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Between Minimum and Optimum World Public Order: An Ethical Path for the Future

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Chapter12

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*Steven R. Ratner**

Among the most significant contributions of policy-oriented jurisprudence to our understanding of international legal process is its identification of minimum and optimum world public order as the overarching goals of international law. Minimum public order in its essence refers to the global state of affairs with limited recourse to unauthorized violence to solve disputes, while optimum public order is synonymous with a world in which human dignity is maximally protected.[1] These two concepts, augmented by other pairings now second-nature to us (for example, authority and control, and myth system and operational code), have also permeated—in the latter case, germinated in—the scholarship of Michael Reisman. From early writings on the legitimacy of sanctions against Rhodesia to more recent scholarship about the limits of self-defense or international criminal law, Reisman has been navigating the shoals of minimum and optimum public order, clarifying past trends of decision and offering prescriptions for norms and institutions that will advance both of these causes.

The New Haven School did not merely identify two goals; it effectively set priorities for them. A world of minimum public order seemed to be the first priority. Indeed, the School's founders termed it "indispensable to human rights."[2] Such stability in the international arena would pave the way for states, international organizations, and civil society to work together to promote human rights.[3] Yet the relationship between these goals could never be that simple for at least two reasons. First, as

* I appreciate comments from Eyal Benvenisti, Allen Buchanan, and Monica Hakimi, and research assistance from Raphaelle Monty.

1 Myres S. McDougal, Harold Lasswell & Lung-chu Chen, Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity 410 (1980).

2 *Id.* at 236.

3 In this sense, it is no coincidence that the McDougal/Lasswell project produced a major volume on minimum world public order in 1961, long before their famous volume on human rights. *See* Myres S. McDougal & Florentino P. Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion (1961); McDougal, Lasswell & Chen, *supra* note 1.

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practical matter, the project of minimum world public order remained and remains ongoing, so to expect such order—assuming one even knew it when one saw it—before advancing human dignity meant that the latter process would never get off the ground. Second, policy-oriented jurisprudence has always recognized that the two goals might be in tension—that some unauthorized coercion might indeed advance rather than impede a world order of human dignity.

The linkages and balance between minimum and optimum world public order—between conflict prevention and human rights—thus are central to the New Haven School. Yet at the same time, the approach does not ask the full range of questions that need to be considered in knowing how to link public order and human dignity. How do we know, for example, whether minimum public order always advances optimum public order, and how do we decide which to favor if they conflict? To address these issues we must transcend not only policy-oriented jurisprudence, but law entirely, to the realm of political and moral philosophy.

In that light, this essay seeks to uncover the linkages between minimal and optimal public order by exploring the ways that political and moral philosophy can contribute to the project that Reisman and his many colleagues and students seek to advance. In particular, it highlights various cosmopolitan traditions of global justice and explains how their analysis converges with and diverges from the approach of the New Haven School. I conclude with some thoughts for further inter-disciplinary scholarship along these lines.

I. Public Orders in the New Haven School Framework

For McDougal and his successors, law is 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.[4] Minimum and optimum public orders are the chief policy goals of the international legal process, the standard against which all outcomes of that process must be measured.[5] The basic content of these two concepts was grounded in sociology (Lasswell's great contribution to the endeavor) and instantiated in law. Minimum public order derived from the observation that human beings can best advance their individual and collective goals with minimal coercion and with a set of authoritative procedures for the deployment of force in situations when it is necessary. International law had set the basic terms of this process in the U.N. Charter, and in particular its centralization of the power to make war in the Security Council, coupled with the recognition of the inherent right of individual and

4 Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in the World Constitutive Process: How International Law is Made*, *in* International Law Essays 355, 368-69 (Myres S. McDougal & W. Michael Reisman eds., 1981).

5 Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, *in* The Methods of International Law 47, 61 (Steven R. Ratner & Anne-Marie Slaughter eds., 2004).

collective self-defense.[6] The rules of international humanitarian law were also part of minimum public order. At the same time, the precise rules of international law that would contribute to such a minimum public order generated significant debate, including most notably over the scope of Article 51.[7]

The concept of optimum public order also originated in sociology, in that it was said to be the global order that allowed for maximal production and sharing of the eight base values identified early in the work of McDougal and Lasswell: respect, power, wealth, skill, enlightenment, rectitude, affection, and well-being. 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 deprive individuals of their enjoyment; and how international law could be a vehicle for their deployment and their fulfilment.

When push came to shove, though, and the two goals seemed to conflict, the New Haven School has offered less than a completely satisfactory answer. On the one hand, it has recognized—and insisted that the U.N. Charter did too—that human rights was just as important a goal for public order as prevention of conflict, offering a quick riposte to those governmental and scholarly advocates of traditional sovereignty-at-all-costs. Indeed, Reisman, in his controversial defense of the Panama invasion in 1989, presciently defined sovereignty as inextricably linked with human rights, a position that would later receive ringing endorsement from a U.N. Secretary-General and at least a grudging acknowledgment by heads of state.[8] This position led to his belief in a limited right of humanitarian intervention not only as lex lata but as de lege ferenda as a way of deterring coups d'etats against democratic governments.[9]

On the other hand, the New Haven School's critical emphasis on context in gauging both the existing expectations of international actors and projecting future policies at times left us wondering whether more general recommendations could be made. Thus, in discussing the legality of amnesties, Wiessner and Willard note that the authority for amnesties "is context-dependent, it is never known, with specificity, in advance of a particular problem."[10] Reisman's recognition of the legality of a limited right of humanitarian intervention by states acting without a Security Council man-

6 U.N. Charter arts. 2(4), 41, 42, 51.

7 For various academic views, see Albrecht Randelzoffer, *Article 51*, *in* The Charter of the United Nations: A Commentary 788, 797 (Bruno Simma ed., 2d. ed. 2002).

8 W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 Am. J. Int'l L. 866 (1990); The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General*, ¶ 129 , U.N. Doc. A/59/2005 (Mar. 21, 2005); 2005 World Summit Outcome, GA Res. 60/1, ¶ 38, U.N. Doc. A/RES/60/1 (Sept. 15, 2005).

9 W. Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 Fordham Int'l L.J. 794 (1995); *see also* W. Michael Reisman, *Acting* Before *Victims Become Victims: Preventing and Arresting Mass Murder*, 40 Case W. Res. J. Int'l L. 57 (2007-2008) (reliance on Genocide Convention for obligation to prevent atrocities).

