The Twentieth-Century Discipline of International Law in the United States

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THINKING ABOUT INTERNATIONAL LAW AS A PROFESSIONAL DISCIPLINE

I WOULD LIKE TO TELL TWO stories about twentieth-century international law in the United States that diverge from the historical conventions of the discipline itself: a story about the transformation of the disciplinary vocabulary through successive waves of generational renewal, and a story about the projects pursued by people in the discipline that animated transformation of the broader vocabulary. These stories foreground the professional discipline in the intellectual and social history of the field, to pave the way for understanding the blind spots and biases that accompany disciplinary knowledge.[1]

The history of twentieth-century international law is more conventionally told as a movement of ideas—usually from nineteenth-century formalism about sovereignty to twentieth-century pragmatism—and as the proliferation of new institutional forms and sites for practice—from the great centralized intergovernmental institutions through the specialized agencies of the United Nations system to the more diverse contemporary array of judicial and nongovernmental bodies collectively often referred to as the "international community" or "civil society." The events referred to in these stories—expanded subject matter, new participants, new ways of thinking about sovereignty, new sites for practice—all happened, and they have been of great significance for the profession. From my point of view, however, the stories customarily woven from them are unsatisfying as history and do much to legitimate the discipline's impoverished vocabulary for thinking about international affairs.

These stories overemphasize the degree of change and the instance of novelty in the field, eliding the degree of continuity in the profession's lexicon. They underestimate the extent to which international law has renewed itself by transforming, without significantly departing from, its disciplinary vernacular. They repeatedly underestimate the degree of ambivalence within the field itself, both at particular moments and across the century. In this, these stories are not good history. But they are also bad histories with consequences—reinforcing, defending, apologizing for the participation of international lawyers in governance while discouraging inquiry into the limits of the international legal imagination. They underestimate the field's own dark side, its participation in the construction and defense of violence, parochialism, human rights violation, environmental spoliation, and international conflict of all types. They confuse expansion of the field itself with the achievement of progressive humanism, and they obscure the unfortunate political, social, and economic consequences of the profession's expertise for its practitioners and for those whose imaginations are limited by the taking of the profession's advice.

To correct for these deficiencies, I offer here two types of stories that foreground movements within the discipline itself, and I then suggest the types of blind spots or biases that might plague the discipline and that might be reinforced by these more conventional stories of its progress. Doing so requires a preliminary sense for what we mean by a "profession," a "discipline," or by a "professional vocabulary," "expertise," or "consciousness."

International law is often defined as a set of rules, doctrines, and institutions—perhaps as "the law that governs relations among states." Although this can be helpful, I am more interested in understanding international law as a lived professional practice, as an intellectual discipline, as the culture developed by international lawyers to speak about what they see as the political and social world around them.

I define international law as a group of people sharing professional tools and expertise, as well as a sensibility, viewpoint, and mission. Their disciplinary consciousness or lexicon is composed of typical problems, a stock of understood solutions, a vocabulary for evaluating new ideas, a sense about their own history, and a way of looking at the world. They launch projects of criticism and reform within and against this professional vocabulary. Of course their shared professional sensibility may differ across time, just as international lawyers in different countries may have rather different professional preoccupations or priorities.

Almost as a byproduct of their professional work, international lawyers have developed relatively stylized modes of criticism and reform that express what we interpret as a relatively continuous disciplinary character or style. Over the life of a discipline, common interpretive formulas or traditions emerge—what we often think of as "schools of thought"—that can remain stable for a long time, just as they can unravel.

A common disciplinary vocabulary like this can extend and reinforce the profession's accumulated knowledge about what works and what doesn't, which may be all to the good. But, of course, a disciplinary vocabulary can also have limitations, characteristic blind spots, and biases. A professional vo-

cabulary can have unacknowledged bad effects when it legitimates, explains away, apologizes for, or simply distracts professional attention from injustice. Like other such professional vocabularies, the routine rhetorical practices of international lawyers can place those who use them in bad faith, uncomfortably stretched between what they in some sense know to be true or possible and what they can find words for at that moment within their professional vocabulary.

MAPPING A PROFESSIONAL VOCABULARY

There are no doubt lots of ways to map the vocabulary or expertise of a discipline like international law. One sort of map would stress the world views of participants in the field: what do they see, what do they worry about, what do they remember, how do they understand their history, where do they look for disciplinary inspiration, what do they want? In my own past work, I have tried to compare international lawyers to professionals in other related fields in precisely this sense. We can make a quick comparison:

Public international lawyers look out at the world and see states. They worry about how law will be possible among sovereigns; they remember wars and understand their history as progress from sovereign autonomy to international community, from formal rules to pragmatic principles and institutions. They look to political science for inspiration, and they want improved global governance.

International economic lawyers look out and see buyers and sellers hoping to trade. They worry about the myriad risks of transacting internationally, particularly those caused by governments; they remember the Great Depression and understand their history as progress toward ever lower tariff barriers and an ever more flexible legal/institutional structure for trade bargaining. They look to economics for disciplinary inspiration and they want an ever more reliable free trade regime.

Comparative law professionals look out at the world and see different legal cultures, made up of national systems at different functional stages of development. They worry about professional parochialism and understand their history as a march toward greater knowledge about the influences, similarities, and differences among cultures and developmental phases. They look to sociology or anthropology for inspiration, they eschew any direct hand in governance, and they want greater understanding.

This sort of map may be helpful in identifying the professional blind spots and biases born of specialization. International lawyers in the United States make a particularly interesting discipline for inquiry of this type because they have been relatively isolated from the broad movement of ideas in American law, from the practice of statecraft and the disciplines of the foreign policy intelligentsia, and from their international law counterparts in other countries. To understand the history of the discipline, of course, we need a map that is far more sensitive to relations among disciplines in a particular place and to the relationships between people working within the field and the broader intellectual, political, and social terrain of their society. I have tried to make maps of this sort—intellectual sociologies, if you like; they tend to get really complex really fast, and I won't attempt one here.

Yet another sort of map, however, is more important to the story of disciplinary transformation I would like to tell here. It focuses on developments *within* the field's vocabulary of disputation. This sort of map requires some historical investigation and enough disciplinary continuity to trace changes in a common vocabulary. In mapping the history of international law's vocabulary, I have persistently been struck by the reappearance of classic debates, tensions, and ambivalences that show no sign of resolution. At the same time, for all the diversity in political projects and ideologies represented in the field, international lawyers have for more than a hundred years shared a few basic commitments I would describe as "cosmopolitan," "liberal," and "humanitarian." It is impossible to evaluate the profession's century of achievement without coming to terms with the virtues and vices of both professional equivocation and the broader liberal cosmopolitan tradition to which this profession has been committed.

The ambivalence: it is customary in talking about the intellectual history of a legal field to treat doctrinal conclusions and institutional outcomes as slowly establishing a corpus of best practices or ruling precedents. There will always be paths not taken, of course, and questions that persist, but the point of the exercise is to document whatever clarity there might be about the rules that are in place and about the ups and downs of doctrinal clarity and institutional competence that have led to this point, on the broad understanding that the field is learning, maturing, coming into its own.

