to be comprehensive. Some may disagree with my characterization of a vast set of literatures.

I. International Legal Scholarship and its Distance from Ethics

Even as international law is by its nature normative, much, dare I say most, of international law scholarship is empty or thin on questions of moral reasoning or ethical theory. It is descriptive or doctrinal, seeking to accurately portray the state of the law, advocate an interpretation of the law, or bring coherence to an area of law characterized by competing interpretations. This starting point is hardly surprising given the dominance of the positivist method within international law, but it nonetheless so far limited possibilities of collaboration with ethics. To international lawyers, positivism is a two-pronged conception, to wit: (a) as with legal positivism generally, what we consider as law is a matter of social fact, making lex lata (the law as it is) and lex ferenda (the law as it should be) distinct issues; and (b) the fundamental formal criterion for law to be valid is the consent of states, particularly through the prescriptive processes of treaty and custom -- though many scholars who call themselves positivists accept the importance of other sources, such as decisions of international organizations and courts. Positivism remains the lingua franca of international law.¹

As a consequence, many scholars write for an imagined audience, in particular a judicial one, that would consider moral arguments ultra vires.² They often move beyond description – what is the content of the law – to prescribe and advocate legal norms and institutions that we

should support, but they generally do the latter within a methodology that relies on accepted practices regarding sources and interpretation, with perhaps the occasional nod to political realities, or efficiency, to guide among competing choices. My sense is that, as much as scholars may have strongly held views on morality or justice, many or even most take it as a point of pride to divorce these concerns from their scholarship, or at least hide them well. Indeed, for many positivists, the emphasis on these formal sources is a way of accommodating the diversity of national systems across the planet (avoiding the one-size fits all approach of natural law), as a result of which they may well see discussions of global justice as simply beside the point. Whether scholars can actually engage in interpretive techniques and recommendations for future decisions that do not entail moral or ethical choices is a great methodological question for all of law. Moreover, even from their normative standpoint, lawyers see themselves as problem-solvers for clients, so at times issues of morality or justice may seem too far from their everyday work. Either way, many scholars are missing an opportunity to consider the ethical underpinnings of their positions as well as to contribute their expertise on legal structures to debates on a more just world order.

Yet even within the positivist tradition, issues of morality can never be completely avoided, as doctrine itself seems to find a place for it. In particular, scholarly treatment of *jus cogens* norms – peremptory norms that override even treaties -- and some obligations *erga omnes* – duties extending to the community of states as a whole and not merely to individual states – generally assumes that part of the rationale for the distinctiveness of these norms is that

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states have recognized that some rules reflect important moral positions. In determining the state of the law, the actual moral views of states become a relevant consideration. Moreover, proposals for new norms could take into account moral views held by states and individuals. And when states violate these norms, legal scholars should think more broadly about which states should take corrective measures and why. Recently, Christian Tams has argued that in responding to breaches of obligations *erga omnes*, states should consider a division of responsibilities so those in the best position to act take a leadership role. Such an inquiry resonates with, but would also benefit from more engagement with, the work of philosophers regarding the division of global duties into national responsibilities.

Looking beyond *jus cogens* and *erga omnes* duties, I would organize current legal scholarship as evincing three encounters with ethics, even as it remains at a distance from philosophical debates on global justice.

A. *Mainstream methodologies and the back door of morality*

Two of the most prominent contemporary methodologies have found a place for ethics, even while skirting many key issues of global justice.

1. “Enlightened” Positivism and Community Interests

First, a strand of positivist thinking that calls itself enlightened, highly influential in continental scholarship, seeks to soften positivism’s formalistic light through subtle recourse to moral argumentation. Bruno Simma, one of its leading proponents, is eager to see the positivist

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lawyer engage with morality, as long as it does not threaten positivism’s reliance upon formal sources to determine the validity of a claimed norm. His scholarship suggests that international law should serve certain ends of justice, in particular advancement of human rights; and that the lawyer has a responsibility to recognize which rules do or do not further those goals. \(^\text{10}\) His position on the role of morality thus resembles that of Neil MacCormick, for whom “laws we judge unjust or detrimental to the public good are . . . deficient examples of that genus to which they belong, even though we may also judge them to belong validly to that genus.”\(^\text{11}\)

Yet, as a good positivist, Simma emphasizes less the ideal goals of international law than the norms on which there is state consent. Indeed, he offers up a sociological observation in asserting that states and other actors are, in fact, acting as if they had some agreement on these moral ends. \(^\text{12}\) He posits that international law has moved from a set of bilateral relations among states, each advancing its own interest, to one of community interest. \(^\text{13}\) The idea of community interests has become conventional wisdom among international lawyers, although it is precisely the positivists’ need to ground community interests in state consent that represents the great limitation of their methodology, however enlightened. Yet this notion is also an opportunity for input from philosophers who develop notions of justice with reference to some kind of political community. One scholar in the European tradition who has managed to move beyond the community concept is Anne Peters, who developed a notion of humanity as both the purpose of, and limitation upon, sovereign powers of states. \(^\text{14}\) Peters brings morality directly into

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\(^\text{12}\) Simma, supra note 10, at 233–34 (“worldwide social consciousness”).

\(^\text{13}\) Ibid.

contemporary doctrine, though the work is still insulated from debates within philosophy – a methodology that probably makes her arguments more appealing to a European positivist audience.

2. Policy-Oriented Jurisprudence, Base Values, and Public Order Goals

On the other side of the Atlantic, one strand of scholarship, the policy-oriented approach to international law, developed its own approach to morality within the law. The New Haven school conceptualizes law as a process for advancing policy goals in an authoritative and controlling manner; so once lawyers and other participants can identify the relevant goals of the community, we can begin a process of prescribing legal norms to accomplish these goals.\textsuperscript{15} Minimum and optimum public orders are the chief policy goals of the international legal process.\textsuperscript{16} The basic content of these two concepts was grounded in sociology (Harold Lasswell’s contribution to the endeavor) and instantiated in law. Minimum public order refers to the global state of affairs with limited recourse to unauthorized violence to solve disputes and authoritative procedures for deploying force in exceptional situations.\textsuperscript{17} Optimum public order is synonymous with a world in which human dignity is maximally protected. It was said to be the state of affairs allowing for maximal enjoyment by individuals of eight “base values.”\textsuperscript{18}

The move from elaborating the processes for promoting minimum public order to elaborating those for advancing optimum public order entailed a great focus on the importance of those base values; how they had been used or abused by governments and non-state actors to


\textsuperscript{17} See Arts. 2(4), 42, and 51 of the United Nations Charter.

\textsuperscript{18} These are respect, power, wealth, skill, enlightenment, rectitude, affection, and well-being.
deprive individuals of their enjoyment; and how international law could be a vehicle for their deployment and their fulfillment. The result was a fountain of scholarship on a range of international law issues.

Yet the New Haven School’s engagement with ethics has always been constrained. While never denying the role of morality in international law – certainly human dignity is a moral concept – it sees morality through an anthropological lens. International law reflects morality because it reflects the demands of the community as determined by their base values. Any other theorizing was defective because it lacked social context. Thus, McDougal and his associates attacked Rawls in particular for his lack of empiricism. Yet philosophers would find this position equally frustrating for its failure to recognize that the content of these base values is often contested by different communities and that moral argumentation is inherent in the process of evaluating claims and ultimately identifying base values.