10 Wiessner & Willard, *supra* note 5, at 60.

date and his embrace of this possibility to preserve democracies was followed after the Iraq invasion with a warning about the dangers of regime change.[11] And the New Haven School's emphasis on human rights translated into support for humanitarian intervention to protect the Ibos in Nigeria, but not for secession in Bosnia.[12]

My point is not that these judgments are wrong—on the contrary, the analysis of context is generally so astute that the recommendations regarding future directions for the law are always worth considering very seriously. But the inherently sociological approach of the New Haven School—one might call it "fact-based international law"—that is its great strength can also at times be a weakness. I do not mean a weakness in the way that European doctrinalists have (very wrongly) criticized it—that it is not sufficiently binary and elides law observance and law violation.[13] But it can be a shortcoming for those seeking more generalized guidance on the tradeoff between minimum public order and optimum public order. Without denying the importance of close scrutiny of the participants, perspectives, situations, base values, and strategies relevant to a particular set of competing claims, we can ask whether it is not possible to find some overarching principles of how international actors ought to behave that will supplement the sociological approach. At a certain point international actors making policy choices should be—or, as a descriptive matter of the process of authoritative decision, simply will be—guided by moral considerations as well.

II. From Social Process to Ethics

A. Complementary Inquiries

Although the New Haven School never denied the role of morality in the development of international law—certainly human dignity is an inherently moral concept—it preferred to see morality through a more anthropological lens as simply the demands of the community relating to certain values.[14] International law would reflect morality because it reflected the demands of the community as determined by their base values. Any other sort of theorizing for law was defective because it lacked social context.[15] But those demands, even for a concept as morally significant as human dignity, cannot be transformed into legal norms, for minimum and optimum public order are simply too general as concepts to guide a process of prescription. We need instead to weigh those demands against each other and ultimately make critical

11 W. Michael Reisman, *Why Regime Change is (Almost Always) a Bad Idea*, 98 Am. J. Int'l L. 516 (2004).

12 *Compare* Michael Reisman, Humanitarian Intervention to Protect the Ibos, in Humanitarian Intervention and the United Nations 167 (Richard B. Lillich ed., 1973), with Remarks by W. Michael Reisman, 1993 Am. Soc'y Int'l L. Proc. 258-59.

13 *See, e.g.*, Gilbert Guillaume, *Preface*, 58 Me. L. Rev. 281 (2006). For a response, see Steven Ratner, Jeffrey Dunoff & David Wippman, ASIL President's Column, July 6, 2007, http://www.asil.org/ilpost/president/pres070706.html.

14 *See, e.g.*, McDougal, Lasswell & Chen, *supra* note 1, at 3-13.

15 *See infra* note 41 on their reactions to Rawls's project.

choices in the prescription of law. This process requires some intervening stage of moral scrutiny.

In this light, the central moral inquiry that complements the sociological approach and contributes to its key task of devising strategies for achieving optimum public order is the following: what ethical duties do we have to promote the human dignity of other individuals on the planet, both those on our territory and those abroad? Deriving these moral duties of individuals—and eventually moral duties on the state—is a critical component to prescribing law for states, as moral duties remain an important inspiration for legal rights and duties. This linkage of legal rules to moral rules remains the case, even though, as both positivists and legal realists (including policy-oriented jurisprudence) agree, what we consider as law is a matter of social fact.[16]

Yet the question of the moral duties owed by the state to individuals is not one that lawyers alone can answer, for that is not what lawyers normally do. Lawyers can identify expectations, shape future preferences, devise and invoke the processes of institutions, and do many other things, but they rarely engage in rigorous ethical inquiry underlying the observational standpoint that they bring to the table. But that does not make ethics irrelevant to the lawyer. For lawyers are not mere engineers, tinkering with this institutional arrangement or that to advance some client's interests. As Christian Reus-Smit writes, "international law [is] a crucial site within international society for the negotiation of practical and purposive norms."[17] So it is very much the business of international lawyers to ask ethical questions, because the arrangements they construct will reflect the ethical perspectives of the various participants, including the lawyers themselves.

– As we consider these duties, we will be able to ask and answer questions about international law that policy-oriented jurisprudence also seeks to answer:
– What action is required, permitted, or prohibited, to carry out those duties?
– If action is required or permitted, then who must or should act to carry out those duties?
– If those designated to act fail to do so, then what shall be the consequences?

The duties and questions that flow from them are also at the core of the issues so central to Reisman's scholarship: humanitarian intervention, the responsibility to protect, self-defense, regime change, self-determination, and international humani-

16 *See* H.L.A. Hart, The Concept of Law 198-207 (1961); Peter Cane, Responsibility in Law and Morality 12-16 (2002). Morality, even of a purely utilitarian nature, is not the only justification for particular legal rules, as, for example, problems of coordination rather than cooperation may produce rules that are not morally superior to other proposals but are nonetheless superior to no rule. On the role of moral views in judging, see Richard A. Posner, How Judges Think 94, 240-41 (2008).

17 Christian Reus-Smit, *Society, Power, and Ethics*, *in* The Politics of International Law 272, 278 (Christian Reus-Smit ed., 2004); *see also* Kok-Chor Tan, *International Toleration: Rawlsian vs. Cosmopolitan*, 18 Leiden J. Int'l L. 685, 686-87 (2005) ("[N]ormative political philosophy can identify the fundamental norms that our global legal institutions should reflect.").

tarian law. Traditional international law is not oblivious to these sorts of questions, but the static concepts of opposability or obligations *erga omnes* (the latter of which human rights are said to be part) does not capture the myriad possible duties that participants in the international legal process may owe each other.

B. International Justice and the Cosmopolitan Project

Fundamentally, the moral inquiries decisionmakers need to make involve a search for justice at the global level. Philosophers interested in global justice ask whether, and if so, what sort of, duties are owed by various international actors to each other. These questions transcend interpersonal ethics by asking not just how humans should behave to each other, but how we can construct institutions at a global level that advance a certain understanding of those interpersonal duties.[18] Work on global justice is as old as the classic philosophers, but has coalesced in recent years around essentially three approaches: (1) philosophers who see justice as a uniquely intrastate phenomenon and remain sceptical of global justice; (2) those who see justice in terms of a set of relationships and structures based on the idea of communities (for example, states or peoples) as the sole or key units of moral concern—communitarians; and (3) those who see justice in terms of a set of relationships and structures based on the notion of individuals as the sole or key unit of moral concern—cosmopolitans. Each of these positions now has a vast literature to accompany it, and each clearly maintains relevance for international law.