International legal histories of this type have generated a number of common assumptions about the field: that international law is predominantly about states and sovereignty, that its dominant interpretive method is rather formal compared to other fields, that consent lies at the heart of its binding force. That "it" is law rather than politics, and international rather than local. That its rules are public rather than private. That the field has progressed, just as international society has progressed, from a period of sovereign autonomy to one of international community, from a time of rules to a period of principles, from a law of doctrines to one of institutions, from governments roped together by treaties to an open-ended process of global governance, from a formal legal method to something more functional, modern, and pragmatic.

I am always struck by the extent to which this is not at all the whole story. For more than a century, international lawyers have imagined each new moment as the overcoming of sovereignty, formalism, autonomy, and politics and

as the coming into being of law, pragmatism, and international community. More than a hundred years ago they were already proclaiming the arrival of institutions, pragmatism, community, and globalization. Yet that which has been thought finally overcome continually returns, not only as an evil foe, but also as a newly attractive reform. We need only think of the resurgence of formal attitudes toward law, in doctrines about territory (*uti possedetis*, for example) or in the increasing legalization of the world trading system, to realize that the triumph of antiformalism has been neither rapid nor complete. Indeed, it would be more accurate to say that the discipline sustains interest in these propositions with the deepest ambivalence.

Almost every basic doctrinal proposition in the field is now conceived in at least two voices—a voice of stability, associated vaguely with the past, and an updated or renewing or reform vision that is more complex, relevant, up to date. Looking back, we see a field with a double consciousness about its own materials. There are rules and exceptions, classic positions and new thinking, formal definitions and pragmatic solutions. The discipline is both tenaciously attached to the classic definition of international law as "law among sovereign states" and full of denunciations of international law's fetish-like attachment to states and to "sovereignty."

As a result, it is far more useful in reconstructing the field's intellectual history to identify the debates that continually preoccupy the field, rather than the stockpile of temporary and partial resolutions that litter the disciplinary landscape, and to focus on the voice of the professional that can bring these contradictory tendencies into harmony, at least temporarily, and can reframe particular choices as contributions to disciplinary progress.

More conventional histories of the field understate this ongoing ambivalence, often by spreading its elements out into a historical narrative. Thus, in the most classic and common example, one finds recognition of the enduring commitment to *both* formal sovereign entitlements *and* antiformal efforts to embed international law in a more multifaceted political structure repeatedly explained as the presence of "traditional" and "modern" elements. The more one gets into the materials, the less compelling this story of an incomplete break from the old to the new international law becomes. There were elements of what we would think of as antiformal ideas about sovereignty in the nineteenth century, and formalism remains a potent source of innovation and idealization for the discipline. It would be better to say there was a transformation in the way international lawyers understood the meaning and importance of their ambivalent commitments—a more extreme antagonism between the elements and a stronger practice of displacement and denial in their narration—that accompanied the fall into modernism at the start of the twentieth century.

As a result, we need to think further about the function—the ideological function, for want of a better term—of these conventional stories in the disciplinary vocabulary. It is as if one function of historical narration were quite straightforwardly to lessen awareness of the ambivalence of the field's ongoing commitments. As a result, some terms in the professional lexicon are certified as progressive and community-oriented, others as regressive holdouts for a more primitive world of sovereign autonomy. So long, for example, as formalism remains associated with the nineteenth century and is thought to have characterized a presocial international world of autonomous sovereigns, while antiformalism about sovereignty seems linked to twentieth-century reforms and the emergence of an "international community" for the discipline to interpret and manage, the profession has a sort of default reform proposal ready at hand—when in doubt, deformalize, denounce sovereignty, demand a law embedded in the political. The endurance of this sort of calcified reform imaginary in the discipline's expertise is hard to overestimate.

At the same time, the field also exaggerates the "reality" of the nineteenth-century system and the artificiality or constructed nature of the twentieth-century innovations. The old law was formal, but the old states were really states, real political actors. The new law is more embedded in social life, but its creatures—institutions, individuals, the apparatus of civil society—are constructs, its community an artifice of law. That this sort of thing might affect the way international lawyers see the world around them is easy to imagine. Picture international lawyers coming to the dispute between Israel and the Palestinian Authority, making every effort to achieve a neutral, detached, objective and even-handed attitude. They nevertheless might see two types of claims—formal demands for absolute sovereignty over this or that and more pragmatic demands for international recognition of overlapping competences—and might hear one type of claim as more primitive than the other. And they might see two types of claimants—the one a real, if rather new, state, the other an artificial creation of the international community itself. If you work for the Palestinian Authority and want to make a claim for absolute sovereignty over something, you can anticipate a problem being heard—you are yourself the creation of the modern pragmatic international community, and what you are demanding is not only retrograde, returning us all to an era of autonomous political units, but in some vague way incompatible with your own status. Israel, by contrast, need not claim sovereignty—it *has* sovereignty.

If we look back at international law in the twentieth century, we find this sort of thing going on quite a bit. The arrangement of terms within the professional vocabulary has an impact on the way international lawyers come to imagine the world for which they hope to provide the law. But international lawyers also share a more overt form of common professional consciousness.

The common vision: the most significant element in the international legal imagination is quite simple. When international lawyers look at the world it is self-evident that we have plenty of politics, but only very little law. The idea that we have plenty of law, a kudzu of procedures and norms beneath which

only the most tenuous political culture can survive, is simply not on the table. This idea has all sorts of consequences for the field, setting in place a program to expand law and reduce politics, to tame the political with law, rather than the reverse. This program, in turn, has a number of elements: cosmopolitanism, liberalism, and humanism.

A hundred years ago "cosmopolitanism" was termed *l'esprit d'internationalité*. In the 1920s and 1930s, as again in the 1950s, it was reflected in an increasingly federalist interpretation of international organizations, and today it is visible as enthusiasm about "global governance." The idea here is commitment to the general, the global—and not the particular, the local, the cultural. As cosmopolitans, international lawyers are more concerned with the level at which solutions emerge or governance proceeds than with the details of those solutions or the distributive consequences of that governance. Where they govern, they aspire to do so with clean hands, detached from the messy business of arbitrating among political groups. This is an arms'-length government of adjudication and consensual dispute resolution.

The international legal vocabulary imports the problematic of liberal political theory into international affairs. The international lawyer looks out at the world and sees separate, autonomous communities ("states") struggling to relate to a hypothetical "world community," in which they can both remain free and come to be members themselves. International lawyers construct their field around the philosophical question: how is governance possible among free entities in a community? Since relations among states "are" political, and law "is" a national creation of the sovereign, it is difficult to build an international law. They experience this worry both as a philosophical problem to solve (how can there be law among sovereigns?) and as a practical challenge (what should we do next to strengthen law among states?). Like domestic liberal political theory, international law often explains the compatibility of freedom and constraint in contractual terms. At some times the international legal order has seemed a Benthamite machine for maximizing the happiness of the greatest number; at others it has been seen as a Kantian vehicle for protection of fundamental rights.