As a result, the New Haven School’s emphasis on context in gauging the expectations of international actors and projecting future policies leaves us wondering whether more general recommendations can be made. For example, in the work of its leading scholar, Michael Reisman, the emphasis on human rights translated into support for humanitarian intervention to protect the Ibos in Nigeria, but not for secession in Bosnia. The inherently sociological approach of the New Haven School – one might call it “fact-based international law” – that is its great strength can be a shortcoming for finding generalized guidance on the tradeoff between

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minimum and optimum public order. Here recourse to ethical concepts on the balance between peace and human rights would be helpful.

B. Critical Approaches: Giving a Voice to the Marginalized

For the past two to three decades, various critical methodologies have not merely engaged with morality, but in many ways put it at the center of their agenda. These approaches seek to identify hidden agendas and biases within international law – including its norms, institutions, practitioners, and methodologies – and reform it. Critical legal scholars built their methodology of deconstruction from literary theory and linguistics. Where positivists saw consent and acceptance, critical legal scholars saw power and hegemony;²² where positivists saw international law as a language of communication, critical scholars saw lawyers seeking to preserve their own relevance in a changing world.²³ Feminist scholars, beginning with foundational work by Hilary Charlesworth and Christine Chinkin, saw international law as dominated by male views of society and individuals. Looking to the building blocks of the international system, they found certain assumptions made by positivism to reflect the biases of male statesmen and scholars.²⁴ And Third World Approaches to International Law (TWAIL) took a similar path with regard to the lingering legacy of colonialism within international law.²⁵ Other scholars who may not self-identify as within the critical legal methodology place concern

²² See generally M. Koskenniemi, From Apology to Utopia (1989).
about international law as benefiting the powerful at the center of their work, including Gerry Simpson, Benedict Kingsbury, and Jose Alvarez.\textsuperscript{26}

In one sense, ethics and global justice is the agenda of these critical methodologies. Each sees power as having both constituted and corrupted international law and argues for reform that takes into account voices marginalized for centuries. The solution for Koskenniemi, the most influential voice among the critical scholars, is a return to formalism, for international legal scholarship that has incorporated approaches from other disciplines – whether sociology (the New Haven School) or international relations – has yielded descriptions and prescriptions that serve the interests of the most powerful voices (typically American). He fears that calls for global governance subject to a standard of legitimacy will simple erode the standards within law into mere interest-balancing that benefits the powerful.\textsuperscript{27} So in their view, their goal is surely a more just world order.

Yet the ethics seems to end with this agenda. Critical scholars generally do not make a significant effort to engage with contemporary ethical theory by philosophers. Some scholarship is based mainly on the fear that too much power in the hands of one state in the no-longer-bipolar world will be damaging to everyone, using the record of the Bush years as Exhibit 1. Critical legal studies, in particular, often vacillates between a skepticism, even cynicism, of ethical inquiry as somehow hegemonic at worst, or at least a subterfuge for advancing each side’s


power, on the one hand, and a generally unarticulated commitment to egalitarianism, on the other.\textsuperscript{28} It is not that these works lack theory – on the contrary. It is just typically not theory about justice or ethics. They are all far better at identifying what is wrong with international law than providing a theoretical grounding for the way forward; and ethics offers such a foundation that would also make their various criticisms far more powerful – as well as more nuanced.

C. Direct Engagement with Ethics

A final approach among recent legal scholarship is to integrate philosophical ethics directly into its work. These works vary significantly, in particular in terms of the balance between description and prescription, as well as between defending and attacking international law, but they demonstrate some receptivity by legal scholars to cross-disciplinary dialogue.\textsuperscript{29}

The most influential work in this genre has been Thomas Franck’s \textit{Fairness in International Law and Institutions}, a comprehensive attempt by an international lawyer to measure international law against a standard of justice. Franck posited that “fairness” encompassed two notions – legitimacy, i.e., a procedural fairness based on a norm’s development through a right process, and distributive justice, which he equated with a norm’s substantive justice. Distributive justice meant compliance with Rawls’s difference principle of maximin. Franck then worked through key norms and institutions see if they met these two criteria.\textsuperscript{30}

Yet the ambition of Franck’s reach is severely compromised by the narrowness of his criteria for substantive justice. As John Tasioulas wrote, “a distributive principle cannot be the


\textsuperscript{29} I am excluding scholars of an earlier generation who grappled with international law’s ability to promote justice, e.g., Stone, ‘Approaches to the Notion of International Justice’, in R.A. Falk and C.E. Black (eds), \textit{The Future of the International Legal Order, vol. 1}, (1969) 372.

\textsuperscript{30} T. Franck, \textit{Fairness in International Law and Institutions} (1995).
sole substantive principle in a theory of international law,” noting that Rawls’s more fundamental principle was equal rights. This flawed starting point not only limited Franck’s inquiry into the justice of institutions, but it forced him to squeeze odd topics – such as humanitarian intervention or self-determination – into the box of distributive justice when they should instead be evaluated according to other elements of substantive justice, e.g., respect for individual dignity. The result is an expansive scope of topics coupled with a highly undertheorized and incomplete notion of justice. At the same time, the difference principle does matter with respect to some aspects of the international legal order, in particular the distribution of wealth. Recently, Frank Garcia, as well as other legal scholars, have applied it to scrutinize the work of the World Bank, the International Monetary Fund, and the World Trade Organization.

Other legal scholars have offered less comprehensive, and sometimes idiosyncratic, visions of justice. In his 1990 book *Eunomia*, Philip Allot offered a highly original, but also frustratingly abstract, attack on international law for failing to take into account the interests of humanity as a whole. Yet the work remains mostly isolated from debates among philosophers as to the makeup of that new international society. Fernando Tesón offers a critique of the existing legal order grounded in Kant’s ideas of justice, which Tesón sees as providing a blueprint for an ideal world. Democratic legitimacy should be the lodestar of international

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legitimacy, as democratic states live side by side in peace.\textsuperscript{35} Tesón deserves credit for bringing Kant back into the scholarship of international law. Tesón’s later work claimed that states that do not meet Kantian standards of international legitimacy are proper targets of unilateral intervention.\textsuperscript{36} Partly in response to Tesón and other cosmopolitans, Brad Roth offers a robust defense of inter-state diversity, arguing that, in a world of deep moral disagreement, law must remain tolerant of different moral visions. This makes him skeptical about the project of global justice (as well as about US-based ideas of refashioning the world according to American democracy). Although Roth may overstate the depth of moral disagreement, he makes a strong case for the morality of sovereign equality and non-interference, ideas that philosophers often criticize.\textsuperscript{37}

Lastly, certain topics of international law have been more open to ethical inquiry even in the absence of some general engagement with morality as seen in the works just mentioned. Human rights scholarship is replete with discussions of utilitarian vs. deontological justifications for international norms and the translation of rights into duties, although even much of that scholarship is still fairly divorced from contemporary ethical scholarship about global justice.\textsuperscript{38} International environmental law has done a better job of reckoning with moral concepts such as


intergenerational equity and the proper distribution of burdens to prevent and remediate environmental harm.  