Among the sceptics of international justice, the views vary from some political scientists who simply see no role for morality in international affairs to more subtle approaches that accept that international society should be governed by some rules but refuse to regard those as part of the project of justice. Thus, for instance, Thomas Nagel believes that duties of justice—in particular economic justice—based on equal regard for our fellow human beings can only arise in "a strong and coercively imposed political community," which the international system clearly is not.[19] At the same time, he acknowledges that some aspects of justice, such as basic human rights, do not depend on such associations, so a "minimal humanitarian morality" means that outsiders should be concerned about how a state treats its citizens.[20] In Rawlsian terms, even if there is not at the international level an overlapping consensus on a political conception of justice, and interstate relations are instead based on a mere modus vivendi, it is still possible for states or individuals to have duties toward each other, for states to enter into agreements, and for law to emerge.[21] But because these scholars are mostly concerned with explaining why the dignity of the individual cannot be the basis for elaborating duties and justice at the international level, their

18 *See* Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 Ethics 48, 50-52 (1992) (contrasting interactional and institutional conceptions of morality and justice).

19 Thomas Nagel, *The Problem of Global Justice*, 33 Phil. & Pub. Aff. 113, 133 (2005).

20 *Id.* at 126-27, 130-31.

21 *See* John Rawls, Justice as Fairness: A Restatement 192-95 (Erin Kelly ed., 2001).

ability to contribute to the challenges of moving from minimum to optimum world public order is limited.

Communitarians bring somewhat more to the table insofar as they do not completely deny the possibility of some concept of international justice; they merely see it in terms of respect for various communities. Indeed, whether in the work of Michael Walzer or even Rawls's attempt to derive a liberal foreign policy of just peoples in *The Law of Peoples*, communitarians do not give short shrift to individual human dignity; they rather see that dignity as defined by the community itself. For them, justice is about allowing for significant degree of toleration of diversity in order to allow communities to flourish and individuals to realize their goals in them. It is, in Walzer's terminology, at best a thin conception of justice, to be contrasted with the thick notion that prevails within a community.[22] Fundamentally they are willing to give a great deal of discretion to communities to organize themselves as they see fit, although they do set some limits when it comes to violations of the most basic human rights.

Of the three approaches, cosmopolitanism has most directly engaged the possibility of international justice.[23] Cosmopolitan scholars are committed to justice based on the equal moral concern for individuals everywhere, regardless of whether the individual is in one's community or in another community. Human beings qua individuals, not as members of communities, are the sole or at least fundamental unit of moral concern. Yet various views of cosmopolitanism emanate from this agreed starting point. Philosophers disagree about the duties that flow from valuing all individuals equally—and in particular the source and range of our duties to those with whom we have special relationships compared to our duties to all people generally. Strong cosmopolitans believe in equal regard for all persons in determining all duties; any special treatment we give to those in special relationships with us (for example, co-nationals) is completely derivative of that equal worth and cannot be justified based on the relationship itself. Weak or moderate cosmopolitans argue that we have both general duties to all persons in the planet as well as special duties to those in certain relationships to us that are of independent moral significance; the latter, towards families or co-nationals, need not be derivative of general duties.[24]

Indeed, we might recharacterize all of the above positions as falling along a spectrum in responding to the fundamental question put by Brian Barry (himself a strong cosmopolitan): "[G]iven a world that is made up of states, what is the morally permis-

22 *See* Michael Walzer, Thick and Thin: Moral Argument at Home and Abroad, at xi (1994).

23 As Miller writes, "'[c]osmopolitan' is probably now the preferred self-description of most political philosophers who write about global justice." David Miller, National Responsibility and Global Justice 23 (2007).

24 *See* Samuel Scheffler, *Conceptions of Cosmopolitanism*, *in* Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought 111, 114-16 (2001). For a somewhat different definition of strong vs. weak cosmopolitanism, see Miller, *supra* note 23, at 27-31 (distinguishing between insistence on equal treatment of all persons and equal value to all persons).

sible range of diversity among them?" [25] To rephrase somewhat, how much global diversity—in terms of various conceptions of and respect for human dignity—is consistent with global justice?[26] Of the three camps I have identified, the first would reject the premise of the question; communitarians might accept the possibility of global justice but would argue that significant diversity, up to some limits, is at its core; and the third group would argue that global justice as a substantive concept requires limits on diversity, with the greater limits among the strong cosmopolitans (who, for example, tend to favor major wealth redistribution to address global inequalities).[27] These theorists are also asking, fundamentally, whether we have one international community or multiple communities, and why.[28]

In addition to their focus on the limits of diversity, cosmopolitan approaches are characterized by the centrality of the concept of impartiality to their reasoning. In particular, a cosmopolitan morality is "based on an impartial consideration of the claims of each person who would be affected by our choices."[29] Cosmopolitans often argue over which sorts of duties at the international level can be defended as impartial. As a general matter, weak cosmopolitans accept the possibility, or affirmatively argue, that special relationships, such as those between nationals, can alone give rise to special duties. Strong cosmopolitans are much less willing to take this route, preferring that all special duties be derivative of the idea of equal treatment of all individuals. Both thus regard their approaches as impartial but differ on the basis for grounding disparate treatment. [30] Indeed, they may end up agreeing on the scope of some duties, as weak cosmopolitans do not insist that all special relationships give rise to special duties, and strong cosmopolitans may see certain special duties as fully justified based on the idea of equal treatment of the individual.

Lastly, cosmopolitans differ not only in their views on special duties, but also in terms of the methodology for deriving principles of justice from the equal dignity of all individuals across the planet. Utilitarians such as Peter Singer will consider the sum total of human welfare with all individuals counted equally;[31] deontologists such

25 Brian Barry, *International Society from a Cosmopolitan Perspective*, *in* International Society: Diverse Ethical Perspectives 144, 154 (David R. Mapel & Terry Nardin eds., 1998).

26 *Cf.* Tan, *supra* note 17, at 686.

27 As an example of the latter, see Barry, *supra* note 25.

28 Beyond philosophy, the so-called English School of International Relations, which is built on the idea of an international society, shares certain ideas of cosmopolitans.

