THE "LEGALIST PARADIGM" AND THE RESOURCES FOR MORAL CRITIQUE IN INTERNATIONAL SOCIETY

by

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Abstract

This thesis explores the “legalist paradigm,” an important approach to the ethics of international relations, and addresses the question of whether the legalist paradigm has adequate resources for moral critique. Chapter One presents a synopsis of the legalist paradigm, drawing especially on the work of Robert Jackson, Michael Walzer, and Terry Nardin. The central contention of the legalist paradigm is that ethics in international relations should be worked out primarily in terms of the rights and duties of states in international society. Three key points of this approach are identified. First, states relate to each other within the normative order of international society. Second, respect for state sovereignty is connected to respect for human individuals. Third, international society is a “practical association” whose members are united not by common purposes or ideals, but by recognition of a common code of conduct that limits the actions states can take in pursuit of their individually-held purposes.

Chapter Two focusses on an important criticism of this approach to international ethics: that given its commitment to the norms of international society, the legalist paradigm will find it difficult, if not impossible, to be critical of those normative standards themselves. This essay argues, on the contrary, that the legalist paradigm holds considerable resources for moral critique. Drawing on the theories of Michael Walzer and Jürgen Habermas, the possibilities for immanent critique from within the norms of international society are explored. The example of humanitarian intervention and the “responsibility to protect” illustrates how genuine moral transformation can occur through reinterpretation and revision within international society. Finally, even though
the discourse of international society, like all moral discourse, strains toward universally valid norms, it cannot be replaced by the imagined discourse of a universal, moral point of view.
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Introduction

The “legalist paradigm”\(^1\) refers to a way of thinking about the ethics of international relations that takes the rights and duties of states elaborated in international law as its starting point.\(^2\) This paradigm encompasses a wide range of intellectual traditions, but it is united around a core idea: that morality in international relations must be understood in terms of the code of conduct that has developed in the practice of international statecraft. The legalist paradigm can be understood by an analogy to domestic society: states have rights and duties in international society—some of which are codified in law—just as individuals have rights and duties in domestic society. Moral arguments about international relations are best made in the language of the rights and duties held by states in international society.

In Chapter One of this essay, I will present a synopsis of the legalist paradigm, drawing especially on the work of Robert Jackson, Michael Walzer, and Terry Nardin. First, I will explain the idea of international society, that is, of the normative order constructed by states to govern their relations with each other. Second, I will examine the question of the moral standing of states, a fundamental premise of the legalist paradigm. Third, I will explain the idea that international society is a “practical association”\(^3\) whose members are united not by common purposes or ideals, but by recognition of a common code of conduct that limits the actions states can take in pursuit of their individually-held purposes.

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2 A version of this thesis will be submitted for publication.
Chapter Two will focus on an important criticism of this approach to international ethics: that given its commitment to the norms of international society, the legalist paradigm will find it difficult, if not impossible, to be critical of those normative standards themselves. In other words, the legalist paradigm might be a purely conservative ethic. I will argue, on the contrary, that the legalist paradigm holds considerable resources for moral critique. Drawing on the theories of Michael Walzer and Jürgen Habermas, I will explore the possibilities for immanent critique from within the norms of international society. The example of humanitarian intervention and the “responsibility to protect” illustrates how genuine moral transformation can occur through reinterpretation and revision within international society.

Finally, I will consider the suggestion that we should dispense with the norms of international society, and instead evaluate international relations directly from a universal, moral point of view. I will argue (drawing again on Habermas) that while the ideal of universality—of norms that could be justified in an “unlimited communication community”—provides an imperative to work toward the transformation of world politics and the institutionalization of more inclusive moral discourses, for the purposes of making decisions in the present this projected ideal cannot replace the actual and present communication community constituted by the society of states. The norms of international society are an indispensable framework both for guiding state action and for critically transforming those same norms from within.
Chapter I: The legalist paradigm in international ethics

1.1 The idea of international society

The idea that there exists a society of independent states—international society—is central to the legalist paradigm. The legalist paradigm contends that the norms that constitute this society, the standards of conduct accepted by its members, is the primary frame of reference for ethics in international relations. Thus, that there is such a thing as international society—in other words, that there are standards of conduct recognized by states in their relations with each other—is an important claim.

The idea of international society is most closely associated with the English School in International Relations (IR). Led by Martin Wight and Hedley Bull, scholars in this tradition have argued that even though there is no overarching authority governing the relations of states (i.e. international relations are anarchical), these states still exist in a society that is held together by common standards and shared practices. The conventions of diplomacy and customary international law constitute a moral order within which states relate to each other. International relations cannot be conceived as a mere “system,” i.e. as a mechanical, normless interactions of states—states bouncing off each other like billiard balls. Rather, understanding the normative structure of the society they have created is essential to understanding their relations with each other.

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4 I’ll use International Relations (capitalized) or IR to indicate the field of study by that name; “international relations” refers simply to relations between states.
The basic presuppositions of the English School have been paralleled to a large degree by the constructivist approach to IR. Constructivism has arisen primarily in dialogue with, and opposition to, the mainstream approaches in North American IR: neorealism and neoliberalism. Neorealism and neoliberalism, though differing in significant ways from each other, both work from the rationalist assumption that states act primarily in order to maximize their interests, where interests are conceived as fixed and material, i.e. as “the national interest.” In response to this, constructivists have argued that the identities and interests of states are social constructions, and thus cannot be understood in materialist and individualist terms.  

Constructivists have emphasized the importance of the norms that both constitute and regulate the activity of international relations.