D. *A Missing Link: Distributive Justice*

A more glaring gap between international lawyers’ engagement with global justice and philosophers is on the importance of global distributive justice. Philosophers’ fascination with this issue is seen in the four decades-long debates over extending Rawls’s difference principle to the international realm. International lawyers far less frequently directly engage with the issue. While lawyers talk and write about aspects of distributive justice, for example, the place of economic rights within the pantheon of human rights, or the balance between the rights of the foreign investor and those of the host state international investment law, most shy away from scholarship or concrete proposals to alter radically the global distribution of wealth. The notable exceptions here are some scholars in international environmental law addressing North-South responsibilities for climate change and scholars associated with TWAIL.

Why this reluctance by legal scholarship? First, for positivists, distributive justice is a risky subject because the gap between the expectations of states as determined through recourse to formal sources and the demands of distributive justice is enormous. States have not generally recognized distributive justice in the sense of wealth transfer between North and South as a goal, let alone an obligation (even of conduct). The International Court of Justice has rejected it as a rationale for determining maritime boundaries. At the same time, for those seeking to make

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41 *Continental Shelf*, ICJ Reports (1985) 13, at para. 46.
new law, particularly in the environmental area where burden-sharing is so central, ethical ideas of distributive justice may provide important source of ideas.

Second, international law is still dominated by Northern governments and scholars, who see wealth inequities as one of many global issues to be addressed, but not morally or politically more imperative than the others, such as improvement of basic human rights, resolution of festering conflicts, and nuclear non-proliferation. I myself see these issues as all morally compelling, and some more than certain claims for distributive justice.

Third, international law and lawyers value solving problems through existing structures and institutions. During the heyday of international attention to distributive justice in the 1970s and 1980s, it seemed that such institutions were developing. But the end of the Cold War halted that process, as developing countries that had benefited from the largesse of the other superpower now vied for Northern investment. As they have sought to play in the institutions established by the North, the focus of attention has shifted to the WTO, the World Bank, and the IMF. As a result, as long as international law lacks a single mechanism or institution for addressing global economic inequities comprehensively, international lawyers will think about distributive justice only piecemeal. The practical focus of lawyers makes sense at a certain level, but it strikes me as giving up too soon on the lessons of the ideal theory, and some interaction with philosophers handling global justice questions would improve the work of both.

II. Moral and Political Philosophy: Global Justice and the Suspicion of Law

Contemporary moral and political philosophy has left a vast imprint on questions of global justice. Much of it falls within debates between communitarians and cosmopolitans over the territorial scope of individual and state duties and, relatedly, the permissible limits of diversity among territorial units globally. Some of these debates originate in questions of
interpersonal ethics and then extend in many directions, from the justice of existing interstate borders, to the distribution of economic wealth, to the design of international institutions. These questions are also central to international law, which is very much about setting global standards on conduct that can limit the autonomy and actions of communities and creating institutions to implement those standards.

Philosophical engagement with international law has varied significantly; I here consider a spectrum of approaches that suggest various degrees of openness to collaboration. I also adopt a broad understanding of philosophy here to include political theorists who have engaged with global justice, although for reasons of space I do not include legal philosophy or jurisprudence as applied to international law.

A. Ethical Scholarship About International Norms

Certain works in moral and political philosophy make their subject, or at least as a central part of it, the morality of the rules of international law. That is, the inquiry itself, and any theory resulting from it, seems in significant part to be generated by a need to understand, justify, or challenge the existing law. Philosophy of this sort is not confined to global justice, and indeed some of the most notable examples are only tangentially part of that project. Thus, Michael Walzer’s *Just and Unjust Wars* sees as a significant part of its project the holding up of legal norms of *jus ad bellum* and *jus in bello* to ethical scrutiny. Philosophers continuing in this tradition include David Luban (on issues of human rights and international criminality), Jeff

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43 For a volume including both ethical and jurisprudential approaches within philosophy, see S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010).
McMahan (on the civilian-combatant distinction), Larry May (on criminalization of aggression and violations of *jus in bello*), David Rodin (on *jus ad bellum* and *jus in bello*), and Henry Shue (on numerous issues of human rights and *jus in bello*).45 James Nickel, Charles Beitz, Henry Shue, James Griffin, William Talbot, and others have examined the human rights norms of international law to determine their ethical grounding.46 This scholarship demonstrates that some within ethics regard these norms as mattering enough in international relations, or the ways that we think about international relations, to merit serious scrutiny. An interdisciplinary project is already under way.

B. *General Theory First, Application to Norms Second*

A more common practice within ethics is to hold international law up to scrutiny, but only after presenting a more general argument about some aspect of global justice. A key early example was Charles Beitz’s *Political Theory and International Relations*, which offered a normative account of the international order that called for a morality of states based on a link between state autonomy and just domestic institutions, as well as a deep form of distributive justice. After offering his vision, he provided an ethical appraisal of certain international law norms, e.g., defending the right of colonial self-determination by conceptualizing it as a claim to rectify social injustice.47 From a very different standpoint, Mervyn Frost argued that the system


of sovereign states itself helps constitute the individual and promote his or her flourishing, thereby justifying many of the basic rules of international law.48

A great deal of the communitarian/cosmopolitan debates fall into this category, with theories that provide blueprints for key aspects of a just world order and then some testing of extant legal norms and institutions. David Held and others sharing his outlook present a comprehensive conception of a cosmopolitan world order, emphasizing its legal components. They have then assessed, for example, the structure of the European Union and the United Nations against this vision.49 Jürgen Habermas has stepped into these debates by arguing that international law is now becoming a constitution for Kantian-based international community, seeing positive trends from the trajectory of international law since 1945.50 In the course of this work, they propose radical reorganization of the U.N.’s organs, based on a need to dilute the influence of powerful states, ensuring a greater role for individual voices and relying on judicial mechanisms for resolving disputes.51 Their deep cosmopolitanism makes them suspicious of justifications for aspects of existing institutions, such as the need for stability or peace.52 While the project helps us see the big picture of the global order, it tends to be utopian and not take

48 M. Frost, Ethics in International Relations: A Constitutive Theory (1996), at chs. 4-5.
50 J. Habermas, The Divided West (2006), at 115-93.
seriously enough the possibility that international law has a moral grounding. It would clearly
benefit from the expertise that international legal scholarship brings as to why rules and
institutions have ended up as they have, a process that involves as much careful consideration of
alternatives as it does power politics.

Other authors give more prominence to institutions. Allen Buchanan argues that all
moral questions about the duties of individuals or states can only be answered with careful
consideration of the institutions currently capable of allowing those duties to be carried out.
Substantively, he then argues that a state’s legitimacy turns fundamentally on its observance of
human rights and democratic participation, and institutional legitimacy turns on similar factors.
He regards the rules on both secession and humanitarian intervention as overly protective of
existing states, but insists that new rules take into account existing or realistically possible
institutions. For Thomas Pogge, the focus is on distributive justice. At first arguing for the
globalization of Rawls’ difference principle and later asserting a more robust view of equality,
Pogge claims not only that the rules of international trade and intellectual property are unjust, but
also that individuals in the North are violating duties not to harm those in the South by
participating in that system.