29 Charles R. Beitz, *Cosmopolitan Liberalism and the States System*, *in* Political Restructuring in Europe: Ethical Perspectives 119, 124-25 (Chris Brown ed., 1994).

30 *See* Christopher Heath Wellman, *Relational Facts in Liberal Political Theory: Is There Magic in the Pronoun 'My'?*, 110 Ethics 537 (2000) (distinguishing between "reductionist" and "associativist" (or "nonreductionist")); Brian Barry, Justice as Impartiality 191-95 (1995); Marcia Baron, *Impartiality and Friendship*, 101 Ethics 836 (1991) (on different levels of impartiality); *cf.* David Miller, On Nationality 53-55 (1995) (finding impartiality discussion confusing).

31 *See, e.g.*, Peter Singer, *Famine, Affluence, and Morality*, 1 Phil. & Pub. Aff. 229 (1972).

as Allen Buchanan will start from premises of duties and rights;[32] and contractarians such as Thomas Pogge will ask what sort of system would be agreed by a group of equally valued individuals.[33] Each of these approaches can yield vastly different conceptions of international justice, and each can create sharply contrasting visions of the balance between minimum and optimum public order.

III. International Justice, Cosmopolitanism, and Policy-Oriented Jurisprudence—Convergences and Divergences

The preceding brief elaboration of approaches to international justice suggests the possibilities for many linkages between theories of international justice and international law. As noted above, understanding the scope of our moral duties to other individuals is a prerequisite for devising the requisite legal rights, duties, and responsibilities for promoting public order. Of the three approaches, cosmopolitanism's direct engagement with international justice per se and its focus on the equal worth of the individual resonates most closely with the project of the New Haven School. Both cosmopolitanism and the policy-oriented approach seek to develop the criteria, rules, and institutions for a public order based on human dignity, even as the former derives these from first principles of morality and the latter from sociological observations. At the same time, policy-oriented jurisprudence does not demand (although it does not preclude) the sort of commitments that the strong version of cosmopolitanism places upon both individuals and states to guarantee various aspects of human dignity. Indeed, communitarian themes surface at times in Reisman's scholarship, notably his concern about sovereignty belonging to the people of a state (although this is not inconsistent with a cosmopolitan vision either).[34]

The two key themes of diversity and impartiality discussed above also resonate with international lawyers, and the New Haven School's search for optimum public order in particular. First, issues of diversity and toleration so central to international justice are also essential to the project of international law. As Kok-Chor Tan writes, "in so far as we hope that international law does reflect our justice-based commitments, clarifying the limits of toleration can help to identify for us the range of international legal arrangements that can be described as just."[35] International lawyers constantly inquire as to whether new areas should be subject to global (or regional) regulation, and how much that regulation should preserve the flexibility of individual states to pursue their policy ends as they see fit. Second, cosmopolitans' search for an impartial justification for moral duties is similar to the project of lawyers seeking to develop new norms. A duty enmeshed in the rule of law must be ultimately justifiable as impartial and treat all persons or states equally in some sense. Refraining from

32 *See, e.g.*, Allen Buchanan, Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law 85-98 (2004).

33 *See, e.g.*, Thomas W. Pogge, Realizing Rawls (1989).

34 *See* Reisman, *supra* note 8, at 872 (sovereignty as "the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors").

35 Tan, *supra* note 17, at 686.

playing favorites does not require equal treatment for all states and individuals—but it does mean that they be treated as equals.[36] So for those seeking a just world order grounded in law and institutions, partialist justifications will not pass muster.

At the same time, the targets of inquiry of the international justice and policy-oriented projects are not identical in several important respects. First, they differ sharply in their approach to the phenomenon of state power and its disparities. The New Haven School sees the diverse power of states, international organizations, and other actors as a variable that must be considered front and center as both a constraint upon, and instrument for, the promotion of human dignity; as Reisman writes, "lawful acts, to be such, will require a minimum degree of effectiveness."[37] Policy-oriented scholars disagree significantly on different aspects of the relationship between authority and control, including the role of centralized mechanisms of enforcement compared to individual state action, but still see power as essential to law's effectiveness and ultimately its existence.[38] Cosmopolitans (and many other philosophers as well) tend to see norms and law in opposition to power (just like political realists reject the relevance of morality in a world governed by power). Theorizing seeks to find the grounds by which states or international institutions can exercise political power rather than take that power as a given.[39] At the same time, international justice theorists often concede power's importance in making particular recommendations for non-ideal theory. Andrew Hurrell, of the English School of political science, which shares certain basic premises of cosmopolitanism, expresses both the distaste for power and the ultimate need to engage with it when he writes, "the aspirations of [a] normatively ambitious international society remain deeply contaminated by power and … the normative theorist can only ignore the persistence of this structural contamination at the cost of idealization."[40]

Second, scholars in the policy-oriented perspective (including this author) have tended to give far less attention to problems of global distributive justice than philosophers. The latter's fascination from this issue stems from the vast debate surround-

36 Ronald Dworkin, Taking Rights Seriously 227 (1977).

37 W. Michael Reisman, *Law from the Policy Perspective*, *in* International Law Essays, *supra* note 4, at 1, 7; *see also* W. Michael Reisman, *On the Causes of Uncertainty and Volatility in International Law*, *in* The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity 33, 48 (Tomer Broude & Yuval Shany eds., 2008) ("Normative arrangements require power to support and implement them.").

38 For insightful comparisons between McDougal and Falk in this regard, see Rosalyn Higgins, *Policy and Impartiality: The Uneasy Relationship in International Law*, 23 Int'l Org. 914 (1969) (reviewing Richard A. Falk, A Legal Order in a Violent World (1968)). For Higgins's further views, see Rosalyn Higgins, Problems and Process: International Law and How We Use It 3-7 (1995).

39 *See, e.g.*, Buchanan, *supra* note 32, at 299-327.

