

# ONE, TWO, THREE, MANY LEGAL ORDERS: LEGAL PLURALISM AND THE COSMOPOLITAN DREAM

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Over the last few years, innumerable scholars have turned their attention to the fragmentation, disaggregation, and multiplicity of the international legal regime. With so many diverse perspectives on the puzzle, the opportunity, the problem, of legal pluralism in international society, I would be crazy to try to pull it all together. In my view, we are far better off leaving the issue lying about in fragments.

I have three points. First, legal pluralism—whether encountered formally or sociologically—can be good for your professional moral health, opening the door to the experience of professional power. Second, in a world governed by experts, it is the pluralism of *professional perspective* that we least understand, and that may be the most significant. By mapping the diversity of *professional sensibilities*, we can put aside questions about whether “the legal order” is or should be or might be coherently unified, to focus on the projects of identity, power, and ethics pursued by legal professionals. In doing so, I want us to replace worry about legal pluralism with worry about something else—the dark sides, blind spots, and biases of the fragments. And of efforts to corral the ponies back to the herd.

Third, a where-do-we-go-from-here point. My suggestion: we should take a break from the project of elaborating, celebrating, and adumbrating a normative humanist universalism. I will develop this proposal—that the cosmopolitan dream of the international legal community might take a different and plural form—with reference to the next UN Secretary General: what, concretely, should she do in a world of normative fragmentation?

## I.

### LEGAL PLURALISM: A LOOK ON THE BRIGHT SIDE

Legal pluralism is not a fact about the world. It is a professional experience: the experience that things don't add up, that coherence fails, that incommensurability must be acknowledged. One of the most fascinating aspects of recent literature has been the proliferation of typologies of fragmentation. At the risk of typologizing the typologies, let me offer three modes of *experiencing legal pluralism*: doctrinal, sociological, and perspectival. The first two are familiar,

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and little more need be said. But of these, the greatest and the least understood remains the last: the pluralism of professional perspective.

But let me begin at the beginning. The professional experience of legal pluralism has two dimensions. First, encounter—encountering the other. Second, loss of confidence, destabilization. In the presence of legal pluralism, one is defaced of professional knowledge, certainty. Perhaps, one must acknowledge, the legal situation is, in fact, some *other way*. Let us take doctrinal pluralism—the current preoccupation, as I understand it, of the International Law Commission. We can experience doctrinal pluralism whenever there are conflicts, gaps, or ambiguities in the law *and* when it suddenly appears to us that they *may not be reconciled*. Karl Llewellyn put the point clearly more than a half century ago: “What—more than one law . . . in a single jurisdiction, according to the whim or practice of an official, or according to the funds or temperament or political complexion of the layman affected? Just that.”<sup>1</sup>

In the last few years, the international legal profession has focused on situations in which more than one norm might, in purely *formal* terms, come to occupy the same space. For example, two courts may have pronounced differently, where no court has jurisdiction to decide which is right. Two legal orders—public international law and some more specialized functional or regional regime—might overlap with no one authorized to sort out which prevails. And so forth.

But legal pluralism is not only a formal problem, accessible when we try, unsuccessfully, to say what the law is by deduction from valid sources, or when we try to enunciate the doctrinal fabric as a unified and coherent tapestry. The experience of legal pluralism also arises when we approach the legal order sociologically—when we find what the law *is* by observing what the law *does*. When we approach the international legal order in this spirit—one I associate in my own national tradition with Oliver Wendell Holmes—we are more interested in legal effects than legal validity, more concerned with remedies than rights. We care more for a norm’s persuasiveness than for its pedigree.

This road also leads us to normative pluralism. International law is applied differently in different places. It is more dense here than there. This is the world in which one’s chance of getting nabbed for committing a “universal crime” varies with the inverse square of the distance from London or Brussels. Or in which the extraterritorial *impact* of California automobile emissions standards wildly outstrips the state’s formal extraterritorial jurisdiction. Or in which ISO 14000 environmental standards<sup>2</sup> are forced through the supply chain by private ordering, whether or not they correspond to national regulations.

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1. Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 455–56 (1930).

2. These environmental management standards are promulgated by the International Organization for Standardization. See ISO 9000 and ISO 14000—in brief, <http://www.iso.org/iso/en/iso9000-14000/understand/inbrief.html> (last visited Apr. 30, 2007).

It is in this sociological world that Gunther Teubner discovers the quasi-autonomy of various functional and sectoral regimes, in which it makes more sense to map a global regime for “automobiles” or “pharmaceuticals” than it does to draw neat boundaries between national and international, public and private legal orders.<sup>3</sup>

Legal sociology has always been a double-edged sword. Finally, it promises, we could *get it right*: say what the law really is, as applied, without the deductive errors and odd fantasies that arise when we try to link everything in long formal chains to first principles or valid sources. But sociology also launches a critique of the very notion that we might say what the law *is*, before the law has acted. All we have in advance are “predictions” of what legal actors will do; the norm reveals itself only retrospectively. To invoke the law is to wager on the reaction of others to one’s assertion. When you look back, of course, the law might very well turn out to have been quite plural, with similar cases handled differently, or cases not handled at all, or injury transformed into privilege.