53 For applications of cosmopolitan thinking to international norms, see, e.g., Beetham, ‘Human
Rights and Cosmopolitan Democracy’, in Re-imagining Political Community, supra note 49, at
58; Hassner, ‘Refugees: a Special Case for Cosmopolitan Citizenship?’, in Re-imagining
Political Community, supra note 49, at 273; Page, ‘Cosmopolitanism, Climate Change, and
Greenhouse Emissions Trading’, 3 Int’l Theory (2011) 37. See also R. Pierek and W. Werner
(eds), Cosmopolitanism in Context: Perspectives from International Law and Political Theory
(2010); C. Barry and T.W. Pogge (eds), Global Institutions and Responsibilities: Achieving
Global Justice (2005).
54 A. Buchanan, Justice, Legitimacy, and Self-Determination: Moral Foundations for
55 See, e.g., T.W. Pogge, Realizing Rawls (1989); T.W. Pogge, World Poverty and Human
Rights: Cosmopolitan Responsibilities and Reforms (2002); Pogge, ‘Recognized and Violated by
C. Ethical Arguments Built on Law

Some writers have taken the law a step further, building an argument on international norms themselves. Terry Nardin took an early significant step with his call for a limited vision of inter-state justice based on a traditional positivistic notion of international law.\textsuperscript{56} Held constructs his model of cosmopolitan democracy (and Habermas his idea of constitutionalization) in part on the significant changes within the international legal order, notably the development of human rights, limitations on state immunity, the notion of common economic heritage, and the increased powers of international organizations.\textsuperscript{57} David Miller appears to rely on an understanding of international refugee law to derive a state’s duties toward refugees vs. immigrants.\textsuperscript{58} Thomas Mertens supports Rawls against cosmopolitan criticism in part by noting that Rawls is closer to the view of toleration expressed in the U.N.’s universal membership.\textsuperscript{59} And Peter Singer has relied upon the U.N. Charter and actions of the Security Council to endorse limits on a state’s domestic jurisdiction regarding human rights abuses.\textsuperscript{60}

International law has at times been used defensively in ethical reasoning. Robert Goodin, in his pioneering article justifying a state’s special duties to its own nationals on utilitarian grounds, pointed out situations where, under international law, a state’s duties to foreigners are actually greater than its duties to its citizens (e.g., with respect to protection of private property and the ability to draft people into an army).\textsuperscript{61} He uses these examples to rebut the strong nationalist claim that states should always owe greater duties to their own citizens than

\begin{itemize}
\item \textsuperscript{56} Nardin, ‘Legal Positivism as a Theory of International Society,’ in D.R. Mapel and T. Nardin (eds), \textit{International Society: Diverse Ethical Perspectives} (1998), at 17.
\item \textsuperscript{57} Held, \textit{Democracy, supra} note 49, at 101-11.
\item \textsuperscript{58} D. Miller, \textit{National Responsibility and Global Justice} (2007), at 224-30.
\item \textsuperscript{60} P. Singer, \textit{One World: The Ethics of Globalization} (2002), at 127-35.
\item \textsuperscript{61} Goodin, ‘What is So Special About our Fellow Countrymen?’, \textit{98 Ethics} (1988) 663.
\end{itemize}
to foreigners, thereby assuming that these rules count as ethical arguments for rebutting the strong nationalist position. Kok-Chor Tan uses the presence of institutional coercion at the level of international law as one argument against the view that reciprocity limits duties of justice to the domestic level.\textsuperscript{62} Joshua Cohen and Charles Sabel made a similar argument to reject Thomas Nagel’s view about the territorial limitations of justice.\textsuperscript{63} And arguing against much ethical theorizing about human rights, Beitz and Cohen effectively take human rights as they appear in legal instruments and generate arguments against a top-down derivation of such rights.\textsuperscript{64} This openness to using law as moral argument provides a plank in a bridge between the fields.

D. \textit{Getting the Law Wrong}

As a sort of counterpoint to the prior examples, it is worth noting that philosophers mentioning international law sometimes get it wrong. The most prominent example in recent years is surely Rawls’ \textit{Law of Peoples}. Rawls cites as support, or perhaps recognition, of his basic principles of mutual respect between peoples James L. Brierly’s 1963 treatise \textit{The Law of Nations}.\textsuperscript{65} This move represented simultaneously a step forward and a step backward for integrating international law and political philosophy. On the positive side, it demonstrated that international law already embodies certain ethical principles. For Rawls, those principles are defensible from a contractarian perspective, as he claims – though does not really prove – that they would be agreed to by democratic peoples in an original position and then supported by so-

called decent peoples. But Rawls cited and endorses an outdated restatement of international law that, most glaringly, does not reflect the developments in human rights law that limit a state’s freedom to govern itself however it chooses (and to be immune, at least non-militarily, from external interference).

From a different perspective, Saladin Meckled-Garcia challenges the notion of cosmopolitan justice in part by arguing that there is no global basic structure because no international power can assign rights and duties equally to all agents. Setting aside whether a basic structure indeed requires such an authority, and whether that authority must be able to assign individual duties and rights as opposed to states’ duties and rights, it is highly formalistic, if not simply wrong, to say that no international institution has such authority. In the most obvious cases, the Security Council may effectively assign duties to individuals (e.g., not to export certain items to a target state); and the International Criminal Court can throw (or order a state to throw) someone in jail. At the other extreme, the optimism of some cosmopolitans for compulsory ICJ jurisdiction seems based on a misunderstanding of the Court’s actual functioning. The ICJ is actually a highly conservative tribunal, whether in avoiding politically contentious cases as it did concerning France’s nuclear testing, NATO’s bombing of Serbia, and

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69 For a philosophical argument showing this effect, see Cohen and Sabel, *supra* note 63.
Kosovo’s declaration of independence; or in its overt disdain for distributive justice.  

E. Law as the Passing Stranger: Causes and Consequences

Notwithstanding some examples above, much, if not most, ethical scholarship regarding global justice still operates parallel to, rather than with a serious understanding of, international norms and scholarship about them. To justify -- and eventually outline -- a project of interdisciplinary cooperation, it behooves me to explain the causes and pernicious effects of that gap.

1. An Attempted Explanation for Philosophical Distance from International Law

Several factors seem to account for the current situation. First, some theorists in global justice work on foundational questions where the state of international law seems beside the point. Thus some scholarship is about interpersonal ethics, e.g., what each of us owes individually to those within and outside national borders. As Pogge has noted, this sort of interactional morality is quite distinct from the institutional morality about which Pogge and others write. Thus, a line of scholarship from Singer’s article on global poverty to recent work on impartiality has focused on the identities, roles, and responsibilities of individuals, not institutions. In this case, the lack of engagement with law can be justified on the ground that

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70 See, e.g., Legality of the Use of Force, ICJ Reports (2004) 279; Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion, ICJ Reports (2008) 409; Continental Shelf, supra note 41. For examples of such proposals, see S. Caney, Justice Beyond Borders: A Global Political Theory (2005), at 162; Copp, ‘International Law and Morality in the Theory of Secession’, 2 J. Ethics (1998) 219, at 238 (calling for the ICJ to decide secession claims and saying that it is “not clear . . . that my proposal is politically unrealistic”).


the content of norms that, at least in the first instance, regulate the activities of states is not relevant to the duties of individuals. But this reason cannot shield scholarship on global institutional ethics that shies away from international law and institutions. Much scholarship argues for duties states should have at the global level, yet with little regard to the rules that states have in fact derived and enforced.