Robert Jackson provides a good overview of the norms of international society. He cites the following list of basic procedural norms, specified by the Organization of Security and Cooperation in Europe (OSCE) in the Helsinki Final Act (1975): (1) sovereign equality, respect for the rights inherent in sovereignty; (2) refraining from the threat or use of force; (3) inviolability of frontiers; (4) territorial integrity of states; (5) peaceful settlement of disputes; (6) non-intervention in internal affairs; (7) respect for human rights; (8) equal rights and self-determination of peoples; (9) co-operation among states; (10) fulfillment in good faith of obligations under international law. To these basic norms can be added other accepted norms, including peacekeeping, international aid, environmentalism, and the standards that govern the use of force in war (*jus in bello*).

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as contained in the Geneva convention and other bodies of international law. In addition to these procedural norms, Jackson argues that there are moral norms of prudence in statecraft. It is understood in international society that statespeople have a responsibility to protect and advance the interests of their nations.

There are two important points to make here about the norms of international society. First, to identify these as norms does not mean that they are followed, or that they provide an accurate description of states’ behaviour. These are “norms” in the sense of moral or legal standards of conduct, not in the sense of statistical regularities. These are the standards by which states judge the behaviour of other states. It is in terms of these norms that the dialogue that constitutes a great deal of international politics takes place: the rejection or acceptance of justifications for actions, cooperation and discord, agreement and disagreement. Identifying the norms of international society, then, is not a matter of examining what states do, but of identifying what counts among them as an acceptable reason for what they do. Thus, Mervyn Frost suggests that a settled norm exists “where it is generally recognized that any argument denying the norm (or which appears to override the norm) requires special justification.” As well, efforts to cover up an action can also be evidence of a settled norm, since statespeople have an interest in appearing to act morally, even when their actions are wrong. As Michael Walzer aptly put it, “[soldiers and statesmen] lie in order to justify themselves, and so they describe for

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8 Ibid. For another description of the norms of international society, see Mervyn Frost, Ethics in International Relations: A Constitutive Theory (Cambridge: Cambridge University Press, 1996), 106–12.  
9 Jackson, Global Covenant, 19–22.  
10 Walzer, Just and Unjust Wars, 44; Frost, Ethics in International Relations, 105.  
11 Jackson, Global Covenant, 55, 37.  
12 Frost, Ethics in International Relations, 105. See also Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change” (International Organization 52, no. 4): 892.
us the lineaments of justice. Wherever we find hypocrisy, we also find moral knowledge."\textsuperscript{13}

Second, the norms of international society apply universally to all states, not only within the West where the present international society has its historical origins. This is one of the implications of the decolonization movement of the latter half of the twentieth century: the society of independent states is now a truly global society, wherein all member states possess equally the rights of sovereignty.\textsuperscript{14} Non-Western nations have enthusiastically adopted the foundational norms of international society, especially state sovereignty, self-determination, and non-intervention.\textsuperscript{15}

However, the universality of international society needs to be qualified. Among the norms of international society there is a strict hierarchy, with those norms relating to state sovereignty, territorial integrity, and non-intervention given clear priority over the others, and the true universalism of international society depends upon this hierarchy.\textsuperscript{16} Only the fundamental norms of state sovereignty have the unambiguous support of the whole society of states. Although other norms, such as respect for human rights or environmental protection, are also widely or even universally accepted, they remain subordinate to the norms of state sovereignty.\textsuperscript{17} This reflects the idea that unless states recognize each others' basic right to an independent existence, there can be no international society, and no moral relations between states at all.

\textsuperscript{13} Walzer, \textit{Just and Unjust Wars}, 19.
\textsuperscript{14} Jackson, \textit{Global Covenant}, 37, 126.
\textsuperscript{15} Nardin, \textit{Relations of States}, 321.
\textsuperscript{16} The list of basic norms from the OSCE, quoted above, reflects this hierarchy: the first six relate to state sovereignty.
\textsuperscript{17} Jackson, \textit{Global Covenant}, 17.
1.2 The moral standing of states

One important question for the legalist paradigm is how the rights and duties of states in international society are related to the rights and duties of individuals. Ultimately, individuals, and not states, are the fundamental units of moral concern. It seems then that the moral standing of states—and the moral validity of the rights and obligations of states in international society—stands in need of some justification.

Scholars in the legalist paradigm have taken two different approaches to this problem. The first approach is to demonstrate the connection between individual rights and freedoms and the sovereignty of the state. The rights of sovereign states, above all to territorial integrity and political independence, derive primarily from the value of that state sovereignty to the people who live there. The freedom of their political communities as sovereign states is something that most citizens and subjects in the world value. The enthusiasm with which former colonies have embraced independence is an indication of this value—an indication of the conviction that one’s political community, represented by the state, should stand in a position of (at least) formal equality in its relations with other states. As well, the willingness of people to fight in defense of their state indicates their commitment to it and establishes an obligation to respect state sovereignty (that is, the duty of non-intervention).

The moral standing of states is premised on the presumption, usually justified, that the state protects the political community within it. But this presumption does not

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18 Jackson, Global Covenant, 112; Walzer, Just and Unjust Wars, 53.
19 Walzer, Just and Unjust Wars, xiv.
20 Frost, Ethics in International Relations, 152; Jackson, Global Covenant, 126.
always hold, and for this reason, most scholars in the legalist paradigm recognize that
where states commit, or fail to prevent, violations of the most basic human rights of their
own citizens—by massacre, enslavement, or ethnic cleansing—the rights of state
sovereignty are negated. Thus, the possibility of humanitarian intervention is inherent in
the moral standing of the state. If state sovereignty is grounded upon the presumption that
a state protects the self-determination of a political community within it, intervention is
justified wherever such terrible atrocities occur that “talk of community or self-
determination . . . seems cynical and irrelevant.”