40 Andrew Hurrell, *International Law and the Making and Unmaking of Boundaries*, *in* States, Nations, and Borders: The Ethics of Making Boundaries 275, 284 (Allen Buchanan & Margaret Moore eds., 2003).

ing the possibilities for extending Rawls's difference principle from *A Theory of Justice* to the international realm. The subject has dominated ethical thinking regarding international relations for thirty years, with strong cosmopolitan scholars taking the lead in arguing for global distributive justice. Nothing in the framework of the New Haven School presents an obstacle to considering problems of distributive justice, even if McDougal was highly critical of Rawls's philosophical and thus anti-empirical approach.[41] Whether as a result of the hostility of the founders of policy-oriented jurisprudence or the general reluctance of U.S. legal scholars to discuss questions of economic justice (as opposed to narrower questions of the contours of economic and social rights set forth in treaties), the gap between the New Haven School and international justice theorists remains significant on this front.

Third, and most critically, cosmopolitan scholars spend a great deal of their efforts, whether in debates between the weak and the strong versions, or in their debates with communitarians, on the underlying basis for the idea of an international community. For justice is viewed by many philosophers as a concept that governs those within some kind of community, whereas relations based on mutual interest alone—a modus vivendi—cannot ground duties of justice (though they can ground other duties). Thus, significant argumentation takes place on the question of whether, and if so what sort of, interactions among states and individuals at the global level can create the international equivalent of Rawls's basic structure and whether such a structure is needed to generate duties of international justice.[42] The policy-oriented school, like other approaches to international law, assumes the existence of some kind of international community—the world community—by virtue of the shared interests and interactions of global actors, factors that might fall short for philosophers as a basis for duties of justice.[43] International lawyers would not deny that other communities exist alongside the global community and thus see no need to question the idea of special duties to one's co-nationals. In this sense, international law as a field is consistent with a moderately cosmopolitan vision of international justice insofar as it does not actively oppose the idea of national ties per se as creating special duties.

This difference in focus is indeed precisely wherein the advantage of ethical inquiry lies for international law. For international law's *assumption of*—rather than an *argument for*—an international community, and the resultant lack of interest in addressing why we should have international duties to others, perpetuates the lack of guidance on moving from minimum to optimum public order. Each different ethical theory of the origin, nature, and scope of international duties will affect the choices we make proposing international duties that assist us in navigating between mini-

41 McDougal, Lasswell & Chen, *supra* note 1, at 454 n.9, 459-60 n.23.

42 For example, Charles Beitz originally said that trade alone could create a community in which each member owed the others duties of justice, but later backtracked on this idea. Charles Beitz, *Cosmopolitan Ideals and National Sentiment*, 80 J. Phil. 591, 595 (1983); *see also* Buchanan, *supra* note 32, at 83-85.

43 The New Haven School founders did not quite assume its existence, but regarded it as an anthropological fact rather than a moral question. *See* McDougal, Lasswell & Chen, *supra* note 1, at 88.

mum and optimum public order. To demonstrate this necessity and the consequences for international law of different approaches to deriving moral duties, I now turn to an area of law not extensively considered by the policy-oriented school but highly important in contemporary international law.

IV. Fitting Ethics In: The Case of Extraterritorial Duties Regarding Human Rights

The scope of a state's duties under international human rights law to those persons not on its territory has lately become one of the key issues in international law. From the jurisdiction of the European Court of Human Rights over NATO action over Belgrade or in Iraq, to the conduct of the United States toward those it has captured abroad—or targeted for killing—in the name of combating terrorism, to Israel's construction of the separation barrier in the West Bank, those harmed by the conduct of governments beyond their territory have invoked human rights law to bolster their claims and seek redress. Human rights NGOs and many scholars, backed by the views of some U.N. bodies as well as the International Court of Justice, have argued for the extraterritorial application of various treaties; states, led by the United States in numerous public statements, have been far more reticent, with the European Court of Human Rights treading carefully between the two.[44] The lines are essentially drawn between those who see the corpus of human rights law, and thus states' duties under it, as extending to all situations when a state infringes upon a human right and those who view both the treaties and custom as limiting the scope of a state's obligations to those on its territory.

Each of the many methods of international law will have its approach to addressing this important problem.[45] Positivists will focus on principles of interpretation of treaties and black-letter rules for the derivation of custom. Policy-oriented jurisprudence's comparative advantage lies in its explicit consideration of all the contextual factors related to this issue, so that observers and policymakers are able to see the full complexity of the problem. Their conclusions would likely highlight the reasons states may have originally agreed on a territorial approach to human rights; the various ways in which states may act beyond their borders; the practical effect on standards of human dignity of extending such duties extraterritorially; the consequences for interstate relations and minimum public order if states were assumed to have various duties to those beyond their borders; and the consequences for the human rights enforcement if the state was held to have duties beyond its borders. Such a careful appraisal could be accompanied by prescriptions for how to interpret existing treaties as well as the directions for future law development. As the New Haven School has recognized, it is likely that each evaluation of the problem and solution will be influenced by the observational standpoint of the relevant participant. So it

44 *See* Nicola Wenzel, *Human Rights, Treaties, Extraterritorial Application and Effects*, Max Planck Encyclopedia of Public International Law, http://www.mpepil.com.

45 *See generally* The Methods of International Law, *supra* note 5.

should not surprise us that states and human rights NGOs disagree on the meaning of texts and custom.

But a richer analysis of the problem requires that we return to the original question above—what are our moral duties to individuals at home and abroad—with a particular focus on the permissible bases on which a state may distinguish its duties among various classes of individuals. What, in essence, are the general duties of a state—owed to all individuals—in the area of human rights, and what and toward whom are its special duties, owed only to some? Many philosophers would accept that *individuals* in state A have some duties to those in state B, but they would disagree on the grounding of those duties, whether they are duties of justice or some other kind of duties, and the consequences that flow from such duties for *state* A itself in its relations with state B.

Indeed, when viewed from the perspective of general and special duties, it becomes clear that the lawyer's problem of extraterritorial duties related to human rights is actually part of a broader issue about *two sets* of duties. Most lawyers are really only considering one of them, while philosophers have only been considering the other. When lawyers talk about extraterritoriality of human rights obligations, they are concerned with (1) *the duties triggered when a state decides for whatever reason to take action* beyond its borders. These duties include the duty to refrain from torture or disappearances when undertaking counter-terrorism operations, or to guarantee certain rights to people under occupation. Philosophers have, however, focussed on a different set of extraterritorial duties—namely (2) *the duties by a state to initiate action* outside its borders to protect or assist persons abroad. These obligations range from duties to aid foreigners in attaining a decent diet to duties to help them in overthrowing a genocidal regime.[46] Whereas the first focuses on the obligations on a state to protect individuals once it acts abroad, the second set of duties addresses the moral trigger for action to help individuals abroad in the first place.[47] Lawyers have certainly addressed the second question, but generally as a separate inquiry—in the doctrinal boxes of jus ad bellum or non-intervention—rather than part of the problematique of extraterritorial human rights duties.[48] But they ultimately come back to the scope of the duties of the state to foreigners and thus cannot be separated. In that light, because philosophy has asked what I consider the more fundamental questions about (at least some) extraterritorial duties, I here examine their contribution to the overall debate over extraterritorial duties related to human rights.