Liberalism has plenty of associations, and international lawyers have been drawn to all of them at one time or another: a left-of-center faith in the humanitarian potential of federal and universal government, a right-of-center belief in mercantilism and the pacific consequences of commercial freedom, a centrist commitment to technocratic and rational government. They have typically advocated moderate or intermediate solutions to problems of international governance; they have emphasized possible harmony of interests, rational governing techniques, the need to "balance" among opposed considerations, moderation in social reform, self-determination and participation by social groups in decision making.

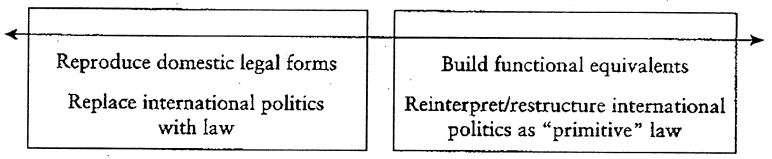
International lawyers have seen themselves as an avant garde for peace, for social goals and humanitarian causes. The keys here are pragmatism, humanitarianism, functionalism, and universalism. International law, they feel, stands with peace, prosperity, and a forward-looking and pluralist global community, while "politics" is associated with war, with the collapse of commerce, with a primitive parochialism. They stress international law's social and emancipatory potential, its ability to express and further universal human needs/wants/natures/functions, rather than its potential for defending the aggressor or miscreant. They advocate arbitration to replace war, institutions for dispute resolution, and rationalist machinery for collective security, a benevolent and civilizing global governance system. In this they have been ardent reformers, of their discipline and of the world.

To sustain each of these elements—the priority of law over politics and of the global over the local, and the association of international law with humanism and liberalism—requires ongoing intellectual work. At the very least, any ambivalence within the disciplinary vocabulary on any of these points needs to be managed. If the materials with which the professional works foreground sometimes the legal and sometimes the political, a general story about the progressive movement from one to the other will be useful in maintaining a commitment to the omnipresence of the political and the need for law.

So far so good. But we also need also to explore, to map if you like, the vocabulary with which international lawyers have expressed these ambivalences and articulated this common vision. The vocabulary of their expertise, in which they express, formulate, and defend reforms. It is not surprising that as international lawyers have worked to build a legal system outside the state they have pursued issues that parallel the traditional forms of domestic law: legislation, administration, and adjudication. Their efforts to do this might be arranged on a spectrum that ranges from direct efforts to reproduce domestic legal forms and institutions among states to more indirect efforts either to build looser "functional equivalents" to domestic legal institutions or to reinterpret the conditions of statecraft as a more "primitive" version of national law (see fig. 1).

International lawyers have proposed a large number of different techniques

Figure 1. Building International Law

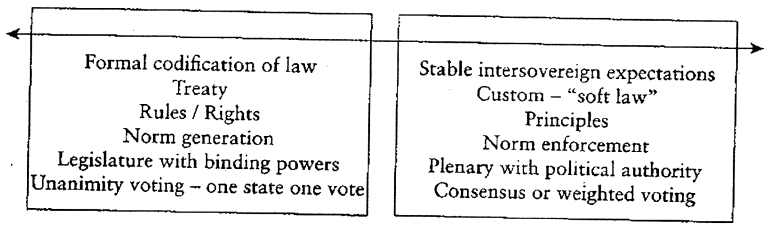


to build international law across this spectrum, covering all three types of legal/political authority: legislative, administrative, and adjudicative. The debates in each of these domains might also be arranged along a spectrum.

Legislation

Here we find work on "sources of law," on the best modes of legislation or codification, on the relative merit of treaty and custom or of rules and principles, and on the relationship between norm generation and enforcement. The spectrum would run from efforts to establish an international legislature with binding powers or to codify an international common law through to softer efforts to expand the domain of stable intersovereign expectations and habits that "function" as norms (see fig. 2).

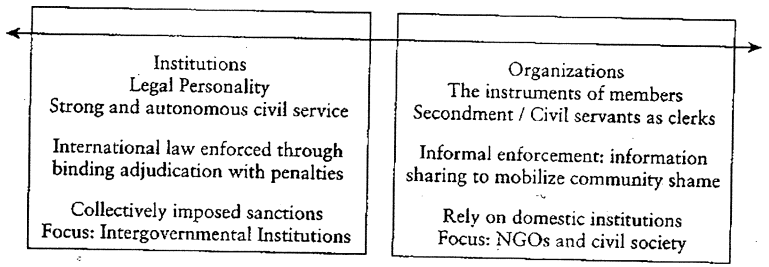
Figure 2. Building International Legislative Capacity



Administration

International lawyers (often in more or less strained partnership with the fields of "international institutions" and political science) have worked on the constitutional structure for international bureaucracy; on forms of leadership; on the construction, reform, coordination, and control of an international civil service. The enforcement arm for international law might also be either a

Figure 3. Building An Effective International Administration

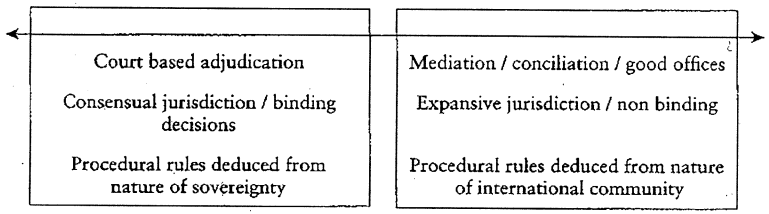


formal equivalent of the domestic state or a more primitive and decentralized functional equivalent based on the mobilization of shame and political pressure within the "international community" (fig. 3).

Adjudication

We find work structuring an international adjudicative process—rules about jurisdiction, enforcement of decisions, and so on. International lawyers speculate about what law might offer to the peaceful settlement of disputes, or about the relative merits of adjudication, arbitration, conciliation, and other dispute settlement formats (fig. 4).

Figure 4. Strengthening the International Judiciary



The terms within which these choices are debated are surprisingly consistent across the last century, and the pattern in these debates is also at odds with the idea that the choices are either pragmatic (what will work best in this context) or responsive to immediate historical developments (what will best catch this historical wave). To defend choices in the left-hand columns, international lawyers stress the importance of sovereignty, at least as a current reality, as well as the need to root international law firmly in the consent of sovereigns and the importance of establishing an international law distinct from political calculation. In defending choices in the right-hand columns, international lawyers have stressed the desirability of indirectly sneaking up on sovereignty. In this view, an international law more embedded in its political context will be more likely to dislodge sovereignty and will express more adequately the will of the current and future "international community."

One point stands out about this argumentative practice at this stage. International lawyers tend to defend and criticize relatively modest reforms—very minor movements along the spectrum—in extreme and hyperbolic terms. Think of legislative mechanisms, arrayed from very formal consent-based treaties to the quasi-legislative or persuasive force of "non-binding" agreements. Somewhere along this spectrum we would find people proposing to strengthen the persuasive power of, say, General Assembly recommendations, and people opposed to this idea. This quite modest alteration in the overall

scheme of sources, as it is debated, seems to implicate all of the arguments for an embedded law, and all of those for an autonomous law. Proponents of one or the other side characterize the proposals, however "close" they might lie to one another on the spectrum, as implicating all the strengths and weaknesses of the opposite extreme.