Well, whether we think about it sociologically or formally, pluralism makes it harder to answer the question: how are we governed? The idea that there is national law and international law, public law and private law, and that the legal order is a tidy sum of the four, is no longer plausible. It doesn’t add up. We need a better map. But when we set about to map a plural world, we rarely ask “how are we governed” in a disinterested, scientifically dispassionate way. We have an interest. We *want* it to be governed. We want it to be governed *sensibly*. We want the world to be governed in an orderly, coherent, aesthetically—and ethically—pleasing way. Often, we want it to be governed by international law, for in our profession we tend to think that international law is a good thing, and there should be more of it, forgetting all the dastardly deeds done in its name, or shielded by its norms. It is the rare international law tract—or talk—that is not also a polemic for more, for better, international law.

But legal pluralism sticks an awkward wrench in this wish. In a sense, of course, legal pluralism could go on for some time without anyone noticing. Cases get resolved, wars get fought, goods and services get traded. What is the problem? We *notice* legal pluralism precisely when we are trying to say what the law is and someone brings to our attention that the law *is*, or *might well be*, something else. There we are, minding our own business, working out what the law means, and along comes someone else with an equally plausible professional argument that yields a different normative answer. Or when we have written a perfectly splendid description of how it all adds up, how the normative order can be explained and justified and understood to make sense, and along comes someone who points out something that just doesn’t fit on our map.

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3. See, e.g., Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT’L L. 999 (2004).

We know it is legal pluralism when we *have to admit* under the canons of professional interpretation that either of us *could* be right—that there is, in fact, a conflict, a gap, or an ambiguity in the legal fabric that cannot be definitively closed by the routines of legal argument. It is legal pluralism when we have to put something on the map that doesn't fit.

It is not surprising that legal professionals would recoil from this experience and seek to sort it out somehow. Perhaps there is a higher principle to reconcile the two interpretations; perhaps one law is special, the other general; perhaps the two rules can be interpreted to yield the same result; perhaps there is a normative hierarchy; or perhaps, after all, there might be a procedural solution. Perhaps the International Court of Justice could, at least in theory, or in fantasy, be invoked as the determiner of last resort. Or perhaps we can rely on the states, the politicians, to sort it out. And so on.

The experience of legal pluralism brings us face-to-face with two uncomfortable facts. First, we have discretion, we have choice. In a word, we rule. But second, our rulership is unmoored from anything but a hope that precisely this discretion would not be necessary, that the world would *already have been organized* in a benign cosmopolitan order. Of course, this experience of legal pluralism is no different from what we experience whenever we think we have a good legal argument, and then find ourselves convinced that actually, the other person had the better interpretation.

Now, we all know that in professional life, the experience of actually being persuaded by someone else's argument is rare. People get seduced, feign agreement, or stick to their guns long after everyone else has been convinced they are off base, but being persuaded—that is rare. Still, when it happens, we should celebrate. There is a moment, just before we make the leap, when we lose confidence in our own argument, when what seemed entailed by the doctrine or the treaty or the case suddenly no longer seems so clear. There is a moment of vertigo—and of freedom, professional freedom—that comes when we realize it might well be the other way. Legal pluralism is a doorway to that experience.

I want to celebrate this professional experience first, because at that moment we realize we have *discretion*. We are open to persuasion, and we have lost control, precisely because *we do not know* what the law determines. And second, because at that moment we see our Cosmopolitan Dream of a universal rule of law for what it is—a dream. Seeing this, perhaps we can take another look at *what* we are deciding, *what* world, among the many possible ones, we are creating through our rulership. Perhaps we can open the by-products and unanticipated consequences of our unacknowledged rulership to contest.

There is a long tradition in religious and political thought praising this moment—the moment when “unknowing” and “deciding” cross paths, when freedom and moral responsibility join hands. It is, I think, what Carl Schmitt

had in mind by “deciding on the exception,”<sup>4</sup> or what Max Weber spoke of as having a “vocation for politics.”<sup>5</sup> It is what Kierkegaard spoke of as the “man of faith,”<sup>6</sup> or what Sartre described as the exercise of responsible human freedom.<sup>7</sup> It is, I think, what Derrida meant by “deconstruction.”<sup>8</sup> The sudden experience of unknowing, with time marching forward to determination, action, decision—the moment when the deciding self feels itself thrust forward, unmoored, into the experience.

In that moment of vertigo, we lose confidence that our international legal expertise gives us special access to the terms of the Cosmopolitan Dream. The vision, the identity, and the cognitive control that go with our expertise as international lawyers slip away. Also lost is the confidence that when you speak as an international lawyer, whatever your methodological predilections, you are speaking *law*, not politics; the universal, not the particular. That you are enunciating what it means, must mean, actually means, to hold on to the cosmopolitan promise.

Now when I say “Cosmopolitan Dream,” I have in mind a set of widely shared commitments, which have been transformed over the last thirty or forty years into concrete legal regimes and policy initiatives. The commitments are quite familiar:

A commitment to engagement with the world, by our government and, perhaps more importantly, by our citizenry. A commitment to multilateralism and to support for intergovernmental institutions. A broad renunciation of power politics, militarism, and the aspiration to empire. A commitment to moral idealism and to projects of moral uplift, religious conversion, economic development, and democracy. A commitment to attitudes of tolerance, moderation of patriotism, and respect for other cultures and nations—an aspiration that we might *rise above* whatever cultural differences divide our common humanity.