46 I appreciate this critical distinction from Allen Buchanan.

47 As discussed below, these do not map onto the distinction between so-called positive and negative duties.

48 One exception would be work on the territorial scope of a state's duty to respect various economic, social, and cultural rights, which address questions about the duty to act abroad through the lens of extraterritorial human rights protections.

A. Skeptics of International Justice

Philosophical approaches sceptical of global moral duties could take a number of positions about extraterritorial duties related to human rights. One view would emphasize the lack of one international community and argue that at best states co-exist in a state of modus vivendi. So whatever duties best preserve that modus vivendi are worth pursuing and those that undermine it are not. The modus vivendi, rather than any conception of international justice, undergirds international law's duties that states not use force against each other and not intervene in each other's internal affairs. While they might accept that individuals have moral duties to those abroad, any duty of a *state* to those abroad must not undermine those two key inter-state duties and the modus vivendi.

Thus, duties by one state to ensure that those abroad gain their right to vote or their right to food—the second category above—would be rejected, unless perhaps if such duties were conditioned upon a request of the host state. Humanitarian intervention would seem to be generally off limits. On the other hand, they might well accept that a state cannot impinge on the human rights of individuals in another state when acting abroad—the first category above—since it would upset the modus vivendi. They might argue that such a duty would not apply if the target state itself consented to those violations, although perhaps consent would not affect the most basic rights against ill-treatment. Such a view of the two sets of duties is consistent with the overall goal of preserving the modus vivendi. It also views human rights obligations as essentially interstate; it downplays the idea that individuals are themselves the holders of human rights to whom states have a duty.[49]

B. Communitarianism

Communitarians would also be unwilling to envisage too many extraterritorial duties by states regarding human rights. But their reason is not the need to preserve the modus vivendi, but to preserve the autonomy of other communities. Because communities define individuals and their dignity, their autonomy deserves significant respect. The state will thus have numerous duties to those on its territory; as Walzer says, an individual's "right to place" means that "[t]he state owes something to its inhabitants simply, without reference to their collective or national identity."[50] Indeed, his emphasis on territoriality extends to a claim that the state has a duty to grant political asylum to oppressed people from other lands who make it to the state, though he cautions against extending this principle to requiring the grant of asylum

49 On the distinction between the duties of beneficiaries of rights vs. rightsholders, see H.L.A. Hart, *Are There Any Natural Rights?*, 64 Phil. Rev. 175 (1955). *See also* Steven R. Ratner, *Is International Law Impartial?*, 11 Legal Theory 39, 60-61 (2005) (human rights treaties based on states as holding rights and individuals as beneficiaries).

50 Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality 43 (1983).

to all those oppressed abroad as the state "might be overwhelmed."[51] But our moral duties to individuals abroad are limited by the need to respect the autonomy of communities. As a result, communitarians might well favor a duty of the second kind to aid states that are victims of conquest by other states (or are likely to be) and have thus lost their autonomy; but they would refrain from any duty to object to a state's internal practices short of gross human rights violations.[52]

Rawls adopts a similar position in *The Law of Peoples* with his emphasis on the need for liberal states not merely to respect each other, but also to respect other "well-ordered peoples," by which he means so-called decent hierarchical societies, or semi-authoritarian states that respect the most elementary of human rights and act responsibly abroad.[53] At the same time, with respect to societies that are not in these two categories, he advocates stronger extraterritorial duties. He argues that "[w]ell-ordered peoples have a *duty* to assist burdened societies," namely those communities that "lack the political and cultural traditions, the human capital and know-how, and, often, the material and technological resources needed to be well-ordered."[54] Rawls himself focuses on the need for economic assistance to get these states to the point of being well-ordered. But he seems reluctant to argue for further interference in their internal affairs, since the goal, as for Walzer, is "the political autonomy of free and equal liberal and decent peoples."[55]

The skeptics and the communitarians thus differ on the scope of the duty to act ab initio (the second set of duties above). Part of this difference stems from a willingness by the latter to engage with the question of whether the government really speaks on behalf of the community at all and thus whether its consent is necessary and sufficient to preserve the community's autonomy, a question that those concerned with preserving a modus vivendi among states would not find relevant. At the same time, they might well agree on that a state has significant duties in the first category above, that is, when it acts abroad—that it cannot then violate the rights of persons inside another community.

Some communitarian approaches would even question the morality of the status quo in human rights law, under which a state's duties to individuals apply to all on its territory, with few duties limited to citizens alone.[56] Andrew Mason offers his own

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51 *Id.* at 51.

52 Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations 53-63 (2d ed. 1992); Michael Walzer, On Toleration 21-22 (1997).

53 John Rawls, The Law of Peoples 59-85 (1999).

54 *Id.* at 106 (emphasis in original).

55 *Id.* at 118.

56 The key examples are (1) a state's duty to allow individuals to participate in public affairs is limited to citizens; and (2) a state's duties to respect an individual's economic, social and cultural rights allow developing countries to opt out of granting such rights to non-nationals. *See* International Covenant on Civil and Political Rights art. 25, *opened for signature* Dec. 16, 1966, 99 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 2(3), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

version of a state's duties based on the idea of citizenship as an intrinsically valuable good. He rejects cosmopolitan stances (in particular those of Robert Goodin and Allen Gewirth) that justify duties only to residents, but he also rejects theories that limit duties only to members of the nation, both of which are distinct from citizens.[57] His and others' embrace of the need to justify special duties to compatriots is based on their perceived need to find a moral basis for the common-sense pull of ties based on citizenry. Presumably their only response to the existing legal order under international human rights law, which is territorially based, is to find it irrational or immoral. For one who questions whether a state has duties to all those on its territory, the notion of extraterritorial duties would be, in a sense, doubly absurd.