In this way, the legalist paradigm grants rights to states while still recognizing that
it is individuals who are of ultimate moral value. However, it is important to point out
that the rights of states are not simply identical or reducible to the rights of the
individuals within them, a position that would effectively deny that states have any rights
at all. This is implied in the positions taken by some “cosmopolitan” scholars. Charles
Beitz argues that the decision whether to intervene in the affairs of another state rests
ultimately on a calculation of whether the intervention (and subsequent occupation) is
likely to promote or impede the formation of just institutions, where justice is conceived
in terms of Rawlsian hypothetical consent. Similarly, for David Luban, the justice of a
war depends on whether it will defend or subvert “socially basic rights,” which include
subsistence rights to “healthy air and water, and adequate food, shelter, and clothing.”

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22 Walzer, *Just and Unjust Wars*, 90; Terry Nardin, “International Political Theory and the Question of
Justice,” *International Affairs* 82, no. 3): 457–64; Terry Nardin, introduction to *Humanitarian
Jackson is an exception (*Global Covenant*, chaps. 10–11).
1979), 90, 102; Beitz, “Bounded Morality: Justice and the State in World Politics” (*International
Organization* 33, no. 3): 413.
What is common to both these theories is that the state has no rights at all: whether to intervene is purely a matter of calculations done on the individual level.

By contrast, the legalist paradigm argues that although individuals are of ultimate moral concern, states also have rights. This position stems in large part from the recognition that people in different political communities the world over disagree about what precisely is due to individuals. The rights of sovereign states provide a sphere of freedom from foreign coercion in which political communities can work out their own answers to questions of justice.\textsuperscript{26}

1.3 The “authoritative practice” of international society

The second line of argument put forward to justify the rights and duties of states focuses on the nature of moral order in international society. According to this argument, the actions of states ought to be judged according to the standards of conduct that are internal to the practice of international relations. As international society has developed from its origins in early modern Europe, states—or more specifically, the statespeople who conduct foreign policy—have recognized among themselves standards of conduct that govern their relations with each other. It is these recognized standards, including customary international law, diplomatic protocol, etc., that form the “authoritative practice,” the rules, by which the relations of states are properly understood and evaluated.

This conception of the moral structure of international society is developed most clearly in Terry Nardin’s \textit{Law, Morality, and the Relations of States}. Nardin draws a

\textsuperscript{26} Jackson, \textit{Global Covenant}, 408; Nardin, \textit{Law, Morality, and the Relations of States}, 237.
distinction between two kinds of associations: purposive and practical. The members of purposive associations are united in the pursuit of a common goals, ideals, or values. The members of practical associations, on the other hand, are united by their acknowledgement of a common code of conduct—an “authoritative practice”—that governs their actions. These members do not necessarily share common goals or ideals, and thus their association with each other can only be on the basis of a common set of rules that limit the means by which they each pursue their different goals.

International society has both practical and purposive aspects, but Nardin argues that international society is fundamentally a practical association. Cooperative activity in the pursuit of common purposes is a key feature of international relations. Many international organizations can be understood in purposive terms, and the relations of some states, particularly within the regional communities of Europe and North America, are highly shaped by shared purposes. However, international society itself, the medium in which all international relations take place, cannot be understood in instrumental terms. The fundamental rules of international society arise not from the pursuit of common goals, but from the necessity of finding a way for diverse political communities to coexist and relate to each other within a common normative framework—that is, on the basis of commonly-accepted rules. International society is at its most basic, and most important, when it allows states to associate peacefully with each other even in the absence of shared commitments. It is an example of what Robert Jackson calls the

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27 Nardin, Relations of States, chap. 1.
28 Ibid., 226–32.
29 Ibid., 268.
30 Jackson, Global Covenant, 36.
31 Nardin, Relations of States, 305.
“unity in diversity” by which the full heterogeneity of human life on the planet can be accommodated within a single system of human relations.\textsuperscript{32}

It soon becomes clear, however, that the authoritative practice of international society may come into conflict with particular moral ideals held by some of its members. This points towards a perennial, and probably inevitable, tension within practical associations. The authoritative practice that governs such societies is always to some degree a compromise between the conflicting moral ideals held by its various members. It is precisely by accommodating conflicting ideals that an authoritative practice does its work of making association possible between people who disagree with each other. Nonetheless, there is a constant temptation for individuals to impose their ideals and goals on the whole society by arguing that their ideal is right and that the current practice is wrong. In effect, this is to reinterpret the practical association as a purposive association, where the individual’s purpose is imputed to be a common one. If the goal being advanced is indeed shared by all, there is no harm. But if the goal is not shared, if it is a private or particular ideal, then to break the common rules in pursuit of the goal will inevitably have the effect of undermining the association itself. In this way, Nardin draws an important conclusion about what it means to live in a society governed by common rules: for there to be rules at all, they have to be considered authoritative over the privately-held ideals and goals of the society’s members.\textsuperscript{33}

This understanding of international society sheds some light on what is at stake in the question of whether to accept the norms of international society as morally authoritative. To deny that states have any moral standing, and to insist on understanding

\textsuperscript{32} Jackson, \textit{Global Covenant}, 22.
\textsuperscript{33} Nardin, \textit{Relations of States}, 270.
international ethics purely on the rights and freedoms of individuals, is to apply a standard of conduct external to the common rules of international society. Given the shape of these common rules now, an ethical approach that refers exclusively to the rights of individuals can only be a particular and private ideal. Actions guided by this ideal that break the common rules of international society would justifiably be seen as wrong by those states that do not share the ideal.

This is exactly the situation with the agenda of human rights in international politics. Human rights have become accepted norms in international society. They are expressed in law in the Universal Declaration of Human Rights, the Geneva Conventions, and other documents. But in the common rules of international society, they are still subordinated to the more basic norms of state sovereignty. This does not quite tell the whole story; the picture is more complex. There is a growing consensus that humanitarian intervention (that is, the suspension of state sovereignty on the basis of human rights) is justified in international law, provided it meets certain strict criteria: for example, that it have the authority of the UN Security Council or that it be in response to only the most egregious violations, such as genocide or ethnic cleansing, etc. The rationale for this qualification of state sovereignty was explored briefly in the section above. Nevertheless, apart from these very specific and (hopefully) rare exceptions, human rights are subordinated to the norms of state sovereignty.