Tensions among these commitments—to engage the world, but in the name of a cosmopolitan tolerance; to reform the world, while renouncing the tools of power politics—have been built into the legal and institutional regimes we have created to give them expression. Indeed, they have been built into international law itself. In short, legal pluralism starts right at the core of our identity: we want it more ways than one. Thrust into action, unmoored from knowing, these conflicts press upon us.

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4. See generally CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (George Schwab trans., Univ. Chi. Press 1996) (1932).

5. See generally Max Weber, *Politics as a Vocation* (1918), reprinted in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77 (H. H. Gerth & C. Wright Mills trans. & eds., 1946).

6. See generally SØREN KIERKEGAARD, *FEAR AND TREMBLING; REPETITION* (Howard V. Hong & Edna H. Hong trans. & eds., Princeton Univ. Press 1985) (1843).

7. See generally Jean-Paul Sartre, *The Humanism of Existentialism* (1946), reprinted in THE PHILOSOPHY OF EXISTENTIALISM 31 (Wade Baskin ed., Citadel Press 1965).

8. See generally JACQUES DERRIDA, *WRITING AND DIFFERENCE* (Alan Bass trans., Univ. of Chi. Press 1978) (1967).

Legal pluralism places us before our ambivalence about rulership. We should not be surprised that ambivalent rulership is so often rulership denied, nor that legal pluralism should be so resolutely resisted, by each of us, each time the experience arises. When we feel the impulse to put Humpty Dumpty back together again, to find the political fulcrum, the substantive principle, that will rekindle confidence in normative universalism, we are feeling the anxiety of rulership, of discretion, of choice, of openness to the other.

I have rarely heard a group of international lawyers discussing a global problem without confidence that the whole thing would be far better handled were there more international law and more international lawyers. But we remain convinced it is not *we* who rule; instead it is them, the politicians, the statesmen, the businessmen, the clients. We prefer to think of ourselves off to one side, speaking truth to power—or hidden in the policy apparatus advising *other people* (the princes)—to humanize *their* work. We commonly chalk any doubts up to the weaknesses of the humanitarian tradition—a meek David facing the Goliath of foreign policy establishments in a harsh world of power politics. We give advice and keep people informed about what the law *is*.

I am afraid this image is an outdated and dangerous professional conceit that has left international lawyers unable to face the dark sides of our own work. Cosmopolitanism is not only a dream, a proposal, a polemic; it is also a mode of governance. Governance cosmopolitanism. So there is a surprising turn in my first point. As it turns out, the comforting stories we tell ourselves about how the norms might all be fit together, how the Cosmopolitan Dream might be resurrected, are not symptoms of a professional will to power in a wicked world, but precisely the opposite. Our struggle against legal pluralism is a professional retreat, a denial of agency, and an apology for rulership denied—a professional will to irresponsible marginality in a world we have come to rule.

So that is my first point: we should embrace rather than deny legal pluralism as professional opportunity.

## II.

### LEGAL PLURALISM: UNCOVERING THE DARK SIDE

My own recent work has focused on the significance of legal expertise for global governance.<sup>9</sup> I begin with the simple sociological observation that the world is governed. The domain outside and between nation-states is neither an anarchic political space, over which we have thrown but a thin web of rules, nor a domain of market freedom immune from regulation. Our international world is the product and preoccupation of an intense and ongoing project of regulation and management. It's not coherent, but it is governed.

When I look around, I am convinced, moreover, that this legal order is not

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9. See, e.g., David Kennedy, Address, *Challenging Expert Rule: The Politics of Global Governance*, 27 SYDNEY L. REV. 5 (2005); DAVID KENNEDY, *OF WAR AND LAW* (2006).

up to the task of governing us wisely, or meeting the most important social, economic, and political challenges we face. Last year, a student raised his hand early in my international law course to ask, "But with so many urgent global problems, don't you think global solutions will emerge?" It broke my heart to have to tell him, but unfortunately, I do not. Our legal tools, our global institutions, and, most importantly, our ideas, are, at the moment, simply not up to the task. And, I'm afraid, all those global problems are not simply happening; they are the product of decisions by people, decisions that are framed, implemented, and defended in legal terms. Law, I'm afraid, is very much part of the problem.

I say all this because our professional discussions of fragmentation are so often carried on in the spirit of marginal "mopping up," as if our global governance regime needed tweaking, reforming, and consolidating, but could otherwise be left to carry on. I want to be clear that I do not come to legal pluralism sanguine about global governance. I worry that there are only the most marginal opportunities for engaged political contestation over the terms by which we are governed. We have a legal order that obsesses about a few hundred detainees held here and there, about the state's authority to torture and humiliate this or that individual person, all the while wrapping the violent deaths of thousands of others in the wartime privilege to kill and the comforting reassurance that all the "collateral damage" was proportional, necessary, and/or reasonable. We have a public legal order that obscures the whole world of private order—legitimizing the governance decision that millions should be denied access to life-saving medicines to protect legal rights.