The result is, as one might expect, often a great tempest in a teapot, as well as a tendency to disciplinary sectarianism. It would not be too much simply to describe the international lawyer's professional vocabulary as a stockpile of arguments for the hyperbolic defense of modest reforms. But it is nevertheless an exceedingly complex argumentative vocabulary—there are numerous ways of characterizing different reform projects along argumentative trajectories of this sort.

It is quite common, for example, to debate particular reform proposals by arguing about the appropriate boundaries for the discipline. How autonomous should international law be? Is it stronger when it embraces or when it shuns the political? The most basic mode of arguing for or against a given institutional or doctrinal possibility, whether macro ("norm building or administration?") or micro ("should *uti possedetis* trump self-determination in this case?"), is to cast the alternatives as bringing law closer to or further from politics, and then to treat the question as implicating the appropriate boundaries of the field. At this level the arguments for and against a more political international law are intensely familiar and easily presented as a story about progress. Either international law has been too far from politics and must move closer to become effective, or it has become dangerously intermingled with politics and must assert its autonomy to remain potent. Pretty much any choice from the left columns can be defended, relative to its partner on the right-hand side, by stressing the need to keep law pure of politics, just as any choice on the right side can seem a vehicle for merging international law more firmly into the political context. A very similar argumentative structure has developed around a series of boundary issues. For example, how closely should a public law external to states be modeled on national law? Should we be seeking to reproduce the functions of national public law or the forms of national private law or both? Arguments about relations with national law extend from "dualism" with its fully separate international and national legal orders on the left through to "monism," commingling the two legal regimes, on the right.

At one level, international law is not concerned with real people—it is concerned with real problems perhaps, but its agents, subjects, and objects are "states." Still, in pursuing this disciplinary identity, the field has been perennially enmeshed in relations with social movements of various sorts: the peace movement, the women's movement, the environmental movement, the human rights movement, the labor movement, the indigenous people's movement. But how far should this go?

Again, in arguing about the roles of individuals and non-state actors we

find a continuum from thinking states the only proper subjects and sovereignty an on/off legal status, through to visions of multiple subjects and the idea of sovereignty as an artificial legal bundle of rights.

International law has seen itself as "public" law, about governing. But there is also a private international legal order, often deeply enmeshed in national law. We find a great deal of work on the "public" nature of international law and on the field's relations with the worlds of economics, the market, mercantilism, trade policy: in the left column, a sharply differentiated public and private law; in the right, a flexible governance partnership with economic law and institutions.

You get the idea. But there is no stopping here—we might continue this list and speak about relations with nationalism, with religion, with values, with the periphery, and so on. In each case we would find a spectrum of analogous arguments; from one universal to a more variable international law, from assimilation of the periphery into a universal humanism through to more normative flexibility and respect for local cultural or religious autonomy.

HOW CAN WE ORGANIZE THESE ARGUMENTS?

In arguing about the relations between international law and neighboring social spheres and in proposing or opposing particular institutional forms, international lawyers return repeatedly to two basic axes of philosophical disputation, each with its own well-developed vocabulary: the relationship law should seek to strike between an international community and sovereign autonomy, and the most effective balance between a more formal and a less formal law (figs. 5 and 6).

There is a relationship between these two primary vocabularies. As a starting point, we could say that international lawyers have predominantly associated sovereign autonomy with formal law and international community with antiformal law. They have tended to see movement from left to right on these spectra as progress—to think that we move from autonomy to community as we move from formal to pragmatic law. There has also always been a (less often voiced) counternarrative, however. Since late in the nineteenth century,

Figure 5. First Primary Spectrum

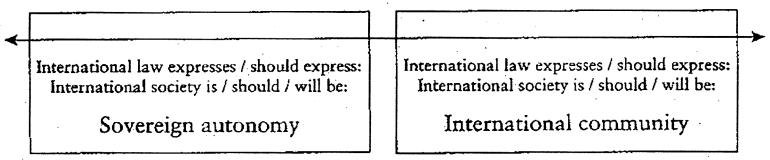
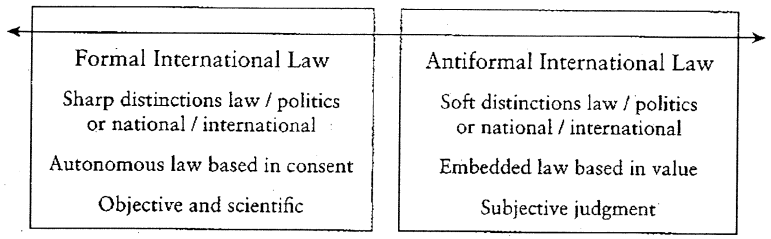


Figure 6. Second Primary Spectrum



international lawyers in a variety of places have stressed the centrality of the nation to international law's project and have seen movement to perfect the nation—in Italy, in Germany, but also through extension of the national form and the principle of national equality to extra-European societies in Asia and elsewhere, through self-determination and eventually decolonization—as forward progress from the more integrated, if haphazard and hegemonic, international system of the past.

In developing this story, the terms thought to convey differences along these continua may vary over time. At one point, the difference seemed well captured by the choice between rules, whether codified by treaty or by custom, and "general principles of law" or the new category of "soft law." At a later moment, after inquiry into the "sources of law" no longer seemed so foundational, the entire effort to generate norms—including both rules and principles—seemed to epitomize the left column, while international lawyers drawn to a less formal international law focused more on matters of policy, asking what arrangement fulfilled a desired political or institutional "function" best, rather than what arrangement was normatively persuasive. This sort of transformation has been common in international law across the century. We might represent this sort of change graphically as shown in figure 7.

This sort of transformation is possible because the terms that illustrate the spectrum can be interpreted to lie in various places along it relative to one another. At a more theoretical level, for some time the general difference between formal and informal attitudes about international law seemed captured by the difference between "positivism" and "naturalism." After theories about the nature of international legal obligation came to seem less important than theories about how international law could be most effective, those drawn to both naturalism and positivism seemed relatively more formal than those adopting a "pragmatic" or "functional" approach (fig. 8).