This subordination reflects the reality of moral agreement and disagreement about human rights internationally. Some human rights are universally recognized. It is quite

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34 Jackson, *Global Covenant*, 17.
reasonable to assume that massacre, genocide, and enslavement are condemned by every society. Immunities from such atrocities are human rights that nobody can claim are just the particular vision of one group. And it is on the basis of these rights that violations of state sovereignty can arguably be justified under international law. But as you move toward other rights that are often called human rights, universal agreement begins to unravel. A human right to free speech or freedom of religion could not find universal agreement. These rights, though they are becoming accepted norms in international society, must remain subordinate to the more foundational norms that are genuinely universal. To violate the common rules of international society for the sake of values held by only a sub-group of that society denies that there can be common rules at all.

As a result, the legalist paradigm rules out “humanitarian intervention” as a way to enforce any human rights beyond the most basic ones.36 We can still believe and argue that individuals everywhere should have these rights. But they cannot be imposed by one state on another using military force. The relations of states (including the question of when and how military force can be used) are properly governed by the code of conduct that has developed in international society.

36 On this matter, the legalist paradigm is less permissive than the “cosmopolitan” theories of Beitz or Luban (Beitz, Political Theory and International Relations, 90, 102; Luban, “Just War and Human Rights,” 175; see also Walzer, “Moral Standing of States,” 210).
Chapter II: The critical resources of the legalist paradigm

Having presented the legalist paradigm, I will now take up an important criticism of this approach to international ethics: that wedded as it is to the norms of international society, the legalist paradigm is fundamentally a conservative ethic. It is committed to the status quo of international society, and thus has no critical resources to question the norms of international society themselves. The price of accepting the current "authoritative practice" of international society as its own standard is that the legalist paradigm can only reaffirm the current moral order.37

This is indeed a significant challenge to the legalist paradigm, and I will devote the remainder of this paper to addressing it. I will argue that contrary to the objection, the legalist paradigm is not as closely tied to the status quo as it seems. In fact, there are significant resources within the norms of international society to engage in a style of "immanent critique" that results in genuine moral change. I will then take up the issue of humanitarian intervention as an example of the possibilities of immanent critique in international society. The emerging norm of the "responsibility to protect" comes from a critique of state sovereignty from within, from a reinterpretation and revision of the meaning and implications of sovereignty. Finally, I will consider the idea that the present discourse of international society should be passed up in favour of the universal discourse of a projected global civil society.

37 For criticism of Walzer's "conventionalism" see Brian Orend, "Considering Globalism, Proposing Pluralism: Michael Walzer on International Justice" (Millennium 29, no. 2).
2.1 The legalist paradigm and immanent critique

What reason is there to think that the legalist paradigm is a purely conservative morality that precludes a critical perspective on the norms of international society? I should recognize at the outset that there is a great deal of initial plausibility to this argument. The central idea of the legalist paradigm is, as I have outlined above, that the primary frame of reference in international ethics should be the normative standards embedded in international society. This does suggest that it might be difficult, if not impossible, to be critical of those normative standards themselves.

The scholars whose theories I have been expounding specifically identify their task as an interpretive one. There is some variation between them in what exactly they are interpreting. Robert Jackson argues that the subject of international ethics is specifically the professional ethic of statespeople: “International ethics and the ethics of statecraft in particular are reserved for judging the relations of independent statespeople in terms of the standards of conduct they acknowledge for dealing with each other.”\(^{38}\) Mervyn Frost gives an account of the “settled norms of international relations” within “the modern state domain of discourse.”\(^{39}\) Nardin is more specifically focused on interpreting customary international law, though he also considers moral traditions in international relations.\(^{40}\) Walzer perhaps has the most expansive view of his subject matter: in Just and Unjust Wars he seeks to interpret the moral convictions of men and women everywhere, the “opinions of mankind.”\(^{41}\) But what is important is that in each

\(^{38}\) Jackson, Global Covenant, 35.
\(^{39}\) Frost, Ethics in International Relations, 105.
\(^{40}\) Nardin, Relations of States, 306.
\(^{41}\) Walzer, Just and Unjust Wars, 44, 15.
case, the goal of the theorist is to give an account of the moral world *as it is*, as it exists in
the judgments people already make, and not in the judgments we might wish them to
make. As Nardin explains,

To theorize about morality and law, I would argue, is above all to be concerned
with understanding the character and presuppositions of moral and legal conduct
and argument. It is to engage in an activity distinct from the making of moral or
legal judgments. . . . the job of the theorist, qua theorist, is not to prescribe but to
interpret and explain.⁴²

Given this commitment to working within a moral world that many social critics
would argue is itself flawed, it is understandable that the legalist paradigm would strike
many as purely conservative. However, to dismiss it in this way would be a mistake.
Even though it works from within the morality of states—in fact, precisely because it
works from within this morality—the legalist paradigm can account for a very powerful
mode of critique, namely "immanent" or "internal" critique.