So I come to consider the rulership of experts with outrage. But the rule of experts does not lend itself to outrage. No one *decides* to make the deaths of so many seem so legitimate. The experts who rule our world affect the wealth, status, and power of other people in thousands of small steps, interpreting and enforcing the background norms and institutions that structure activity in the market, in the state, in the family. Their routine work establishes and refurbishes this complex, transboundary legal and institutional milieu, while giving them the experience at every moment that someone else, somewhere else, had the responsibility. We are ruled by experts who structure their world to deny themselves the experience of discretion and responsibility and the rest of us the opportunity to challenge their action.

Legal pluralism can give us a window onto the blind spots and biases of these experts who rule our world. When all economists think the economy is a Keynesian input-output cycle, they focus on macroeconomic management and worry about getting distribution right. When some economists start thinking an economy is a market of private exchange, they focus instead on "getting prices right" and eliminating what to them seem inefficient "distortions" of a natural order. When we see them *both*, we see the rulership of expertise.

Lawyers also have blind spots and biases. Thinking the law is one thing rather than another can make some problems easy to solve and others impossible

to see, along the line of the old adage that to a man with a hammer, everything looks like a nail. Let us take public international lawyers in the United States: particular, identifiable people, pursuing projects of various kinds by making arguments in a common vocabulary. What is their shared “disciplinary sensibility?” What do they see, what do they worry about, how do they see the world?

How does their sensibility *compare* to that of international lawyers elsewhere? How does it *compare* to the sensibility of American international lawyers at another time? How, moreover, are American international lawyers divided among themselves? Heading down this road takes us to the pluralism of different *perspectives*.

To be an international lawyer in Europe and America is a different job, and all the more so in Cairo or Beijing or Santiago. Sometimes I feel we all read the Lotus Case,<sup>10</sup> but that is about as far as it goes.

I ask my international law class, what was going on in India in 1648, or in Peru, or in China? The lawyers from those countries know, but the Americans and Europeans generally have no idea. In the early nineteenth century, for American international lawyers, the key issue to understand was national independence and sovereignty—how had the Declaration of Independence worked? It would not be surprising to find that for Canadians, the preoccupation was altogether different. Their Vattel<sup>11</sup> was not ours.

To be an academic international lawyer in France today is to have a relationship—at least in fantasy—to the Quai d’Orsay.<sup>12</sup> To be an academic international lawyer in the United States is now (as it has been for a generation) to be unfit for government service. For many in Asia, the Cold War was not at all Cold. For the third world, colonialism was a mixed matter of public and private law, not sorted neatly by decolonization. And so forth—these differences are real.

International lawyers in New Delhi and Washington or Beijing and Paris have different jobs, different professional sensibilities, different relationships to statecraft, and different interpretations of a common professional vocabulary. Even the laws in war look different—and are different in their persuasive effect, in what they legitimate, and in what they undermine—for soldiers and statesmen on opposite sides of today’s asymmetric wars. Today, there is more than one law of armed conflict, and its most basic rules have become sliding scale, varying with the technological sophistication of the military and the perceived legitimacy of the overall struggle.

The effort to articulate universal normative commitments in the decades

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10. Case of the S.S. “Lotus” (Turk. v. Fr.), 1927 P.C.I.J. (ser. A.) No. 10 (Sept. 7).

11. See generally EMMERICH DE VATTTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW, APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS (Charles G. Fenwick trans., Oceana Publ’ns 1964) (1758).

12. Also known as the French Ministry of Foreign Affairs.



since the Second World War has had real advantages, even if norm articulation has often visibly outstripped implementation. The development of a canon of “human rights norms” has given the world’s political elites and citizenry a common language for measuring, denouncing, and defending the legitimacy of political power. Increasingly, however, that effort is reaching a limit. Consolidating the ethical vision of “the international community” has stimulated an equally comprehensive counter-vision: the “West” and the rest, the “center” and the periphery.

And, of course, in every country, *law* itself is something different. What it means to think like a lawyer, and what roles lawyers play in the society, are all different. As a result, international law is not one thing; instead, it is a discipline, a professional network, within which people affected by all those national and more local influences and ideas contest the meaning of their common enterprise.

One of the most puzzling aspects of international law is the intense desire within the profession to deny our common experience of professional pluralism—or to discuss it only over cocktails. As a result, there is no strong science of “comparative international law.” We have intuitions, prejudices, and impressions about one another, but we resist acknowledging, and studying—let alone embracing—our differences. Yet how can we be fit to govern a plural world if we cannot be comfortable with our own differences? Would it not be wiser for us to treat them as opportunities to understand, even model, heterogeneity? And to confront one another’s biases?

Such a conversation, even between American and European international lawyers, would not be an easy one, I am sure. Could we discuss the ethically self-confident passivity of the European international law profession? Or how the European Union has come to set the outer limit for the profession’s geo-strategic imagination on that continent? Our profession is divided across the Atlantic not by differing interpretations of Article 51,<sup>13</sup> nor by different reactions to Iraq or Blair or Bush, nor even by alternate mixtures of formalism and policy science, realism and idealism, positivism and naturalism. We are all eclectics now. We are divided far more profoundly by European blindness to its isolated complacency and hesitance to engage, intervene, act in the world, and American blindness to the wages of engagement wrought with the conventional tools of diplomatic and military power. If only we could change regimes the European way—if only Europe could act, balance, partner in global rulership.