As international lawyers have argued about various reforms, it is unusual to find anyone close to the extreme end of either spectrum. If you thought the situation was and always would remain one of complete sovereign autonomy,

Figure 7. Second Primary Spectrum Revisited

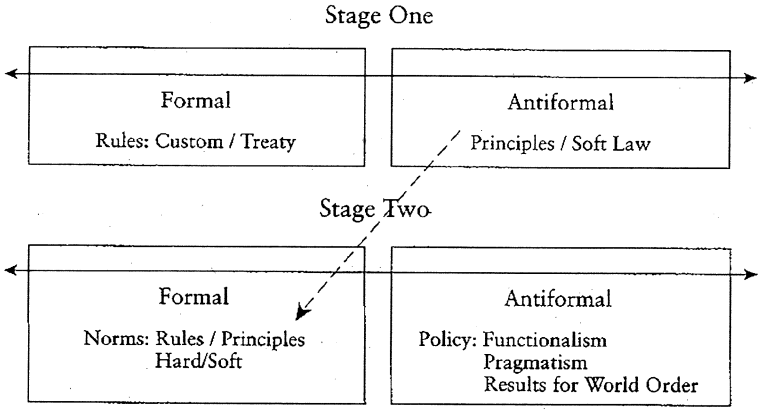
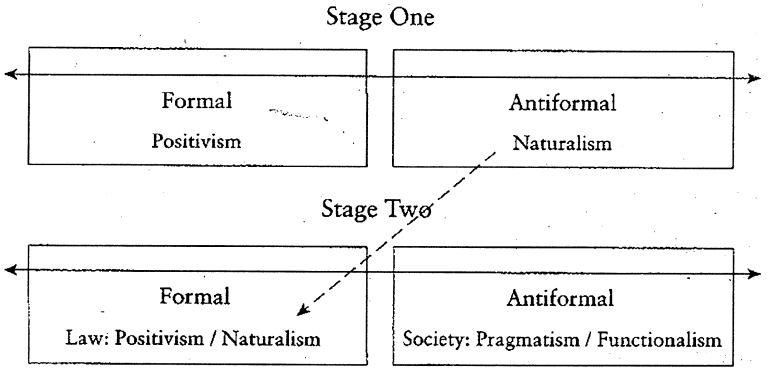


Figure 8. Second Primary Spectrum Revisited II



it would be difficult for you to imagine a role for international law. If you thought the international community had fully eliminated the sovereign state, it would be difficult for you to understand how the law that remained could be seen as "international." Being an international lawyer means seeking to bring autonomous sovereigns into community. Most everyone acknowledges the importance of both rules and broader principles; everyone sees a situation for both sovereign autonomy and international community. No international lawyer imagines law in mechanical terms, just as no international lawyer would see it simply as an expression of natural values or religious principles.

If you put these two points together—that no international lawyer is comfortable at the extremes and that particular positions can be reinterpreted to lie at different points on a spectrum relative to one another—the result is a very puzzling interpretive practice. Assessing positions on these spectra in progressive or ethical terms runs into a sort of Zeno's paradox. Since everyone is situated in some way between the extremes, one may approach without ever quite reaching rules or institutions that clearly signal the presence of an international community; one may downplay, but never quite eliminate, rules or institutions that seem to express the imperatives of legal form. Framing a choice between two arrangements—say, custom and treaty—in terms that implicate the larger issues of sovereign autonomy and international community or a formal and an antiformal international law runs into the difficulty that custom and treaty can often be recharacterized to lie elsewhere on the spectrum. Just when one has railed against custom for entrenching the politics of the past and defended treaties for their ability to legislate with the times, custom can seem altogether flexible and modern compared to the requirement that states reach formal consent before anything can be done—a formula guaranteed to produce vague political compromises rather than workable rules. It is a common experience that no sooner is a more functionalist/community-oriented solution reached than it finds itself open to criticism as emblematic of the formal order wedded to sovereignty that must be overcome. It is in this sense that we might say there is a deep ambivalence about both the direction progress takes and the terms with which it is marked.

Nevertheless, doctrinal and institutional reforms continue to be evaluated in terms of these broad arguments about their significance for the system as a whole. It is surprising how rarely international lawyers argue for particular projects in terms of the specific distributional or strategic consequences for particular groups that will result. At the same time, these general terms are understood by almost all those who use them to be neither entirely persuasive nor nearly as dispositive as the arguments made using them would suggest.

SCHOOLS OF THOUGHT IN INTERNATIONAL LAW

Since a wide range of large and small choices are framed to present these boundary issues, it comes as no surprise that international lawyers have repeatedly reflected on them in theoretical terms. To be a "school of thought" in international law means to have a relatively stable position on these broad theoretical questions. No one thinks these will ultimately be defensible positions. On the contrary, people in the field imagine that virtually all the possible positions are already on the table and have been found inadequate. Nevertheless, we are familiar with international lawyers who see autonomous

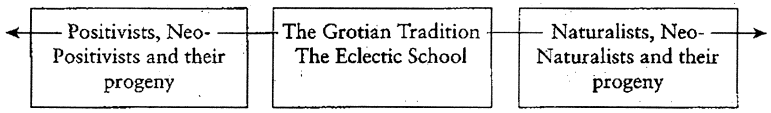
sovereigns behind every bush, and others who see everywhere a community at work. Likewise we know those who think in terms of rules and worry about defending law's autonomy from subjective and political influences, and those who think about principles and policies and worry about ensuring law's links with its context.

Understanding a school of thought in the field means understanding that point on the continuum of different answers—all understood to be bad answers—toward which a given group gravitates. Do they tend to think of law in formal and autonomous terms, do they emphasize that law can only be built among sovereigns by consent, do they worry about diluting law's autonomous contribution to order by freighting it up with other issues and considerations? "Positivists." Do they think of law more fluidly, are they worried about values and context, do they stress the dangers of a law drifting free of the real world? "Naturalists." Do they fall someplace in between, is their instinct to split the difference, do they stress pragmatism over principle? The "eclectic" or "Grotian" tradition (fig. 9).

In traditional textbooks about international law these schools of thought are often introduced by listing ideas or propositions to which people in the schools are thought to adhere. It would be far more accurate to describe what it means to participate in a school of thought by focusing on a person's argumentative default position, his or her instinct in arguing about the field's central questions or basic doctrinal and institutional choices. A "positivist" will start off thinking about any of the choices we have looked at more sympathetic to the left-hand pole, will tend to see anyone less "positivist" than him- or herself as making the errors of the right-hand pole. For a naturalist, the reverse is true. It is not surprising that as argument about these matters goes on, more and more mainstream international lawyers resist identification as either positivists or naturalists, but see themselves instead as "Grotians," instinctively eclectic about all the choices we have looked at. Because all these "eclectics" continue to argue with one another by treating their opponent's position as if it implicated the dangers of an extreme that would give away the project of international law altogether, it is common to think *other* people belong to schools of thought and argue from belief while one's own position reflects a sensible analysis of a specific and nuanced situation.

In each period of renewal and consensus, the field has been arranged in

Figure 9. Some Conventional Schools of Thought about International Law



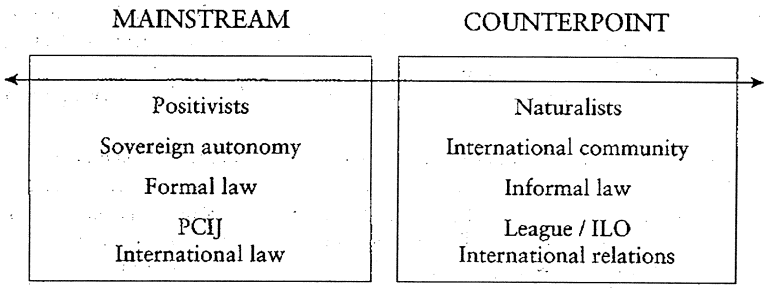
slightly different "schools of thought." During periods of disciplinary crisis the goal of intellectual work is often to rearrange and restabilize the intellectual terrain and the configuration of "schools of thought" is itself up for grabs.