This mode of critique begins with the straightforward but effective activity of
calling people to live up to their own moral pronouncements. "The exposure of
hypocrisy," suggests Walzer, "is certainly the most ordinary, and it may also be the most
important form of moral criticism."⁴³ Exposing hypocrisy is a powerful form of social
criticism, perhaps, because hypocrisy is both so prevalent and so manifestly unjustifiable.
Leaders who say one thing and do another cannot easily defend themselves in moral
terms. This is because moral words have meanings, and their meanings put limits on the

⁴² Nardin, *Relations of States*, xi.
⁴³ Walzer, *Just and Unjust Wars*, xxi.
ways they can be used.\textsuperscript{44} For example, when an invasion is justified as “humanitarian intervention,” the invading state is immediately open to a wide range of criticism arising from the meaning of those words.\textsuperscript{45} Was there really massacre, genocide or ethnic cleansing going on? Will the intervention actually stop the atrocities? Was military force used only as a last resort? Did the intervening state have the proper authority to make the decision to invade? Will the invaders leave when stability returns, or is the intervention really an opportunity for imperial expansion?

The critical activity of holding statespeople to account on their own moral language plays a key role in the spread of human rights norms in international society. Risse and Sikkink have traced the paths by which repressive regimes can be socialized into respect for human rights.\textsuperscript{46} These governments might start “talking the talk” of human rights for instrumental reasons, to improve their relations within the international community. But when they begin to use the language of human rights, even rhetorically, they “entangle themselves in a moral discourse which they cannot escape in the long run.”\textsuperscript{47}

This sort of criticism works well to advance causes, such as human rights, that are already part of widely used moral language. But of course there are also cases where not only the actions but also the rhetoric of states is unjust. If immanent criticism can only call actors to account to moral principles or rules that are already established, it will be of little help when those rules and principles are themselves in need of change.

\textsuperscript{44} Walzer, \textit{Just and Unjust Wars}, 12; “The Triumph of Just War Theory (And the Dangers of Success)” (\textit{Social Research} 69, no. 4): 929.
\textsuperscript{47} Ibid., 16.
However, I think this slightly mischaracterizes the activity of immanent criticism, and so underestimates its scope. Strictly speaking, the moral world within which the “immanent critic” works is not composed of rules and principles, but of social meanings and practices. According to Nardin, morality consists of an authoritative practice; morality is moral conduct. Rules and principles play an important role in moral conduct: they are the means by which we formulate the practice in language, so that we can interpret it and argue about it in common. But rules and principles are “an abstraction from, not the essence of, moral conduct.”48 Any particular codification of the practice in some system of rules or principles never captures the practice fully. The practice always has other latent possibilities, other ways it could be codified, and other answers it could give to a present practical problem.

Similarly, Walzer suggests that the essence of morality is the “social meanings” of moral language; “justice is relative to social meanings.”49 But social meanings in this sense are not the type of meanings that can be fully captured in a stipulative definition. The “facts” of the moral world, in other words, must always be interpreted: they have “to be ‘read,’ rendered, construed, glossed, elucidated, and not merely described.”50 And there is always more than one way to interpret them. Whether morality is understood as an “authoritative practice,” “moral conduct,” or “social meanings,” what is essential is that the moral world speaks with more than one voice. Thus, social critics who work

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within a moral practice are not confined to reaffirming the status quo. Rather, moral
interpretation "will sometimes confirm and sometimes challenge received opinion."51

Recognizing the polyvocality of a moral practice helps to resolve a seeming
contradiction within the interpretive project. The paradox lies in two different and
seemingly contradictory uses of the word "moral." In one sense, a "moral" practice is a
practice concerned with right conduct. Here "moral" is used in a neutral sense. And this
appears to be the primary mode of inquiry in the legalist paradigm. The legalist paradigm
seeks to understand the accepted moral practice in international society. But "moral" also
has a critical meaning: a moral practice is one that is substantively right or just. And
though the scholars of the legalist paradigm claim to reject "prescription" (at least Nardin
and Jackson talk this way: Walzer is less uncomfortable with it), they clearly do make
substantive arguments about right and wrong in world politics. Indeed, any satisfying
account of morality in international relations should allow us to make such judgments.

Yet there seems to be a contradiction: if what is morally just is the authoritative
practice of states (as the legalist paradigm asserts), how can this practice at the same time
be criticized as "immoral" (in the second sense)? The apparent contradiction is resolved,
however, in the recognition that the object of moral criticism is not strictly speaking a
moral practice, but rather a particular action or principle within that practice. A moral
practice is wider than any particular action or principle; a "moral practice" refers to the
entire way of life, the universe of meaning, within which the particular action or principle
is intelligible. It is what Walzer refers to as "the moral world."52 Whatever action or
principle is criticized as false, wrong, or immoral, it is already only one voice among the

51 Ibid., 30.
52 Walzer, Just and Unjust Wars, xix.
many possibilities latent in the moral practice as a whole. Thus, the legalist paradigm, while restricting itself to the interpretation of a moral practice as it is, can still be critical of any particular principle or doctrine within that practice, because there are always other voices or principles available from which criticism can be made. Specific norms, rules, or principles within this moral practice can and do shift, and the internal critic can take sides in the process, arguing that old rules, norms, or principles need to be revised.

Moreover, something can be said about the direction in which norms are likely to shift in the process of reinterpretation and internal critique. To this point, I have been arguing only that internal critique is possible, that the multiple possibilities that are always latent in a moral practice allow the critic to either reaffirm or criticize received opinion. But there are good reasons to suppose that the result of internal critique and argument within a moral practice will be a shift toward more progressive, universal norms.

This is one of the implications of Jürgen Habermas’s theory of communicative action. In the terms of Habermas’s theory, valid moral norms are ones “to which all possibly affected persons could agree as participants in rational discourses.”53 “Rational discourse” is conceived as discourse oriented toward mutual understanding, in which only the “unconstrained, unifying, consensus-bringing force of argumentative speech” is employed, and all forms of coercion and deception are excluded.54 Valid moral norms,

then, will be norms which "claim to express ... an interest common to all those affected and thus able to deserve general recognition."\footnote{Ibid., 19.}

Habermas posits his theory not as a purely prescriptive theory, that is, as a theory that prescribes which norms we \textit{should} consider valid. Rather, it is a theory about how language actually operates, about the conceptual presuppositions of communication itself: "In everyday life, however, no one would enter into moral argumentation if he did not start from the strong presupposition that a grounded consensus could in principle be achieved among those involved."\footnote{Ibid.} The expectation that a valid claim will be agreed to by all is part of the structure of language.