This omission suggests a second explanation, namely that the practical arrangements that humans have derived for their global interactions – including legal norms -- should not get in the way of good theorizing about ideal arrangements. Ideal theory surely has its place in ethics, and indeed there is nothing wrong with postponing the “ought implies can” questions until certain basic principles are derived. Yet I suspect that the avoidance of international law by philosophers goes much deeper. Much of it seems based on the notion that: (a) because much or most law emerges from a political process, it can neither ground nor undercut an ethical argument; and (b) that because law inevitably involves compromises, either in its creation or enforcement, its content is marginal to principled ethical argumentation. Either way, law becomes simply an instrument for delivering, institutionalizing, or enforcing a previously derived ethical position. It is not that the law is morally wrong, but simply that it is irrelevant. But the first of these confuses the origin of a claim with its moral validity; and the second suggests that ethical reasoning does not involve compromise, whereas it typically includes weighing of competing considerations, maybe not at first but at some stage, a distinction captured in part in the notion of ideal vs. non-ideal theory.

73 This position has many nuances. One extreme might be G.A. Cohen’s view that ethical principles cannot be grounded in facts at all. G.A. Cohen, Rescuing Justice and Equality (2008), at 229-73.

74 For one of many examples, see Copp, supra note 70, at 222 (“[T]he question whether there is a moral right of secession is morally prior to the question about international law.”).
Indeed, the point can be made even more strongly. As Allen Buchanan has noted, institutions – by which he includes international law – matter not only because they affect the feasibility of proposals for ethical conduct, but also because they affect the underlying moral justification for the principles. Failure to understand global institutions means that philosophers derive “principles . . . not suitable for institutionalization because they are inconsistent with existing institutional arrangements whose abandonment would be morally prohibitive . . . or because institutionalizing them would generate incentives that undermine the realization of other important principles.” While ideal theory thus has its place, it must be complemented by institutionally grounded or referenced theory.

A further nuance is the possibility that philosophers see law and institutions as irrelevant to global justice because they see them as making no difference to how global actors will ultimately behave, a skepticism invented by some political realists. Under this view, ethical theory should devise solutions, but those solutions will be realized through non-legal avenues. Yet if philosophers have this view, it is simply wrong descriptively. As a generation of international relations and legal scholarship and the lived experiences of international actors has demonstrated, international law and institutions both constrain the behavior of international actors and channel and frame discussions for cooperation.

75 Buchanan, *supra* note 54, at 22–23.
77 See Buchanan and Golove, *supra* note 76.
A third potential justification might explain the distance between international law and one area of global justice scholarship, distributive justice – namely, that international law has generally had little to say about that topic. Yet the legal landscape is not so barren. Although, as noted, international law lacks strong norms in favor of global distribution of wealth, it does have norms worthy of ethical inquiry – in international environmental law (through the core principle of common but differentiated responsibilities); economic and social human rights (weakly in favor of distributive justice); the law of the sea (weakly in favor with respect to exploitation of the continental shelf); and international trade and intellectual property law (probably weakly against it). More important, it has institutions that could, or already do, implement some form of distributive justice. Pogge and Held appraise these institutions (and generally find them woefully lacking); and others invoke them in arguments over whether the international order of today includes the basic structure necessary to the application of Rawls’ principles of justice.79

2. Consequences of Ethical Suspicion

Avoidance of engagement with rules and institutions results in distinct gaps in ethical scholarship. I highlight three shortcomings flowing from these gaps.

• First is a dismissive attitude about the moral justification of key norms of international law. To cite one instance, in a pioneering essay, Brian Barry found, with little argument, that the principle of national sovereignty over natural resources, a core norm of international law, “is without any rational foundation."80 Such a position would strike a lawyer as astonishing, if only because of the notion of ownership to avoid the tragedy of the commons seems like such a basic

idea, one easily justified on utilitarian grounds.\textsuperscript{81} (Perhaps Barry was just being hyperbolic and meant that other ways of dividing up national resources are also valid.) Many cosmopolitans argue against the current structure of the UN without sufficient reflection on the advantages of a Security Council where the powerful states wield a veto.\textsuperscript{82} And the limitation of human rights duties of a state to its own residents also can be justified on several impartialist grounds.\textsuperscript{83} It is not that scrutiny of international law will or should result in uniformly upholding its morality, but rather that a certain set of arguments is not sufficiently discussed.

More generally, international law shows that these issues are not as simple as philosophers may conceive by highlighting contrary positions widely accepted by states that philosophers may have ignored. As Andrew Hurrell, has written: “the ethical claims of international law rest on the contention that it is the only set of globally institutionalized processes by which norms can be negotiated on the basis of dialogue and consent, rather than being simply imposed by the powerful . . . .”\textsuperscript{84} This position challenges a notion shared by many philosophers that law should only be appraised against some ideal standard but lacks any special claim to constitute a moral position.

- Second, much philosophy zeroes in on issues and develops proposals that seem unconcerned with rather clear strictures of international law, e.g., much work on two remedies for oppressed people abroad – secession and humanitarian intervention. Under international law,


\textsuperscript{82} See Ratner, \textit{supra} note 52, at 144-49.


secession is lawful only under particularly egregious circumstances, and humanitarian intervention not approved by the U.N. Security Council is either illegal (but occasionally excused or tolerated) or (my own view) legal but only in cases of the most catastrophic human rights abuses. 85 Yet despite the law’s overall stance against them, these two actions seem to have an innate appeal to cosmopolitan scholars. Thus, some works have collapsed the question of a state’s moral standing in the world into the question of whether it should be subject to dismemberment from within or humanitarian intervention from abroad (though philosophers may differ on the final answer to that question). 86

Again, philosophers’ response to this lack of concern with international law’s limits on these two remedies might simply be, “So what? Change the law. We are in the business of ideal theory.” But that is only a partial answer. It would seem important for philosophers to recognize that international law’s aversion to these remedies still leaves open numerous possibilities for influencing the way a state treats its people. If philosophers are concerned with responses to a state’s abuse of its own people, then they should not leave out of the discussion the main methods that other states actually deploy in these situations -- dialogue, capacity-building, diplomatic protest, naming and shaming, linkage of foreign assistance, and sanctions. Yet they receive less attention precisely because the more drastic remedy is left on the table. 87

Philosophers might reply that they recognize these other options and are trying to focus on the hardest question – when has a state so lost its legitimacy that it can be dismembered or invaded.\(^8^8\) This is a valid project. But this disproportionate attention ignores two points: first, the other options, including diplomatic repercussions or sanctions, raise difficult moral issues as well, e.g., whether sanctions should be used given uncertainties over their efficacy; and second, careful institutional scholarship on global justice should consider methods actually attempted by states. Otherwise, the scholar shortchanges the opportunities for progressive change toward global justice.