Prior to the Second World War, the United States international law academy thought itself roughly divided into positivist and naturalist schools of thought. These schools were differentiated by their tendency to argue from the formal law and sovereign autonomy poles (positivists) and from informal law and sovereign community poles (naturalists) (fig. 10).

The consensus default during this entire period was toward the left end of both spectrums. It is in this sense that we can call this the age of positivism in international law. There were also dissident voices urging a less formal, more embedded law as both a better expression of political reality and an expression of a higher, more integrated international community. These voices were strongest in the anxious period just after the First World War, when the discipline was most resolute in rejecting the legacy of the Hague System seen to have failed in 1914. They were often associated in the United States with political science rather than law, with progressive Wilsonianism, with support for the League, and with interest in international organizations more generally. They were also strong in the Catholic tradition. Although they faded from the mainstream after the establishment of the Permanent Court and disillusionment with the League, they remained present as a kind of ethical and political counterpoint.

After the Second World War, the terrain changed dramatically. All of prewar international law was in disrepute after 1945—positivists in the United States had largely been isolationist, and the naturalist enthusiasts for the League seemed to have been altogether out of touch with the world of political possibility. Numerous efforts to criticize, reform, and renew the profession were launched in the late 1940s and 1950s. Only in the 1950s did a new consensus begin to emerge; it would last for more than thirty years.

Figure 10. Schools of Thought on American Law, 1925–1939



In a sense, it is correct to say that after the Second World War everyone was an eclectic, far more flexible in bringing to bear arguments from across the spectrum on any given doctrinal or institutional choice. But there was also a wholesale reorganization of the main intellectual commitments that defined "schools of thought" in the field. Beginning in the 1950s, most international lawyers in the United States rejected both naturalism and positivism in favor of a sensibility influenced by pragmatism, functionalism, American legal realism, and the American legal process school. By 1960, the postwar generation of international lawyers and academics had established two new schools of thought—both of them post-positivist and post-naturalist—between which the subsequent generation of international lawyers in the United States then arranged themselves.

At one end of the new spectrum was the Yale School, dominated first by Harold Laswell and then by Myres McDougal; at the other was the Columbia School, led by Louis Henkin and Oscar Schachter. Just as in the prewar discipline there was a mainstream and a counterpoint; the Columbia School became the mainstream, and the Yale School became the counterpoint.

The Yale School situated itself toward the policy end of the formal/informal law spectrum and toward the sovereign autonomy end of the sovereign autonomy/international community spectrum. The Yale scholars worked self-consciously in the tradition of American legal realism and were most insistent in their critique of formalism—as practiced by both naturalists and positivists. They introduced the word "policy" into the international law vocabulary as an alternative to norms—a category of judgment and political management that stood outside hard and soft law, rules, and principles. As they moved further toward the right side of the formal/antiformal axis, they were also acutely aware of scholars still further from legal form who had abandoned international law altogether for political science. They differentiated themselves from this new political science "realism" by stressing a commitment to *order* among sovereigns, to values and policies, rather than to a Hobbesian individualism among states. By 1960, the Yale School represented a solid alternative that was neither positivist nor naturalist—it combined a strong antiformalism with an insistence on "realism" about sovereign autonomy as the basis for world community. They had broken the link between antiformalism and prewar institutional idealism, as well as the link between sovereign autonomy and prewar formalism about norms.

At the same time, the Columbia School was moving in exactly the opposite direction. These scholars were also critical of prewar positivists—but for their emphasis on isolationism and sovereign autonomy, not for their commitment to norms. They were also post-realist scholars and had a healthy skepticism about the solidity of codification. Their commitment to norms celebrated

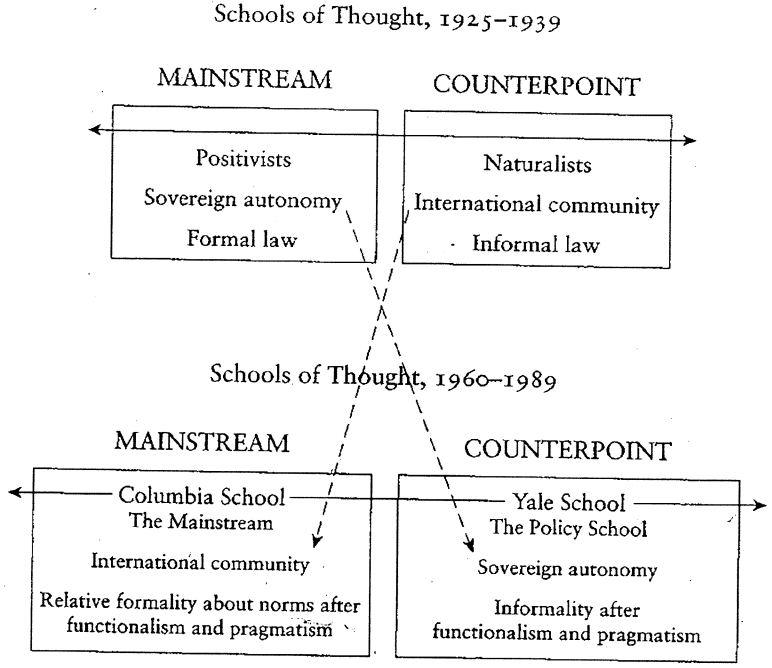
principles as much as rules, soft law as much as hard, flexible as much as strict interpretation. For those in the Columbia School, the point was to build an international legal order focused on the institutions of the United Nations, to establish a normative fabric that could bridge the gap between East and West, and to establish a flexible institutional locus for decolonization and development in the Third World, outside the cold war divisions. This search for a humanist neutralism required norms—human rights norms, procedural norms, administrative law. Too much policy could easily jeopardize the search for a community acceptable to East, West, and South.

By 1960, the Columbia scholars represented a clear alternative to the Yale School, one that was also neither positivist nor naturalist in the prewar sense. They combined a weak antiformalism with a commitment to neutral norms and humanist institutions as law for the modern international community. They had broken the link between a formal commitment to norms and the insistence on sovereign autonomy that had characterized prewar positivism. But they had also broken the link between a commitment to international community and the idealism of prewar progressives and naturalists. We might illustrate this transformation as shown in figure 11.

This new arrangement lasted more than thirty years, until the end of the cold war in 1989. Since then, the field has been in a new period of anxiety and contestation. Early in this period of anxiety, there were fleeting efforts to revive the Yale School—symbol for a generation of a more flexible alternative to the disciplinary mainstream—just as there had been a variety of neonaturalist revivals in the 1940s. Most leading international lawyers under fifty in the United States, however, are now critical of both the Columbia and the Yale schools.

The field has become a center for political and intellectual contestation. There are military voices, economic voices, populist voices, conservative voices, post-Marxist voices, feminists, queer theorists, scholars whose formation was powerfully inflected by the lit/crit movement, the critical legal studies movement, by neoconservatism, and on and on. National differences are more pronounced—never has the United States international law tradition seemed so idiosyncratic, or been in such sustained methodological and political debate with international lawyers in other traditions.