Of course, actual moral debate will not necessarily meet these standards of "rational discourse" or "ideal speech."\footnote{Jürgen Habermas, \textit{Justification and Application}, trans. Ciaran Cronin (Cambridge: MIT Press, 1993), 56. See also Thomas Risse, "Let's Argue!": Communicative Action in World Politics" \textit{(International Organization} 54, no. 1), 17.} Frequently, deception or coercion of various kinds will distort the conversation.\footnote{Habermas, \textit{Theory of Communicative Action}, vol. 1, 332.} Actual moral arguments are often strategic rather than communicative—that is, they are oriented toward having an effect \textit{on} the other person rather than reaching an understanding \textit{with} her.\footnote{Habermas, \textit{The Theory of Communicative Action}, vol. 2, trans. Thomas McCarthy (Boston: Beacon Press, 1987), 74.} Thus, the theory of communicative action does not imply that the better argument will win in any particular moral debate. However, Habermas does argue that in the long run, the internal structure of language will have an effect.\footnote{Ibid., 86–87.} Especially in modern societies where the reproduction of social norms relies less on religious belief and more on communication and consensus, there will be a continual, if gentle, pressure toward norms that express the common
interests of everyone involved. “Once a community of believers has been secularized into a community of cooperation, only a universalistic morality can retain its obligatory character.”

This description is matched closely by Walzer’s account of the process of internal critique. Walzer cites the argument first advanced by Marx and Engels: “For each new class which puts itself in the place of the one ruling before it, is compelled, merely in order to carry through its aim, to represent its interest as the common interest of all the members of society, put in an ideal form; it will give its ideas the form of universality.” For an ideology to be convincing, it has to claim to embody the common interests of everyone. In Walzer’s words, “ideology strains toward universality as a condition of its success.”

To summarize, immanent critique can be understood as a model of how normative change occurs in a moral practice. What emerges is something like a two-step process: elites are drawn into justifying their actions in increasingly universalist terms, and they are then held to account in those terms. The first step can be understood in terms of Habermas’s theory of communication: successful validity claims will tend to be ones that could be agreed to by all affected. The second step takes the form of exposing hypocrisy, and holding actors to the moral commitments they have already made. The whole process can be comprehended as a process of interpretation and revision within the framework of a moral practice.

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61 Ibid., 90.
63 Walzer, Interpretation and Social Criticism, 41.
2.2 Immanent critique in international society: the example of humanitarian intervention

This two-step process of immanent critique aptly describes how effective social criticism takes place within the normative framework of international society. To illustrate this, I will take up the issue of humanitarian intervention as an example. Humanitarian intervention is the topic of much controversy, in part because it appears to challenge the foundational norms of international society: state sovereignty and non-intervention. However, there is a strong argument to be made that the possibility of humanitarian intervention is in fact implied in the idea of state sovereignty. (I outlined this argument briefly in my previous presentation of the legalist paradigm.) This is the idea that state sovereignty itself is dependent on protecting one’s own citizens from the worst abuses: that sovereignty implies a “responsibility to protect.” It is under the rubric of “the responsibility to protect” that a norm of humanitarian intervention has made the most headway in international society. For the sake of my argument, what is most significant about this emerging norm is that it is framed in terms of the normative language of international society; it is criticism from within. In large part, this is exactly why it is an effective argument. The moral debate around humanitarian intervention is an example of the resources for effective criticism on which the legalist paradigm can draw.

In elaborating this example, I will focus on the first step in the process of immanent critique described above, namely, the shift toward increasingly universal

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64 The “responsibility to protect” (or “R2P”) was the theme of the 2001 Report of the International Convention on Intervention and State Sovereignty. On the current progress of this norm see Maria Banda, The Responsibility to Protect: Moving the Agenda Forward (Ottawa: United Nations Association in Canada, 2007).
norms in the language of justification used by state leaders. The second part of this process—holding leaders to account in terms of the moral norms they have already acknowledged—is undeniably a key activity of social criticism. I referred above to constructivist research that indicates the important role of exposing hypocrisy in the spread of human rights practices globally. However, for the purposes of understanding the emergence of a new norm (as opposed to its implementation or consolidation) I will focus on the first part of the process.

The idea of immanent critique, then, points toward the polyvocality of a practice and the ever-present possibility of its re-interpretation. Furthermore, as Habermas and Walzer point out, there is a tendency toward the use of increasingly universal moral language, that is, in terms that could be justified to everyone affected. In this way, the current language of justification contains the possibility of its own critique, when those who are excluded in the present social order (or those who argue on their behalf) use this universalist language to criticize the old practice. The work of the apologists of the present order “gives hostages to future social critics.”

With regard to humanitarian intervention, the status quo is to understand non-intervention as the strong or even absolute right of a sovereign state. The norms of state sovereignty and non-intervention are justified on many grounds. The first and perhaps most important reason for non-intervention is that it limits the occasions of war. Although war within states has eclipsed interstate war in destructiveness, the limiting of interstate war remains a present and pressing concern. The First and Second World Wars have exerted a lasting influence on the norm of non-intervention. Second, state sovereignty and non-intervention can be seen as necessary in order for international society to exist as a

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65 Walzer, *Interpretation and Social Criticism*, 41.
society of formal equals. Were powerful states free to intervene militarily in the affairs of weaker states, the relations of those states would have to be understood in imperial terms. This was, of course, the case prior to decolonization. But since the decolonization movement—which abolished the formal hierarchies of colonialism—the fundamental equality of ‘peoples’ has been incorporated as part of the justification of state sovereignty. Finally, state sovereignty and non-intervention are justified as protecting the self-determination of political communities. Like equality, the norm of self-determination has become especially strong in the aftermath of the anti-colonial movement. The legitimacy of any sort of colonial power that governs subordinated peoples ostensibly for their own good has been repudiated. The 1960 UN Declaration on the Granting of Independence to Colonial Countries and Peoples affirmed that “all peoples have the right to self-determination” and that “inadequacy of political, economic, social, or educational preparedness should never serve as a pretext for delaying independence.”