- A third consequence is the derivation of prescriptions for aspects of global justice that are close to that recognized in international law, without any acknowledgment of the similarity. Thus, Onora O’Neill offers a “practical approach” to determining our duties to those beyond our borders, based on the way we actually behave in certain settings. She calls for qualitative rather than spatial changes in interstate boundaries, rejecting the assumption that their location is unjust in favor of making them more porous.\(^8^9\) But this position, accepting most borders while encouraging cross-border contacts, is, quite simply, that of international law – whether in the rules of \textit{uti possidetis} or the increased use of regional trading areas.\(^9^0\) In a similar vein, Toni Erskine’s work on embedded cosmopolitanism emphasizes non-territorial affiliations and an individual’s identification with overlapping communities.\(^9^1\) But this too has received recognition in both the norms and scholarship of international law. Dual citizenship is an obvious case of

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\(^8^8\) This seems to be the basis for Beitz’s focus on this in Beitz, \textit{supra} note 86.


overlapping membership;\textsuperscript{92} so is acceptance by international law that various NGOs have a legitimate claim to participate in international bodies.\textsuperscript{93} Christopher Wellman’s position on immigration is also close to that of international law, yet the connection goes unrecognized.\textsuperscript{94}

Recent work on statehood and self-determination has also ended up endorsing positions quite close to those embodied in international law. Anna Stilz has argued that a state has a right to territory if it meets various conditions, including notably a strong claim to the territory by its inhabitants through occupancy but not illegal settlement; and its grant of basic participatory rights to its citizens.\textsuperscript{95} Yet she fails to notice the resemblance to key international norms on self-determination.\textsuperscript{96} Daniel Philpott developed a formula in which “secession . . . truly becomes a last resort; it should be endorsed only when a people would remain exposed to great cruelty,” appealing to international law to institutionalize such a view.\textsuperscript{97} Yet international law already endorses this view.\textsuperscript{98}

Again, one might ask why this omission of the coincidence with law matters to the philosopher’s task. Perhaps the question should be reversed: Is a philosopher deriving principles of justice ready to assert that it is \textit{irrelevant} to her argument that her seemingly original vision is one that states have already accepted through international law? On the positive side, the existence of these rules suggests that the philosopher’s position is indeed feasible, giving support

\textsuperscript{95} Stilz, ‘Nations, States, and Territory’, 121 Ethics (2011) 572.
\textsuperscript{96} Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 25 October 1970; Frontier Dispute, ICJ Reports (1986) 554.
\textsuperscript{98} See sources, \textit{supra} note 96.
to those who believe that ought implies can. On the other hand, it could also suggest that the philosophers’ position may not be quite as original as he or she thought, as statesmen and women devising these rules indeed have been thinking along the same lines. All these consequences, then, suggest that global justice scholarship would benefit from closer attention to law and legal structures.

III. International Relations Theory and the Role of Descriptive Scholarship

Within the international relations box of political science, realist scholars have been generally dismissive of law and ethics, even though two of realism’s founders, Hans Morgenthau (an international lawyer) and E.H. Carr, engaged with morality and justice and recognized that both of them, as well as international law, do and should matter to some extent to international politics. As an alternative to the realists, rationalist institutional scholarship, constructivist scholarship, and the English School have delved directly into questions concerning international norms.

Yet the line between description and prescription nonetheless remains thick. The rational institutionalists have for the most part sacrificed consideration of morality for the sake of positive description of the role of law. The only significant exception in recent scholarship is Robert Keohane, who, in work with Allen Buchanan, has offered a series of criteria for

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100 For a fuller account of the ethical approaches within international relations, see The Oxford Handbook of International Relations, supra note 42.

101 For a review of the state of play, see J.L. Dunoff and M. Pollack, International Law and International Relations (2012).
legitimate international institutions that owe much to the democratic character of the institution and its members.\textsuperscript{102}

Constructivists are intensely interested in norms, which they see as helping to form the identity of states rather than merely emanating from the interactions of states expressing predetermined interests. They have traced how international norms spread – “cascade” – through networks of norm entrepreneurs, e.g., in the case of the proliferation and development of international human rights norms.\textsuperscript{103} Their inquiry indirectly contributes to discussions of global justice, as they have demonstrated the possibility of diffusion of norms independent of power politics to create an international consciousness about global justice. To the extent ethical theorizing depends upon demonstrating such a sensibility, the constructivists have offered a salient contribution. Yet their inquiry is mostly limited to specific norms, a tactic that seems methodologically driven. They have not made the move to demonstrating the possibilities for and consequences of those identities to build a more just world. More fundamentally, as Richard Price has pointed out, while their work highlights the possibilities of a global moral consensus, and while their research agenda is tilted toward examples where the cosmopolitan prevails over the statist, they remain unwilling to engage in a deep normative appraisal of the developments they study.\textsuperscript{104}

Lastly, the English School has overtly embraced questions of global justice. Founded in large part by Hedley Bull and Martin Wight, it conceives of the world in terms of an


\textsuperscript{104} See Price, ‘The Ethics of Constructivism’ in The Oxford Handbook of International Relations, supra note 42, at 317.
international society, a sort of mid-point between a Hobbesian state of nature and a Kantian federation of states. Bull described that society as Grotian in that international law reflects certain notions of the right, just as Grotius saw international law as incorporating natural law. The school’s adherents have long been divided between those who see the current world order as corresponding to or tolerating a pluralist society and others who see a liberal solidarism of states. The English School’s vision is not a theory of a future world, but a thick description of the world as it exists. Its adherents make a link between ethics and international law in seeing states as having expressed, through the law that they have prescribed, a certain ethical vision of a society of states, whether pluralist or solidarist. The law is thus not only an expression of policy and shared interests, but has its own morality.

Yet the School has still fallen short on prescribing about global justice. It recognizes the relevance of ethical theory to constructing an international society and indeed emphasizes the critical role of international law in promoting communication among international actors. But it fails to offer a view as to how just the current international order is and whether and how it can become more so. It maintains a type of moral skepticism that prevents it from appraising the order’s morality not only in terms of practices (including law), but in terms of moral theory. As Molly Cochran has noted, while recognizing that ethics and interests are not mutually exclusive, it still focuses on “the monitoring of international consensus and what it can support,” thereby

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107 From a very different direction, Terry Nardin makes the same contribution. See supra note -
108 See Hurrell, supra note 84.
analyzing the international moral community in terms of “measurement rather than judgment.”

Nonetheless, unlike the rest of IR theory, its adherents remain aware of moral debates about global justice and have the empirical interest in gauging how the international law actually matters. This combination makes the English School and its adherents a potentially useful contributor to interdisciplinary scholarship on global justice.

IV. Breaching the Wall

As the critical review shows, even as we accept the different orientations of international law and ethics, to the extent that both are addressing questions of global justice, their approaches are impoverished to the extent they ignore or discount the insights of the other field. International lawyers will lack one carefully derived set of arguments, principles, and standards for evaluating the existing state of the law, promoting changes in it, and developing institutions to implement it. Beyond scholars, ethical inquiry also benefits legal practitioners. For instance, one of the most significant advances in our understanding of the obligations that human rights law places upon states took place when the U.N.’s Committee on Economic, Social, and Cultural Rights endorsed the “respect, protect, and promote” scheme first developed by Henry Shue. That framework has now become part of the accepted interpretation of human rights law and has helped tailor the UN’s responses to failures by the state in living up to its obligations.

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But the benefits are not one-way. The norms accepted by states through international law are an important part of the moral universe that the philosopher considers. As noted, some scholars have already shown the advantages of knowing about international law and institutions – about building arguments based upon them, and about prescribing visions of global justice that work with – or, if needed, supplant -- existing institutions.

In light of these gaps, their consequences, and the advantages of a new approach, I now map out the key elements of a project of interdisciplinary collaboration on global justice.