And yet, although a new disciplinary consensus has not yet emerged, there are strong proposals on the table, both for a new mainstream consensus and for a set of methodological counterpoints. Despite the presence of dissident voices among the field's established players—people like Allott, Berman, Carty, Charlesworth, Chimni, Chinkin, Engle, Frankenberg, Hernandez, Koskenniemi, Langille, Mutua, Onuma, Paul, Tarullo, and Valdes—the beginnings of a new mainstream approach to the field are now visible, proposed largely by people in their forties under the rubrics of "transnational law," "the



legal process," or "liberalism," terms they borrow from the scholarship of the last great period of anxiety in the 1950s.

These scholars, the leading "new" scholars of my generation—people like Koh, Slaughter, Alvarez, Kingsbury, and Teson—many of them my law school classmates, friends, and colleagues, urge movement toward a new understanding of international community and a new appreciation for an antiformalist international law. In the process, they reaffirm some of the field's most familiar and dogmatic propositions: that sovereignty has eroded, that international law should be understood politically, that the boundary between international and municipal law is porous, that international law may not be as universal as it pretends, that the international regime is better understood as a process or multilevel game than as government by legal norms. They have taken ideas that have been part of disciplinary common sense for a century—pragmatism, antiformalism, interdisciplinarity—and turned them into a fighting faith. This methodological self-confidence announces a political optimism: the end of the

cold war will complete the internationalist project, inaugurating a humanitarian "civil society"—an "international community" that will dethrone the state, welcome wider participation, and open international law to the political.

The specific reform proposals on offer differ quite a bit—use domestic courts to enforce international norms, harmonize national regulations rather than seeking international norms, use international law principles to energize a broad coalition of nongovernmental organizations rather than rulemaking by intergovernmental agencies, reimagine the international judiciary as a player in a social game whose currency is legitimation—but the form in which they are presented is broadly similar. They urge greater disaggregation of international law, more reliance on national institutions, more blurring of the lines between law and politics and between national and international law than before. These new mainstream voices criticize the Columbia School for overestimating the role of rules and insist on a revitalized antiformalism. At the same time, however, they criticize the Yale School for straying too close to Morgenthau's political science of autonomous sovereigns. The idea is to break the association between the community orientation of the Columbia school and its overemphasis on rules, while at the same time breaking the Yale association between antiformalism and sovereign autonomy.

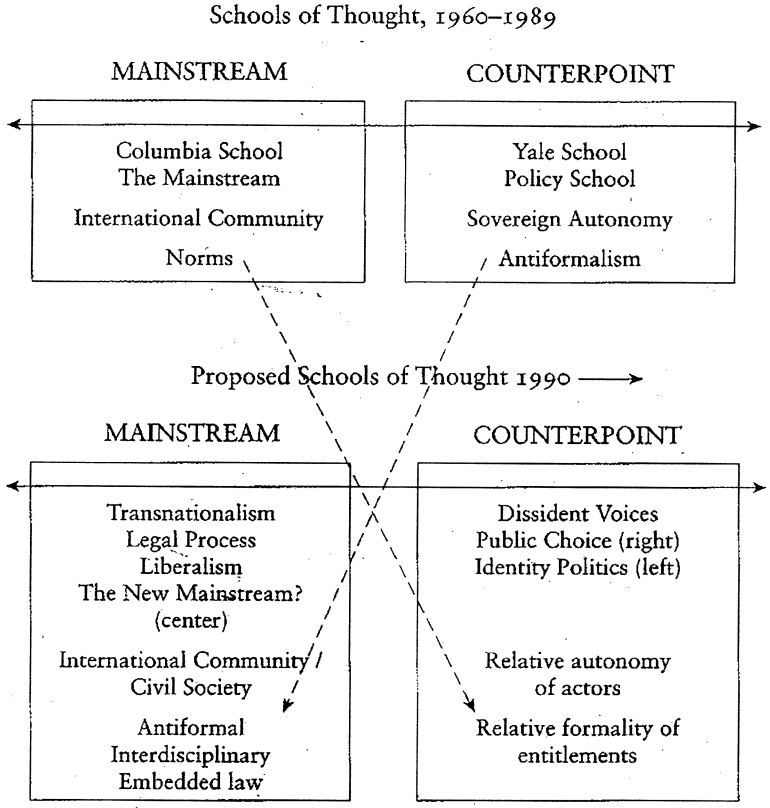
As we might expect, these mainstream proposals have generated a set of counterpoints, again written within the discipline's historic lexicon of arguments. Counterpoints have proposed themselves on both the left and the right. Dissident voices of both types coalesce around an insistence on relatively more formal conceptions of law than the transnational-liberal-legal-process mainstream, and rather more skepticism about the possibility of an international community.

Relative to the centrist proponents of "transnational" and "liberal" law, the new counterpoint positions stress the formality of entitlements and the autonomy of actors. On the center-right this comes from "public choice" scholars, often working in the neighboring field of international economic law, who model the emergence of institutional regimes on the basis of game theories rooted in the autonomy of decision makers and sympathetic to the possibility of a formal legal fabric. On the left, we find European scholars nostalgic for the legal culture of formalism and a range of scholars rethinking the field from the perspective of one or another "identity politics." To get purchase against the emerging transnationalist mainstream, these scholars stress the relative stability of their identity positions, for women, as people of color, as Latin Americans, gay and lesbian, indigenous or disabled people, or as Third World nationals, as well as the relative formality of entitlements necessary for their protection. These voices respond both to more extreme assertions of Third-World sovereign autonomy and to assertions of cultural relativism they fear would undermine their aspiration to universal human rights. These human rights enthusiasts have broken the link between relatively formal law and a

universalist international community, and in that they have departed from even the Columbia School's mainstream enthusiasm for human rights. But they have also broken the link between a public order system based on the autonomy of actors and the antiformalism of the Yale School.

International lawyers in the United States are on the verge of revising the basic high-low arrangement of positions in their field for the second time since the end of the Second World War. We might chart this proposed reorientation of the field as shown in figure 12.

If we put these realignments together, we can trace changes in the disciplinary lexicon as successive generations rebuild the discipline's mainstream by rearranging central terms, borrowing from and criticizing earlier approaches



from both the mainstream and the more dissident counterpoint, and focusing attention on different threats external to the field.

BUT HOW DOES THIS VOCABULARY DEVELOP?

An elementary map of the discipline's ambivalences and commitments leaves more questions open than it answers. We should wonder if this vocabulary limits the international law professional in any significant way. An astonishing range of different phenomena have been understood in these terms over the last hundred and more years, and the vocabulary seems repeatedly to renew itself in the face of a postwar anxiety about new political and economic realities. But do the discipline's own reform ideas capture the full range of the politically possible? How compulsory is debate in these terms? Can renewing the field mean something other than a reorganization of this vocabulary? We need further research into the limits this vocabulary poses for the practical and political imagination of people in the profession (although I sketch some tentative suggestions along these lines at the end of this chapter).