Were we to begin such a conversation, we would surely find these first stabs inadequate. But I am convinced that confronting our professional differences, experiencing perspectival pluralism within the profession, would take us closer to our weak spots and limitations.

The issue is not only one of national difference, of course. In all national

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13. U.N. Charter, art. 51.

traditions of which I am aware, trade lawyers, public lawyers, international private and commercial lawyers, and comparative lawyers have sharply different perspectives. When we public international lawyers look out the window, we see a world of nation-states and worry about war. We remember the great wars of the twentieth century. We were traumatized by the Holocaust, fear totalitarianism, and are averse to ideology. Our common project is governance: how can sovereign states be governed so that war may be avoided? The discipline we feel closest to—and furthest from—is political science.

Trade lawyers, by contrast, look out the window and see a world of buyers and sellers struggling to deal. Their trauma was the Great Depression. They worry that commercial actors will fail to find one another or feel secure enough to trade. Their project is to ensure a global market and free movement of the factors of production. Their disciplinary partner-in-crime is economics. Comparative lawyers look out on a world of different “legal cultures” and different “levels of development.” Their trauma was nationalism, or, more recently, identity politics. Their project is understanding; their work, the attribution of similarities and differences to culture and techne; their disciplinary ally, sociology or anthropology.

Well, all these preoccupations affect what experts in each of these fields feel able or willing to do. The problems they see, and those they don't. The issues they find easy, and those they find troubling. Perspectival pluralism is the loss of professional confidence, and awareness of professional bias, that come with realizing another discipline has an equally well-worked-out idea about itself as the queen of the sciences.

As I see it, defining “international law” as, say, “the rules which bind sovereign states in their relations with one another” is not a description of the world. It is the symptom of a sensibility. International law is a group of *people* pursuing projects in a common professional language. One of their projects is to promote the *idea* that there is “international law” outside their efforts, and that *it* “governs” sovereign states, and that it is, by and large, a good thing—there should be more of it. This idea is simply more visible in the light of disciplinary pluralism.

The following diagram sketches an intellectual history of the public international law field to highlight the ways in which broadly shared disciplinary preoccupations also change over time. In the history of each discipline, ideas come in and out of fashion. You don't have to go interdisciplinary or international to experience the pluralism of disciplinary perspectives. A good map of historical differences and changes in fashion can also unhinge your view of the status of the profession.

FIGURE 1  
INTELLECTUAL HISTORY: PUBLIC INTERNATIONAL LAW

	Trauma	Doctrinal Focus	Preoccupation	Mode of Action	Mode of Organization	Heroic Figure	World Map	Mode of Thought	Inter-disciplinary resource
1900-1950	War, Hague, League failure	Sources treaties/custom	minority rights, colonial management collective security nationalism self- determination	codification	international organization	jurist and international judge	civilization and mandatories progress paternalism	informal/ social reform & positivism	politics
1950-1989	War Cold War, totalitarianism Depression.	Process jurisdiction state responsibility claims Law of the Sea	decolonization development disarmament/ security social welfare expropriation NIEO human rights	administration and policy management conventions and rights	international institutions	manager statesman	East/West and Third World coexistence and cooperation	functional problem solving World Order building	economics and social science
1990-2000	Thatcher/Reagan Neo-liberalism Vietnam American Eerie	Substance environment human rights terrorism international crimes	trade and economic management "globalization" humanitarianism intervention environment	debate and adjudication, principles and standards	national and international NGO's and courts	citizens/NGO advocate and national judge	democratic liberalism and non- democratic non-liberal free trade globalization	pragmatism, legitimacy, humanism ethics	international relations cultural and human sciences

At different moments, international lawyers have seen different things, obsessed about different questions, approached problems with different tools, valorized different heroic figures.

Juxtaposing *different* professional sensibilities makes visible the limits, biases, and blind spots of each. It is not plausible that all the world's problems called out for *codification* in the 1920s, no more than it is plausible that *networks of citizens and national judiciaries* are plausible responses to today's most pressing global problems.

The point is not only that there is something the lawyers of the 1980s might learn from the international law of the 1920s, and vice versa. No doubt an encounter with pluralism may enrich our professional toolkit. But I am more concerned that it sensitizes us to the ways in which our professional work responds more to our peculiar *deformations professionnelles* than to the world's most pressing problems. Codification in the twenties, like transnational networks in the nineties, *did* seem like a useful response to legal pluralism and *did* seem likely to weave the tapestry of legal norms once again whole. The problem was that international lawyers mistook work on the field for work on the problem and substituted tools designed to calm their fears of normative diversity for those that might have addressed the social, economic, moral, and political crises of their time. In each generation, while we knitted, Rome burned.