A. Desiderata for Future Scholarship

1. Figuring out when the other field counts

Collaboration on international justice initially requires scholars in each field to understand the relevance of the other field. Thus, each discipline should address when the arguments from the other count for its own work, and when they do not. Philosophers focusing on individual duties may well be able to stay fairly clear of international law. And lawyers sticking with a descriptive approach based on a narrow form of positivism will still be most interested in what states have agreed to through the formal modes of prescription. Even when they purport to work on the same general topics, their professional methodologies make even a winning argument within one field of highly limited value to the other. For example, a lawyer’s position that the U.N. Charter forbids unilateral humanitarian intervention (if this is even right) seems unlikely, on its own, to fundamentally shift the views of philosophers arguing in ideal theory about the ethics of the practice. And an argument by philosophers that a colonial-era border is unjust and thus must be changed will never by itself convince an international lawyer, committed to uti possidetis, to change it.
But the methodological distinctions between the two fields need not, and indeed do not, play themselves out so baldly. While the philosopher may not be persuaded about humanitarian intervention by a mere citation to Article 2(4), that rule could – and should – cause her to ask why states agreed on that particular norm, still insist on it defending it in rhetoric (even while occasionally ignoring it in practice, as with Kosovo), and show no inclination to revise it formally. Without an awareness of this expectation among states, a position of advocacy of humanitarian intervention is not merely ideal theory, but facile or irrelevant theory. Similarly, the lawyer’s nonplussed reaction to the ethical argument may be a good strategy in some international court settings, but, as the case of the Committee on Economic, Social and Cultural Rights shows, it can matter in other venues. There, when a philosopher offered an answer to the legal question “What is a state specifically obligated to do, vis-à-vis its own conduct and that of others, when it agrees to these human rights treaties?”, the relevance of ethical thinking for legal interpretation became evident.

2. Facing the core gaps

To move beyond an awareness of the relevance of the other field, scholars will need to tackle some foundational gaps in separate approaches to global justice. First and foremost, scholarship will need to address what appears to be an unwritten assumption among some philosophers that international law lacks a moral basis and instead is merely a set of practices, arrived at through politically expediency. As noted earlier, part of this inquiry will turn on whether the law and institutions are examined with reference to an outside template of morality or whether indeed they are constitutive of that morality.

They will also need to consider the advantages and disadvantages of ideal theory when it comes to global justice, where, after all, we are talking about changing the world. Engagement
with international law implies a move beyond ideal theory. In this context, more philosophers should be willing to engage with the ethical significance of a norm of international law (and accompanying institutions) insofar as it suggests an acceptance by key actors of a moral, and not merely a political, position. As Habermas has said of cosmopolitanism, it “remains an empty, even deceptive, promise without a realistic assessment of the totality of accommodating trends in which it is embedded.”

But legal scholars should also challenge the assumption in much scholarship that ethical inquiry is irrelevant or ultra vires. This effort will require looking behind the interpretive methods and outcomes for hidden ethical assumptions and claims. Lawyers must recognize that when they engage in normative (as opposed to descriptive) scholarship, they often, if not inevitably, are already taking an ethical and not just a pragmatic position on issues of global justice. Peeling apart the ethical dimensions of various global regimes will prove enormously beneficial for future analysis and prescription. For instance, as Martti Koskenniemi has pointed out, we cannot avoid issues of morality by focusing on legitimacy.

3. From “parallel play” to direct engagement

While awareness and referencing of the work of the other field is a significant advance over the status quo, a full interdisciplinary project will require those in one field to understand and ideally work with those in the other. To achieve real fluency in the other’s field will require some form of direct collaboration through co-authored work or a willingness of a single scholar to enmesh herself in the debates of the other field. Development of such expertise may require specialized training of scholars in one discipline, as for instance, legal academics are now trained

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113 Habermas, supra note 50, at 144.
in some quantitative methods. Joint degree programs in law and philosophy should encompass the connections between international law and moral philosophy.

B. Agendas for Future Collaborative Research

I now turn to four questions where collaboration would be most productive to advancing scholarship on global justice. These would represent key elements of a more comprehensive research program.

1. *Who is/are the relevant community/ies for global justice?*

The notion of the community is central to both law and ethics. Within international law, an earlier generation of scholars defended the notion of an international community against realist claims of anarchy. More recently, Simma, reflecting the plight of the enlightened positivist, has both defined it in terms of states and as “compris[ing] not only States, but in the last instance all human beings.” The policy-oriented school also assumes the existence of some kind of international community – the world community – by virtue of the shared interests and interactions of global actors. In Franck’s *Fairness*, he posited that fairness discourse requires “a shared sense of the identity of those entitled to a fair share . . . an ascertainable community of persons self-consciously engaged in a common purpose,” finding an “emergent sense of global community” comprised of states and of individuals. In a trenchant critique,

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118 Franck, *supra* note 30, at 11.
Dino Kritsiotis questioned whether such a community exists and whether international law needs an idea of community to accomplish its ends.\footnote{Kritsiotis, ‘Imagining the International Community’, 13 EJIL (2002) 961.}

Within ethics, community is also critical. For communitarians, the community, often a national one, helps to constitute the individual, thereby justifying an individual’s special duties to those in it. Cosmopolitan scholars argue with each other and with communitarians about the underlying basis for an international community. For those who see justice as governing those within some kind of community, or, in Rawlsian terms, within a basic structure with an overlapping consensus rather than a pure modus vivendi, it becomes critical to know whether, and if so what sort of, interactions at the global level are enough to generate duties of international justice.\footnote{See, e.g., Beitz, supra note 79; see also R.J. Vincent, Human Rights and International Relations (1986), at 118-19.} In his defense of the idea of international law as an emerging constitution for the world (a position I find that requires stretching both concepts), Habermas argues that because the UN has the authority to intervene in the internal affairs of states, that body is “already a community of ‘states and citizens,’” a conclusion that resembles Simma’s view (though he does not cite Simma).\footnote{Habermas, supra note 50, at 135.} The opportunity for some mutual understandings on the concept seems clear.

Yet the challenge to interdisciplinary dialogue is equally evident. First, international lawyers and philosophers have distinct understandings of the prerequisites for an international community, and indeed of the importance of such prerequisites. The former do not generally regard it as part of their mandate to argue systematically for (or against) the existence of an international community, even if they may use the term. Franck seems to elide the sense of community with the actual community. Others seem to regard the “sense of community” as a
key criterion for an international community, but it is frankly hard to know what this idea means – how, for instance, should it relate to the many national senses of community? – or how we should determine its presence?\textsuperscript{123} International lawyers generally assume the existence of an international community of states that needs to, and is competent to, make rules to govern itself. They seem satisfied that either the juridical equality of states, the universality of UN membership of the UN, the acceptance of jus cogens, or the presence of global cooperation means that states now form a community.\textsuperscript{124} Such an assumption will not satisfy the philosopher, who seeks an argument for an international community as a necessary condition for global justice.

Second, the concept of the community serves different functions for the cosmopolitan philosopher and the international lawyer. For the philosopher, it justifies a notion of global justice, including distributive justice, with limits on diversity across states, since the fundamental community in which individuals organize themselves is the planet, not the state. For the international lawyer, the international community is at worst a rhetorical shorthand for a group of powerful states; or at best a tool for solving common problems that all agree must be handled jointly.\textsuperscript{125} To the latter, the tension between a global community and diversity across states is less troublesome. In Rawlsian terms, this community is completely consistent with inter-state relations based on a mere modus vivendi, without much of an overlapping consensus on a

political conception of justice. As a result of the need to cooperate, states and other actors accept duties toward each other and enter into legal agreements. 126

2. How should we parcel out the responsibilities of global actors to further global justice?

International law, like the rest of law, couches its legal directives to various actors in Hohfeldian correlatives, often simplified to conceptions of rights and duties. What matters to them a great deal is whether such a duty or right is a legal one. Philosophers ask about right behavior – what ought a person (or state) – do towards another person (or state). Rights and duties – especially duties – are likely to come into the discussion at some point, but whether they are to be put in the form of law is, at best, often a secondary question. Law is merely a vessel.