C. Cosmopolitanism

Among cosmopolitan approaches more open to the idea of global duties based on the equal worth of the individual, the optimal scope of extraterritorial duties would vary across and within different versions of cosmopolitanism. A strong cosmopolitan perspective based on a utilitarian calculation, such as Singer's, would weigh the utility to all individuals of requiring states to guarantee various human rights abroad against the costs. He might find the benefits to individuals outweigh the costs with respect to some duties related to human rights, for example, the duty to provide food to the needy.[58]

Robert Goodin, in an influential article, offered a richer explanation for the special duty of a state to its residents that is consistent with strong cosmopolitanism.[59] All duties regarding others are general, but states represent an efficient way of dividing up the globe to allocate who should carry out those duties. States with effective control over individuals, rather than some other state, have special duties to those people because they are in the best position to ensure respect for their rights. Thus, for example, the control by the Japanese government over Japanese territory puts it in the best position to ensure that criminal defendants there receive procedural guarantees. (This position can also be contested; perhaps effective control over a population does not put the state in the best position to guarantee all rights, for example, in the case of impoverished states.) But at least as an initial matter, we will place the duties to protect human rights only on the territorial states. Goodin then argues that one state does another harm when it "inflict[s] injuries on their [that is, the latter's] citizens," but "ordinarily no state has any claim against other states for positive assistance in promoting its own citizens' interests."[60]

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57 *See* Andrew Mason, *Special Obligations to Compatriots*, 107 Ethics 427 (1997).

58 *See* Singer, *supra* note 31; *see also* ICESCR, *supra* note 56, art. 11 (right to "adequate food").

59 Robert E. Goodin, *What is So Special about Our Fellow Countrymen?*, 98 Ethics 663 (1988). Walzer echoes Goodin's efficiency rationale in noting that "so many critical issues … can best be resolved within geographic units." Walzer, *supra* note 50, at 44.

60 Goodin, *supra* note 59, at 682. "Ordinarily" because Goodin recognizes the possibility that through treaty a state could agree to protect noncitizens beyond its borders. *See id.* at 670.

Goodin thus draws on the distinction between a state's negative duties, that is, not to impinge on the negative rights of individuals (for example, not to torture foreigners) and its positive duties, that is, to guarantee positive rights such as the right to food, suggesting that a state's negative but not positive duties are extraterritorial.[61] The notion resembles international law's understanding that territorial sovereignty imposes duties on a state not to cause harm to other states (and their nationals) on that territory or abroad—a point developed by Reisman in discussing (two years before September 11) a state's duties regarding terrorists on its territory.[62] Territorial sovereignty per se does not impose duties to aid other states (although it may impose certain positive duties of the state toward its own citizens).

At the same time, this approach to duties to those abroad has flaws as a matter of both law and ethics. Legally, the line between positive and negative obligations is not firm: the (positive) duty to provide a fair trial is part of a (negative) duty not to treat someone arbitrarily; and the (negative) duty not to torture requires the carrying out of the (positive) duty to train police. Philosophically, it is not clear that negative duties are more important, or that it is more realistic to expect individuals and states to act on negative duties but not positive ones. Singer and Thomas Pogge, for example, have argued that our and our state's duty to help the starving person around the globe is no less important than our state's duty not to conduct an extraterritorial execution. Pogge in particular emphasizes that each of us as individuals are responsible for global inequities that he claims have been caused by the international institutions we have set up.[63] From this perspective, Goodin's division of labour is itself a function of the resources of international institutions; robust international organizations could enable states to have or act on positive obligations as well. This stronger cosmopolitanism has little room for the positive/negative duties mentioned by Goodin.

Goodin, like most philosophers, focuses on the second set of duties noted earlier, that is, duties when to act abroad. As for the lawyer's concern with duties triggered when a state acts abroad, the negative duties he favors would seem to apply a fortiori when a state is harming another state's citizens on the latter's territory, suggesting at least some significant extraterritorial duties of this kind. Indeed, legal scholars have adopted a similar line for determining which duties regarding human rights a state assumes when it acts extraterritorially.[64] However, Goodin's initial opposition to positive duties to act abroad need not translate into a similar opposition to such duties once the state acts abroad. Thus, for instance, it would be reasonable to claim

61 *Id.* at 667-70.

62 *See* W. Michael Reisman, *International Legal Responses to Terrorism*, 22 Hous. J. Int'l L. 3, 51 (1999) (relying on the *Island of Palmas* and *Lotus* cases).

63 *See, e.g.*, Thomas W. Pogge, *Human Rights and Global Health*, *in* Global Institutions and Responsibilities 190, 201-07 (Christian Barry & Thomas W. Pogge eds., 2005).

64 *See* John Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context*, 40 Isr. L. Rev. 72 (2007); Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 Isr. L. Rev. 17 (2004). Legal scholars tend to put significant emphasis on the degree of control that the state has over the individual.

that states lack a duty to aid other states as a general matter and still accept that, when a state acts abroad (for example, the United States in invading Iraq), that action triggers certain positive duties to aid the citizens of that country. From his perspective in which control over territory is critical for determining a state's duties, a state that occupies foreign territory would likely have various positive duties to aid the population.

David Miller engages the issue from the perspective of a weak cosmopolitan approach that accepts the intrinsic value of relationships among co-nationals and advocates both special duties to nationals and general duties to others. He breaks down our duties regarding others' human rights into four component duties: (1) refraining from infringing rights; (2) securing rights of those we are responsible to protect; (3) preventing violations by others; and (4) securing rights of others when those responsible for securing them do not do so.[65] This maps in part onto the distinction in human rights law among the duty to respect (Miller's first duty), the duty to protect (Miller's third duty), and the duty to fulfil (Miller's second duty).[66] Miller then argues that the scope of duties to those abroad vs. co-nationals should vary both in terms of the importance of the duty and the primary bearer of the duty. He ultimately concludes that we, and presumably our state, have equal duties to our own and to foreigners—that is, general duties—when it comes to duty (1) and stronger duties to co-nationals regarding duties (3) and (4), with the ramifications for duty (2) depending upon whether indeed we have responsibilities to those abroad for certain rights as opposed to others.