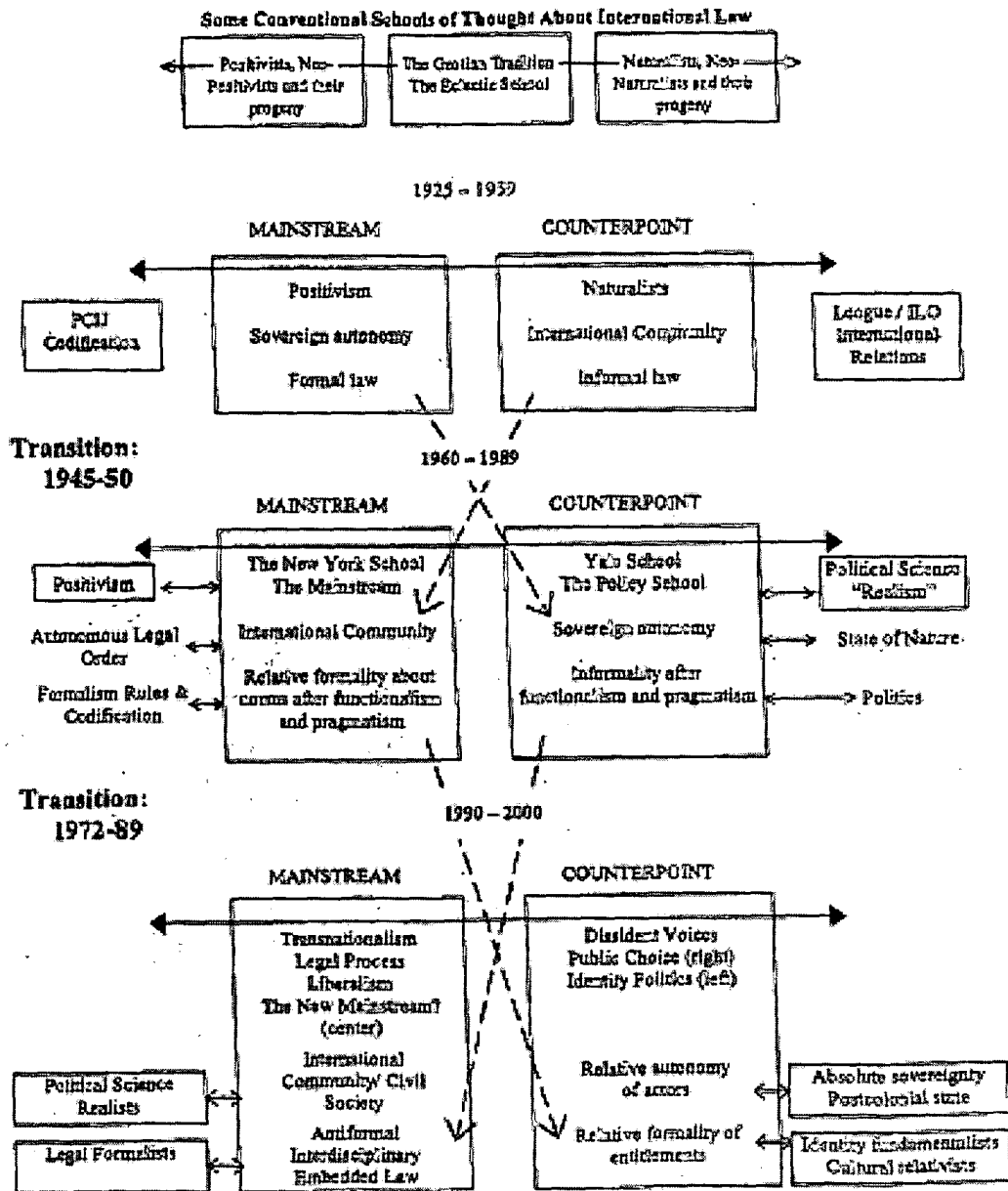
But there is a further point. In each period, in every national tradition, there are "schools of thought," struggling over what Freud once termed the narcissism of minor differences.<sup>14</sup> This is the pluralism we love: to be an international lawyer is not only to know the cases and rules and arguments, but also to have a position among the schools of thought within the field, and an attitude toward them. One can be an enthusiast for one or another, or one can be a more detached "eclectic." It is through examining these differences—the pluralism of method, we might call it—that we can see the projects of identity, power, and ethics that move professionals in the field.

The next diagram offers one view of the "schools of thought" within the American public international legal profession in the twentieth century.

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14. 11 SIGMUND FREUD, *The Taboo of Virginity* (1918), reprinted in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD, at 192, 199 (James Strachey trans. & ed., Hogarth Press 1957) (coining the phrase "narcissism of minor differences" to describe parties' uses of minor differences to justify hostility and conflict toward each other).

FIGURE 2  
SCHOOLS OF THOUGHT: PUBLIC INTERNATIONAL LAW



The point is that the same terms have been rearranged in each generation in slightly different ways: the old distinction between positivism and naturalism morphing into one after another form. Within the profession, these differences, particularly the generational breaks when the terms are rearranged, are deadly serious business. They are freighted with political and ethical significance for those who pursue them.

While seeming to argue about what “international law” *is*, professionals stake out their identity. “It is because I arrange these things in this way, and not that way, that I am an American, and not a Canadian, international lawyer.” “But because I also include this, I am not a political scientist.” And so on. These are debates about the international lawyer’s suitability for rulership—and for government appointment. “You will see that I, unlike those other guys, am not an idealist, or a cynic, or whatever.” And they are debates about moral virtue; this is what the universal ethic demands. “I, unlike those other guys, am virtuous, call us to virtue.” In these debates, it will behoove the players to exaggerate the differences *within* the discipline, for these mark virtue, identity, power. Hence, the “narcissism of small differences.”