But in each of these justifications of state sovereignty, the state itself is not the ultimate value: people or ‘a people’ is. As to the first, the founding mandate of the UN Charter—“to save succeeding generations from the scourge of war”—points in this direction: the deepest evil of war is the horror it inflicts on human individuals, not on the states or regimes they have erected. Similarly with the second two justifications: it is not really the equality of states or the self-determination of states that gives these arguments their moral force. It is the equality and self-determination of peoples or political

67 Ibid., 531.
68 Jackson, Global Covenant, 412.
69 Quoted in Jackson, “Quasi-states,” 531.
70 The Charter of the United Nations, “Preamble.”
communities that matters. The moral wrong of colonialism lies not so much in the assertion that there are superior and inferior states, but rather that there are superior and inferior peoples: peoples who, falling short of the standard of “civilization,” cannot yet be trusted with their own political futures. The discursive success of these justifications for state sovereignty draws in large part from the universality of this language, the way they gesture toward the inclusive recognition of all individuals. ‘Peoples’, and not states or regimes, are all of us.

In speaking the language of ‘peoples’—to save them from the scourge of war, to uphold their equal moral worth and their right to self-determination—the defenders of absolute state sovereignty have provided a critical principle that can be turned back upon states that manifestly attack or destroy the very ‘peoples’ from whom their sovereign rights come. Defending absolute state sovereignty in such a situation becomes very difficult, because the moral groundings of sovereignty have been nullified. Where a state massacres or deports en masse its own citizens (or is unable to protect their citizens from such abuses) any talk of the state protecting a people, its equality, or its self-determination seems, in Walzer’s phrase, “cynical or irrelevant.”71 States that have earned recognition as free and equal peoples now find themselves bound by the limitations of a state’s relationship to the people it protects. Thus, the concept of a people, which in most cases is a justification of state sovereignty, also functions as a critical principle.

This is the logic of the “responsibility to protect.” The principle of a “responsibility to protect” is an attempt to address humanitarian crises—and the possibility of intervening to stop them—from within the language of state sovereignty. It

71 Walzer, Just and Unjust Wars, 90.
is a piece of immanent criticism. And I would argue that “R2P” is gaining traction in international society in large part because it is internal to the normative framework of the society of states. State sovereignty is the keystone of the justificatory language of international society. In international fora such as the UN General Assembly or the UN Security Council it is reasonable to expect that any successful case for humanitarian intervention must be made with respect to, and certainly not in defiance of, state sovereignty.

2.3 Straining toward universality

In the preceding pages, I have attempted to explore and illustrate the critical resources of the legalist paradigm, that is, the possibilities of critique from within the society of states. The argument for humanitarian intervention from a “responsibility to protect” is a telling illustration of the critical possibilities within the states system, since this argument ostensibly challenges the very foundation of international society: state sovereignty.

However, there remains an unacknowledged tension within the picture of immanent critique as I have presented it. The tension lies in the implications of universality. Immanent criticism is inherently related to the idea of universality, to the idea of principles that could be justified to everyone and do not merely express the narrow views and interests of a privileged group. As we have seen, Walzer invokes the idea of universality when he suggests that “ideology strains toward universality as a
condition of its success.” The theme of universality is even clearer in Habermas’s theory. Even though moral arguments are always situated within a particular community, they are inherently oriented toward an “unlimited communication community.” Making a validity claim presupposes that the claim could be justified universally. But if morally right claims are universal, what reason is there to confine ourselves to the normative framework of international society? Why not conduct moral argument directly from a universal point of view, in terms of “those action norms to which all possibly affected persons could agree as participants in rational discourses” (Habermas’s discourse principle)?

The answer to this question is that we can’t. Strictly speaking, these “rational discourses” are not available to us. In any actual conversation, the presuppositions of rational discourse are, at least to some degree, “counterfactual.” Of course, the fact that no actual conversation fulfills the idealized presupposition of rational discourse does not stop individuals from entering into such discourses imaginatively, and constructing an argument about what everyone would agree to if only the presuppositions were true. This moves the discussion onto the ground of hypothetical consent—a venerable mode of argument reaching back (at least) to Kant, carried forward by Rawls and, in the realm of international political theory, by Charles Beitz.

However, as Habermas makes clear, this type of moral argument is limited. The problem is that the individual exercise of reason in an imagined moral discourse will

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72 Walzer, *Interpretation and Social Criticism*, 41.
73 Habermas, *Between Facts and Norms*, 15.
74 Ibid., 107.
75 Ibid., 16, 19.
eventually (or in a pluralistic society, immediately) come up against the actual will of real individuals who might not agree.