Miller's argument for general duties for category 1 but not the other categories is, like Goodin's, based on the negative/positive duty distinction and thus has similar shortcomings.[67] Yet, like Goodin, Miller's preference for nationals with regard to some duties ((2) and (3) in his scheme) need not apply in some situations when a state acts abroad, for in some of these case, notably occupation, the state does have the responsibility to protect foreigners. Miller, then, helps show how a weak cosmopolitan approach can provide a conceptual framework for determining the extraterritorial scope of human rights. He also directly addresses the considerations in deciding which states should assume responsibilities if more than one have certain duties.[68]

D. Lessons and Linkages

The illustrations above cannot reflect the full arguments of each of the positions, and indeed they are based on presumptive extensions of existing positions, as philoso-

65 Miller, *supra* note 23, at 47.

66 *See* Committee on Economic, Social and Cultural Rights, General Comment 12: The Right to Adequate Food, ¶ 15, U.N. Doc. E/C.12/1999/5 (May 12, 1999).

67 Later, after arguing that basic human rights are grounded in basic human needs, he argues that "[w]hen basic rights are threatened or violated, this triggers a responsibility on the part of outsiders to come to the aid of those whose rights are imperilled," though this blurs the difference among categories 2, 3, and 4. Miller, *supra* note 23, at 197.

68 See especially *id*., ch. 4.

phers have focussed on the second set of duties abroad and not offered a sustained, head-on treatment of extraterritorial duties in the area of human rights as lawyers understand that question (that is, the first category of duties noted above). But they do suggest the range of possible starting points and conclusions if philosophers are asked to weigh in on the question of extraterritorial duties. Because philosophy asks the foundational questions common to all questions of extraterritorial duties, its theories as to whether a state has a duty act abroad in the first place can tell us a great deal about what duties it might have when it acts abroad. Their views will turn on the reasons whether we owe any duties beyond our own borders and why; and the implications of those duties for states operating in an interstate system. Goodin and Miller in particular seem to offer the most to this conversation, although their distinction between positive duties and negative duties is really more of a hunch on their part than a well thought-out argument. Further work on this subject is clearly needed, and that thinking can contribute to our understanding of which sorts of human rights trigger territorial duties; which trigger extraterritorial ones; what those duties are—to respect, protect, or fulfill; and who must bear them in a world where there may be multiple duty-bearers but none willing to carry out the duty.

More generally, the above discussion highlights the need for those in law and philosophy to consider broader linkages and ramifications for their work. Lawyers have addressed the issue of extraterritorial application of human rights from a perspective that misses its key connections with subjects such as the responsibility to protect or humanitarian intervention, the latter of which are relegated to another subject area (notably *jus ad bellum*). Recourse to philosophical concepts of duties makes this linkage apparent. Philosophers, on the other hand, have only considered half of the ramifications of their theorizing about general vs. special duties, leaving out a significant set of problems that arise when a state decides to act abroad even when it does not have a duty to do so. In a word, international law has examined the two sides of the problem without seeing it as one problem, while philosophy identifies a broad problem but has only chosen to focus on one side of it.

V. Conclusion

More than any other method of international law, the policy-oriented school has proved itself open to numerous interdisciplinary insights—without being formally anchored to a coordinate discipline as is the case with law and economics. Yet the New Haven School has always seen the social sciences, with their rich empiricism, as its closest kin. This paper has suggested that an alternative set of disciplines, political and moral philosophy, offer new critical insights for policy-oriented lawyers. Whether in scrutinizing his or her own observational standpoint, understanding the perspectives of others, or prescribing for the future, the policy-oriented international lawyer cannot ignore the fundamental moral questions about interpersonal and interstate duties at the heart of the project of international justice.

The upshot is a need for direct collaboration among legal scholars and philosophers to understand the comparative advantage offered by the others. For the present, the lawyers offer the base of knowledge of the process of international lawmak-

ing, the substance of current norms, and the role of international institutions in formulating and implementing norms. Political scientists contribute a thick description of the international actors as well. The philosophers, however, question some of the basic assumptions of lawyers with analytic rigor. Is there really an international community? Why? What sorts of duties flow from different visions of that community? Why might we want diversity or unity with respect to questions of governance? Lawyers implicitly consider these questions in their attempts to build structures of global order, but as the example of extraterritorial duties demonstrates, the explicit consideration of these issues can greatly contribute to more nuanced and careful policymaking.

At the same time, the philosopher's questions can only be part of the project of constructing a just world order, for philosophers need to gain a far greater awareness of the workings of the international process. This requires a deeper understanding of the norms and institutions of international law. In learning about the extant legal order, philosophers often quick to criticize it may recognize that certain elements are indeed morally justifiable and that proposals for reconstruction need to take account of these possible justifications.[69] For those interested in actually achieving international justice rather than simply elucidating its ideal contours, the result of this collaboration will be to make their work more relevant and convincing to the public and policy audiences who in the end must implement it.

The New Haven School offers particularly fertile scholarship for that collaboration, for its avoidance of dry and decontextualized doctrine in favor of nuanced appraisal will best aid the philosopher seeking to understand the contours of the legal landscape. Its attention to both myth system and operational code, the conditional factors behind existing rules, and the shortcoming of the status quo to address current challenges to public order have much to offer those engaged in ethics. Traditional positivist scholarship has its place as well, but those in ethics engaged in global justice would clearly gain special insights into international law from reading the works of Reisman, Higgins, and others not afraid of context and policy.

The results of such a process of collaboration for international law remain to be seen. It may be that, in the end, lawyers will retreat to the practicalities—financially driven and otherwise—of their profession and conclude that their role is to solve problems quickly and realistically. From such a perspective, even non-ideal theory in philosophy is simply too many steps removed from the rough-and-tumble political process of convincing state and nonstate actors to prescribe or implement a certain vision of the law. But such a rejection of the moral questions is likely to be successful for the lawyer only in the short term. As the New Haven School recognizes, even the most practical solution devised by the lawyer will still need to be sold to a various audiences, domestic and global, and for many of them moral argumentation—even if not at the level of abstraction of the philosopher—still holds great sway. For those targets of projected policies will want to hear not simply that the lawyer's solution

69 For one such attempt, see Steven R. Ratner, *Do International Organizations Play Favourites? An Impartialist Account*, *in* Legitimacy, Justice and Public International Law 123 (Lukas H. Meyer ed., 2009).

works, but that it is right. For the lawyer to have considered those questions at the beginning of his or her task rather than at the end can only help in developing new norms and institutions to address the most pressing of global issues.