Yet this apparent disjuncture is not as large as it seems. For, ultimately, both disciplines are concerned with responsibilities, which scholars in both fields have conceptualized and categorized. Though they may use different terms, they ask about, in the most general sense, who is to blame or to praise, as well as be punished or rewarded, for a state of affairs; and who deserves in some sense, or is in the best position, to fix it. 127 What distinguishes a focus on responsibilities from one on duties – which both disciplines also address – is the idea of multiplicity and allocation: that in a world where numerous entities might well have duties, or indeed might have failed to carry out those duties, we must choose how to allocate among them in order to improve the state of affairs. It is about selecting who should do what when there are multiple plausible candidates.

In their respective approaches to global responsibilities, international lawyers have attempted to give some meaning to obligations *erga omnes*; the environmental concept of common but differentiated responsibilities among states, especially as it affects climate change; and the Responsibility to Protect, where the U.N. General Assembly endorsed both the state’s primary duty to protect human rights at home and the UN’s secondary responsibility if it fails to do so.\(^{128}\) It has also looked beyond states, by addressing the accountability of individuals, corporations, and institutions for past human rights violations.

Philosophers have moved more slowly on the question of assigning responsibilities in the international realm (though the general question has a long pedigree). Singer avoided the question in his 1972 essay by asserting that all humans have an equal duty to rectify suffering if they can.\(^{129}\) Barry, Onora O’Neill, and Toni Erskine have asked whether artificial entities, such as states, even have responsibilities as compared to individuals.\(^{130}\) Goodin and Shue have addressed the move from individual responsibility to group and institutional responsibility.\(^{131}\) And important philosophical work has emerged regarding climate change.\(^{132}\) The most elaborated theory is David Miller’s, who advances a vision of global justice in which various states have different roles to play.\(^{133}\)

Just as Miller’s and other frameworks could promote creative legal scholarship, so the examples from international law where states have reckoned with assigning responsibilities

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\(^{128}\) GA Res. 60/1, 24 October 2005, paras. 138-39.

\(^{129}\) Singer, *supra* note 72.


\(^{132}\) See, e.g., the essays in S.M. Gardiner *et al.* (eds), *Climate Ethics: Essential Readings* (2010).

\(^{133}\) Miller, *supra* note 9; Miller, *supra* note 58.
among potential duty-holders would undergird, or even demonstrate, the wisdom of a philosophical position. The move from domestic responsibilities to global ones in the event of the unwillingness or inability of the state to act, and the institutional capacity and legitimacy of global institutions, is ripe for collaboration.

3. How can international institutions further global justice?

Both legal and ethical inquiries into global justice sooner or later face the question of the proper role of international institutions. Each recognizes that at a certain point states need to and will cooperate to undertake common goals, and will do so through institutions. (By institutions here I mean intergovernmental bodies and not an even broader view that would include international law itself.) Institutions are typically created through constitutive instruments and produce decisions of differing legal valences – from purely advisory to fully binding. As a result, in legal scholarship, it is inconceivable to discuss the state of the law or prescribe future courses for it without significant attention to these bodies.

In ethics, the institutional focus is not as central. Rawls, for instance, derived his theory of global justice with virtually no consideration of the role of global or regional organizations. But the landscape is changing, in a way promising for cooperation between law and ethics. Thus, Buchanan and Keohane have addressed the legitimacy of international institutions. That concept should take account of certain basic principles of international law and will often be realized through international law (e.g., in the constitutive instruments or rulings of international organizations). Pogge’s close attention to the role of the WTO in (in his view) promoting North-South inequality also would gain from close attention to the decision-making of the WTO’s

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134 Rawls, supra note 66, at 70 (EU and U.N. as institutions based on equality of peoples).
135 See, e.g., Buchanan and Keohane, ‘Legitimacy’, supra note 102. Though they use the term legitimacy, they do not fall prey to Koskenniemi’s concerns, supra note 114, as they do address issues of morality and justice.
Appellate Body, on which international trade specialists would have much to say. Pierek and Werner’s volume (coauthored by a philosopher and an international lawyer) shows how theorizing can benefit from joint work.\(^\text{136}\)

The potential for collaboration is enhanced by the fluid nature of international organizations today. That is, while the state system evinces a certain level of stability, the reach of global and regional institutions is up for grabs. From the EU to the WTO, states and non-state actors are grappling with how much authority to delegate to these bodies. Lawyers should prove sympathetic to projects to empower or re-envision international organizations. And the very legalized nature of international institutions might cause philosophers to appreciate the other field. The instruments creating organizations, the background norms governing them, and their decisions are the bread and butter of today’s international lawyer.

4. \textit{How important is distributive justice to global justice?}

The gap regarding distributive justice remains significant. Philosophers are right to emphasize the impediment to global justice of severe poverty. But even those who prefer to work within a Rawlsian framework need to see equality in terms beyond transferring wealth to the unlucky poor.\(^\text{137}\) Such willingness opens up a vast range of issues, including how a state should address non-material differences among its citizens, how to treat a boundary that seems to promote unequal treatment of people on either side of it, and the role for equal treatment (as well as whose equal treatment) within international institutions. Some scholars have seen global

\(^{136}\) See sources, \textit{supra} note 53.

justice as addressing more than distributive justice, but I sense that distributive justice is still the most important issue.\textsuperscript{138}

As for international lawyers, their scholarship is likely to be improved if they integrate distributive justice more explicitly into key debates within international law, whether the meaning of economic, social, and cultural rights; the equities of climate change burden-sharing; and the flaws within the regime for the protection of foreign investment and intellectual property. The demise of one political strategy by the developing world to address distributive justice -- the New International Economic Order -- should not banish the \textit{problematique} for the international lawyer.

\textbf{Conclusion}

Debates on global justice have reached a point where both disciplines would benefit from greater interdisciplinary work. Philosophical inquiry has sought to ground responsibilities of individuals and institutions to improving world order. International law now encompasses manifold norms on the ways states should interact, and scholars have proposed institutional improvements as well as new norms. Breaching the barriers of inquiry of two major disciplines is not easy. Philosophy will always be more abstract in some sense than law, with its grounding in practice and institutions. But these differences also invite each other to learn from the other. Scholars need to read work in the others’ field, meet to discuss their work, and appreciate the differences and the similarities in their questions. International law has shown itself generally open to the insights of other disciplines, whether political science, economics, or even literary

theory. Ethics need not represent any greater a challenge. As for philosophy, the effort might be greater, but philosophers have invoked domestic law in their arguments, and some have appraised international law or even used it as a building block in their arguments. Clearly, part of this process will involve a sort of division of labor – dare I say responsibilities – for the global justice project. On certain topics, one discipline will be best suited to take the lead. But the range of problems amenable to shared discourse and dialogue is immense. With the proliferation of international contacts, networks, institutions, and law, the time is now ripe for a collaborative approach to global justice.