Ego can even try to imagine himself in the course of a moral argument in the circle of those involved; but he cannot predict its results with any certainty. Thus the projection of an ideal communication community serves as a guiding thread for setting up discourses that have to be carried through in fact and cannot be replaced by monological mock dialogue.77

Moral argument from an individual point of view—even if the individual is imagining an ideal discourse or original position in which others take part—thus reaches its limit in the “reality of the alien will.”78 In the face of reasonable moral disagreement, it is necessary to move from a moral theory of individual will formation to a legal or constitutional theory of collective will formation: that is, to “set up discourses that have to be carried through in fact.”79

Understood in this way, morality cannot be made to do the work of law: it cannot furnish us with a code of conduct to regulate our life in common with others. Morality on this view is highly abstract: “valid norms owe their abstract universality to the fact that they withstand the universalization test only in a decontextualized form.”80 The application of moral norms to specific situations inevitably requires other considerations, including the ethical and pragmatic concerns of the particular political community with

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78 Habermas, Justification and Application, 16.
79 In Between Facts and Norms, this is expressed in Habermas’s transition from the moral discourse principle to the legal-political democracy principle (107–8).
its particular purposes. Moreover, the abstraction of the moral point of view increases as a society becomes more diverse. The universality of moral discourse implies that it must remain impartial between competing forms of ethical life; and therefore as those forms of life diverge, moral norms must become increasingly abstract in order to continue to be acceptable to everyone. In this way, “the sphere of questions that can be answered rationally from the moral point of view shrinks in the course of the development toward multiculturalism within particular societies and toward a world society at the international level.”

Given the necessary abstractness of moral norms in a diverse society, an appeal to a purely moral form of argument cannot take the place of a contextualized code of conduct worked out through the actual deliberations of the members of a society.

The universal morality implied in discourse ethics, therefore, should not be thought of as a substitute for international law. Rather, it is an ideal inherent within the current discourse of international society (as it is in all discourse) that should guide our efforts to transform the practice of international society for the better. The discourse principle issues an imperative to institute forms of deliberation that approximate rational discourse as closely as possible, and to have the results of those deliberations, the action norms that are validated therein, govern as far as possible our ways of life. This is a

81 Habermas, *Between Facts and Norms*, 108. Note that Habermas maintains the distinction between “ethics,” which has to do with the particular self-understanding and telos of a person or community, and “morality,” which abstracts from particular ideals in order to impartially judge between them. Throughout this essay, I have used “ethics” and “morality” interchangeably, but in the present section I will maintain Habermas’s usage.

82 Habermas, *Justification and Application*, 90. Thus, Habermas can be seen as endorsing a ‘thin’ moral universalism (for debate see Michael Walzer, *Thick and Thin: Moral Argument and Home and Abroad* [Notre Dame: University of Notre Dame Press, 1994], 11–15; Apel, “Globalization,” 149–50). Habermas’s reasoning here is also similar to Rawls’s argument for an international “original position” that, unlike the domestic original position, does not assume a liberal-egalitarian political culture (John Rawls, “The Law of Peoples” [*Critical Inquiry* 20, no. 1]: 36–68).
project of institutional reform, and it is an immensely important project. In the realm of international affairs, it has spurred attempts to understand how global governance could be democratized, how a global public (or more than one) that approximates the conditions of rational discourse might emerge, and how the binding power of these discourses could be brought to bear on the most powerful actors in world politics. As well, many of these theorists, inspired in part by the development of the European Union, have argued that international law should increasingly take on the characteristics of domestic constitutional law, in which individual rights and freedoms are more prominent.

Nonetheless, it is important to recognize that the question of what world politics should become is not the same as the question of what we should do now. The two questions are related: at the very least, our goals for the transformation of world politics (if genuinely held) require that we act now to bring these about. But our response to other practical questions forced upon us—for example, How should our state respond to this present humanitarian crisis?—cannot be wholly determined by a vision of what world politics should become. To try to make the hoped-for discourses of the future answer the present question of what to do now is to repeat the mistake Habermas warns of. The discourses of the future, of the inclusive global public that may one day emerge, can at this point only be imagined, and until they are conducted in fact they remain

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"monological mock dialogue." Thus, current state practice must be guided by the actual and present moral discourse of international society, even as we work towards the transformation of this society from within.
Conclusion

The centre of the legalist paradigm is the affirmation that international society is the community of discourse, the moral world, within which state practice can be understood and evaluated. The scholars of the legalist paradigm are interested in the real moral world of international politics, in the considerations that are decisive in the minds of world leaders, and the standards by which statespeople judge their own conduct and the conduct of others. By speaking the language of international society, the legalist paradigm can illuminate the practice of international relations from within. But as Walzer, Nardin, and Jackson have argued, the moral world of international society is also connected with the wider moral world inhabited by citizens as well as statespeople. The fundamental norms of international society accord with many strong moral intuitions: that political communities and the states that represent them internationally should stand as formal equals with other peoples around the world; that a political community should not be subjected to coercion or domination by foreigners, even when it is allegedly for its own good; that a state should protect the people within it (and thus, arguably, that the state loses its rights when it does not).

Furthermore, the moral world of international society is rich and varied, not static or monolithic. Like all human practices, the authoritative practice of international society contains many voices, many ways in which it can be interpreted, and many answers it could give to present practical problems. Even the fundamental norm of state sovereignty is open to critical reinterpretation and revision—that is, to immanent criticism—as the emergence of “the responsibility to protect” demonstrates.
Finally, the moral discourse of international society, like all moral discourse, is inherently oriented toward universality, toward norms that could be justified to everyone, not only to a narrow and privileged group. But it is important to notice that the universality implied here, the moral point of view contained in the discourse principle, cannot guide state action in itself. Universally valid norms are highly abstract, and need to be filled in with actual discourses in a concrete political community. The legalist paradigm contends that international society—comprised of the statespeople who conduct international relations and the citizens who argue about them—is this community. The ideal of universality, of inclusive moral principles that could be justified to everyone, pushes for the transformation of international society from within. But neither an imagined discourse from the moral point of view nor the hoped-for discourses of the emerging global public (which must, for the time being, also be imagined) can replace the actual moral discourse that statespeople and citizens have worked out to govern relations in the society of states.
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