Well, now we have a puzzling situation: a profession that abhors the vacuum of legal pluralism in the world while obsessing endlessly about internal professional differences in methodological emphasis. Something has definitely gone wrong. It would take longer than we have here this weekend to figure out just what, or what to do about it. But my sense is that what takes us off the track is precisely our commitment to the dream of a unified, universal, ethical, political, and ultimately legal vocabulary. We should get over it.

### III.

#### TAKING A BREAK FROM THE COSMOPOLITAN DREAM: A NEW PUBLIC DIPLOMATIC ROLE FOR THE UN SECRETARY GENERAL

All of which takes me to my third point: what it would mean to walk away from the cosmopolitan dream. It would undoubtedly mean something different in each nation, each profession, each institution. Let me sketch briefly what it might mean for the next Secretary General of the United Nations to take a break from the cosmopolitan dream.

That the next Secretary General’s main tasks will be institutional management and quiet diplomacy is certain. That she will also seek—or find thrust upon him—a more public role as the moral voice of the “international community” seems unavoidable, and will certainly often be valuable. There is no doubt that the global media will sometimes treat the Secretary General of the United Nations as a kind of secular pope or Hollywood idol. Speaking from this “bully pulpit,” the Secretary General can certainly focus attention on issues, crises, and ethical failures that might otherwise fall off the global agenda. Her geopolitical vision can shape the world’s political architecture, particularly where his vision of multilateralism and the role of the United Nations is clear

and compelling.

Kofi Annan has often played this role with real skill, establishing himself in the eyes of many as the ethical voice for humanitarian and multilateral values on the global stage. Recently, I was at a conference in New York assessing Annan's term to see what can be learned for his successor. The experts convened there agreed that he had been most successful as a "normative entrepreneur," strengthening the sense among global elites that there is an "international community" whose ethical consensus deserves respect, and that the most basic terms of international law provide the common vocabulary for that consensus.

In my view, however, the next Secretary General should be cautious about playing this role. The dangers that come with this terrain are real, and easy to overlook. The nature and context for global governance have changed, reducing the space—and plausibility—for an "international community" to speak with a single ethical voice. The world's most pressing problems are diverse and will yield only to complex, heterogeneous cocktails of policy at national and international levels. They will not yield to universal rules, and still less to ethical nostrums. Moreover, as we have heard this weekend, international law is plural, is made by states, and is adumbrated by professionals. It is not well suited for articulating universal moral hopes. And it could have other, higher uses.

Nor should we be encouraged to pin all our cosmopolitan and multilateral hopes on the United Nations system. The multilateral order is far more plural, heterogeneous, and shifting; the United Nations is one site among many. The Secretary General is not the world's premier diplomat or moral conscience. How can we compare his authority to that of a Bill Gates or Pope Benedict XVI? Even the most successful inter-governmental projects require coordination, communication, and the juxtaposition of diverse multilateralisms. Shifting coalitions of the willing—and the coerced—are our future. The United Nations can be the symbolic point for many things, but natural disasters, transnational pollution, and global problems of health, unemployment, development will yield only to diverse solutions. Even a human rights community that is tightly coordinated and converged on the United Nations will not be nearly as effective as one that speaks in diverse ways to different audiences and experiments with different ideas about what justice might become.

None of this is easily advanced by a Secretary General committed to the priority of his system, the necessity of convergence, or the natural superiority of universal norms. Nor is it advanced by a United Nations unable to see *itself* as plural or heterogeneous, which continues to insist that its role is to homogenize the diverse institutions with which it works into convergence on a single approach or standard.

The next Secretary General could make a far more significant public diplomatic contribution by stepping back from efforts to be the focus of the

global political architecture or the spokesman for universal normative consensus. She should instead be an entrepreneur for new ideas about the range and constellation of policies through which those with public capacity—in diverse configurations at many levels—might address the most pressing of our global problems.

We can all see that the United Nations is not a world government. But it is also not—nor should it try to become—a global religion. Might we also take a break from the cosmopolitan dream that international law is a universal normative order, binding, valid, uniform? The world today is ethically diverse and divided. Perhaps if we are able to embrace the pluralism of our own profession, we will be up to the task of governance.

The ethical challenge for the next period will be to dissolve the hubris of a universal ethical expression, communicate modestly across ethical divisions, and heighten our sense for the plural ethical possibilities *within* the West, the rest, the center, the periphery.

If we are honest about international law's contribution to a global moral consensus, moreover, we must recognize that its terms have not always been laudable. The international community tolerates—and legitimates—a great deal of suffering, often in the name of universal rights of property or local self-determination. As a global community, when we balance the importance of property rights against the needs of sick people for access to effective medicines at reasonable cost, we choose property. We allow "sovereignty" and non-interference and local control to become powerful ethical counterweights to social justice, environmental stewardship, and mutual responsibility. And, of course, we have allowed national self-defense and security to legitimate, ethically and normatively, the suffering and death of many thousands in war.

We know that normative principles travel in pairs, at the global as at every other level. Rights conflict. Principles conflict. The most revered texts in the human rights canon are vague and open to interpretation. As a result, it is unlikely that any articulation of a global normative consensus will escape being perceived by those who disagree—and people *will* disagree—as partial, subjective, selective. These are the wages of speaking universally in a plural world.

They are compounded where the spokesman is also a diplomat and civil servant. There has, in fact, always been something of a mismatch between the Secretary General's institutional role and the aspiration to articulate a universal moral vision. We must remember that the Secretary General is also a statesman and civil servant. She works for the Member States and will be needed for a range of complex diplomatic initiatives. It is difficult to speak ethically in the morning and diplomatically in the evening—so also for the international lawyer who serves sovereignty before lunch and justice after tea.

Moreover, the moral authority and political legitimacy necessary to be the conscience of the international community must be carefully husbanded and



deployed shrewdly, strategically—neither too often nor too rarely. The Secretary General's ethical pronouncements must rise above the banal, but she must also be careful lest they be too controversial. When she speaks ethically, she must seek to unite, not divide the international community. She must be seen to call the international community to its best self, reminding it of values and virtues which are, at least in aspiration, universally shared. And all the while, she must retain the confidence of the permanent members of the Security Council, the major donors, the group of 77, and all the other political partners she will need to be successful as an institutional manager and diplomat.

Taken together, this is not the recipe for inspired moral guidance. The United Nations is a diplomatic institution with a particular set of operational mandates. The Secretary General is hardly the only global figure to give expression to universal values; there are also retired politicians, cultural and literary figures, non-governmental organizations, and, of course, religions. Much about the Secretary General's other institutional roles ill suits him to seek comparative advantage in ethics.

Indeed, the crisis in confidence that has crashed on the UN Human Rights Commission is not only about the appalling human rights record of governments that have served on the Commission. It also reflects the limits of turning the articulation and development of human rights over to *governments* in the first place. That governments would want to judge one another, to chastise their enemies and praise their friends in a widely shared ethical vocabulary, is not surprising. What is surprising is that the human rights community has been so enthusiastic about their taking up the task. The limits of a diplomatic ethics parallel the limits of any established church: not good for the government, not good for the church.

There are, moreover, real dangers to universal normative entrepreneurialism, regardless of who steps forward as spokesman. Expressing the ethical conviction of the international community can suggest that there is, in fact, an "international community" ready to stand behind one's pronouncements. It can lead people to intervene, multilaterally or otherwise, where there is no stamina, in fact, to follow through. It can crowd out other local or religious terms for articulating global justice concerns—or consign them to opposition as the "other" of a universal civilization.

In the human rights field, the years after the end of the Cold War witnessed great optimism about the potential for harmonizing the work of all kinds of diverse international, national, and local social justice institutions under the umbrella of the United Nations. It can certainly be useful to coordinate the global response to humanitarian disasters, just as it can be useful to build a common ethical vocabulary among those seeking social justice and humanitarian objectives in diverse cultural, economic, and political situations. But convergence can be taken too far. It is also useful to have diverse capacities and institutions with diverse political affiliations and different vocabularies for social

justice, in approaching both disasters and more quotidian injustice.

It is easy to respond by seeking to coordinate “local cultural expressions” for “universal human values” in a kind of ethical pyramid, with the Secretary General—or the “college of international lawyers”—at the top. But this is a mistake. The “site” for the universal is also, after all, a local place: the international community, the United Nations, the world of the global media, the world in which we live and work as international lawyers, the world of conferences like this. Ours is not an abstract place of enduring ethics, but a concrete place, in which particular people, regimes, and institutions contest what will be spoken, legitimated, and denounced.

Nor is every local cultural commitment the mere “expression” of a universal value the Secretary General, or anyone else, would be in a superior position to express in more universal terms. Local cultures are contesting the universal, expressing it, and participating in its development. In my view, the moral challenge is not to interpret all the world’s cultures into the harmonious terms of a universal ethical canon, but to build bridges, conversations, cooperation, understanding, and respect among the world’s quite different ethical worlds. For the Secretary General or the international legal professional to play *this* role, she or she must pull back from the ethical self-confidence that goes with speaking for the universal.

Moreover, when the Secretary General gives voice to a universal ethics, we can be led to enchant the terms of that ethics, the institutions of the United Nations—even the office of the Secretary General—as substitutes for the hard moral and political work of discovering what justice means each time and in each place anew. The truth is that we do not know what justice will mean in a complex and changing world, any more than we agree on the terms through which it should be sought. Neither we, nor the next Secretary General, should pretend otherwise.

Our global political world remains decentralized and horizontal. There is no one “international community.” The phrase refers to the particular elite who are the audience for the global media. We must recognize the idea that they share a “consensus” view of global political or ethical matters—or that their views condense the attitudes of humanity—as a fantasy. It may often be a desirable fantasy, and we may often want to encourage it, but it is a fantasy. And it can be a dangerous fantasy. It can encourage us to think there is, in fact, an “international community” ready to back up pronouncements made in its name. It can encourage political elites to start projects and launch interventions, for which there will be no follow-up. It can suggest that those who disagree with these elites—and many do—are somehow outside the circuit of “civilization.” It can lead us to imagine that we know what justice is, always and everywhere. But, of course, we do not. Justice is not like that. It needs to be made anew in each time and in each place.

My thought, however, and I will leave you with this, is not that the

Secretary General should be still, nor that international lawyers should withdraw from the challenges of global governance. I applaud our will to power. But we should see ourselves as entrepreneurs for policy diversity, for a more vigorous but fragmented public capacity, and for a normative order that embraces legal pluralism. Let us hope that in the next Secretary General, we will have an ally.