It is also difficult to understand how this extremely plastic and repetitive professional vocabulary develops—why does one or another school of thought become the "mainstream," another only a "counterpoint?" Why does the arrangement of schools remain stable for long periods, and then reconfigure itself so dramatically in only a few years? Why, we should wonder, does one or another set of ideas within this broad vocabulary come to dominate at a particular time, and what animates movement among these ideas? The process by which a disciplinary vocabulary is used and transformed remains an extremely human one. Beyond the work of individuals responding to problems with good ideas, we have energy and passion, which can better be understood in the language of power and group struggle.

Of course it comes as no surprise that one set of ideas within a broad disciplinary vocabulary can come to dominate at a particular moment because people with that idea have institutional resources to devote to its implementation. If an American administration pumps money into international institutions to develop interest in the use of international law by national courts, or if a leading law school tenures scholars who promote interest in national courts, or if the American Society of International Law funds study of international law by national court judges, or if important journals have symposia on relations among national judiciaries in various countries—any of these will have an effect on the perceived plausibility of these ideas. We are all familiar with the work of foundations—from the Ford Foundation in the 1960s to the Olin Foundation in the 1990s—inflecting the agenda of professional disciplines. The international law discipline has its own odd lot of institutions scattered about, often with some power to dispense jobs, fancy certificates, visas,

medallions and the like. If the United Nations sponsors symposia on Third World Approaches to International Law, or if UNESCO publishes books on the subject, the plausibility of these ideas will be affected. If the author of such a book becomes president of the World Court, some people will read the book, some will reject it, some may try to repeat the gesture, others treat it as spent. The ideas about international law popular at a given moment in some countries are more influential than those popular in others simply because some countries are more powerful. The effects of educational patterns in the metropolis on thinking at the periphery is no less pronounced today than a hundred years ago.

Power in this sense—money, access to institutional resources, relationship to underlying patterns of hegemony and influence—is central to the chance that a given idea will become influential or dominant within the international law profession. We need look no further than the extremely disproportionate effect of ideas developed in the United States since the Second World War. Struggle among individuals and groups over resources—institutional resources, prestige, the resources of perceived plausibility, disciplinary hegemony—and the processes by which these resources are allocated are better explanations for the dominance of some ideas at some times, and for transformations in the disciplinary vocabulary, than either the good-faith pragmatism of innovative individuals or the meritocractic allocation of resources by practitioners and institutions external to the field.

To understand this struggle we need a map of disciplinary groups parallel to our map of the disciplinary lexicon. As a starting point for such a mapping exercise, let me propose three basic sorts of group dynamics within the field of international law: those based on affinity for ideas, those based on professional and personal identity, and those based on struggle for domination.

Common Intellectual Projects and Ideas: The Dynamic of Commitment and Aversion

At the most overt level, many people in the field are animated by their fealty to a set of ideas. They do come to believe in the importance of various intellectual propositions about law or about international society, and they then develop projects to promote these commitments. They try to get other people to share their ideas and to forgo competing ideas. And, of course, people come to believe that other ideas are not as valid or important or useful as their own, and they develop aversions to projects that seem to express commitments with which they disagree. As particular doctrinal or institutional projects come to be associated with one or another of these ideas, those who share the commitment can sometimes be mobilized on its behalf, just as those who do not can often be mobilized against it. Sometimes groups sharing intellectual commitments or aversions develop projects to promote these commitments. It is also

common, however, for groups formed on the basis of a shared professional identity or political project to seek allies on the basis of these shared intellectual commitments.

The most important idea around which international lawyers have organized themselves has been the discipline's own broad mission—to construct governance among states, to speak to power from a cosmopolitan point of view, to promote a broadly liberal and rationalist frame for understanding international affairs. Of course, particular groups of international lawyers experience this commitment differently. A group could form around the project of ensuring that little changes in international law, or that everything needs to be rethought for the discipline to survive. Each of the positions mapped in the professional lexicon has also, at one time or another, been the basis for shared commitment and aversion by some international lawyers. Rearranging the field's schools of thought, proposing a new mainstream or counterpoint arrangement of the disciplinary vocabulary—these are all projects of this type. Moreover, the discipline is intellectually and politically porous, so international lawyers in different countries are influenced by the intellectual styles and political preoccupations of the national elites within which they work, and the long march of the tendencies operates in international law as elsewhere.

Identity Groups: The Dynamic of Affiliation and Disaffiliation

If we thought of a professional discipline simply as a group of people sharing a common vision, project, or professional vocabulary, divided by intellectual orientations, commitments, and aversions, we would miss a great deal. The profession is also rife with sociological and political affiliations that are not experienced first as *intellectual* commitments. The field is animated by the seductive power of groups and individuals, as well as by the desires of many professionals to disaffiliate with one or another group of colleagues. Affiliations based on personal and professional identity affect the distribution of ideas in the field as profoundly as do shared intellectual commitments.

We are all familiar with the charismatic power strong teachers or professional leaders can exert on behalf of their methodologies. People can also be attracted or repelled by doctrinal or institutional projects—building courts, working with nongovernmental organizations—because they express particular professional identities: people who build bridges, or like to argue, or always look on the bright side, or like to feel that they are lighting a single candle. Some groups will seem "in" and some will seem "out" at particular moments. Some professional "voices" can seem more fun to speak than others—more sophisticated, more daring, safer, more committed, more powerful, more abject. Maybe the Yale people have all the fun, or the Columbia people are the really serious ones, or the formalists exude the pleasures of negation.

Professionals are often more ready to affiliate with those who share their disciplinary subspecialties and to disaffiliate from those in other departments. Like other fields, international law is also divided by generational affinities: people who remember the Second World War, who worked in European reconstruction, who were affected by Vietnam, who grew up with computers, and so forth. Among the strongest sources of professional identification are the links built through mentor-mentee relations. Like ethnic, class, gender, race, religious, national, or other strong identities within the broader political field, mentor-mentee relationships present, at a micro level, a somewhat independent field of life, of desire, affiliation, and alliance somewhere between the rationalist community and the ambitious individual. In launching projects or proposing intellectual commitments, it is often possible to find allies and enemies by tracing the links among mentees and mentors.

Pursuing Projects: The Will to Dominance and Submission

The discipline is more than groups of people with substantive commitments or professional identifications. The patterns of intellectual commitment and aversion and of professional affiliation and disaffiliation provide a context or terrain in which professionals can pursue projects of dominance and submission with other individuals and groups. New thinking emerges not simply as the result of a disinterested persuasion effort among identity constituencies in the field with different commitments; it is also the result of competition among constituencies within and outside the field for authority, recognition, prestige, and resources. Many such projects are simply the extension into action of an intellectual commitment or professional identity. Others express a will to power that arises outside these common professional characteristics. And the discipline has a will to power of its own, for itself as much as for its vision.

Moreover, although it is less often discussed in these terms, there is also a will to submit that will affect the distribution of ideas and resources in the discipline at any given time. The discipline as a whole may see itself paying fealty to other powers—to politics, say, or to economics. International lawyers may find congenial the role of servant to statecraft, voyeur of power, chronicler of politics, even powerless critic of power, and might be altogether uncomfortable if thrust into the driver's seat. And individual international lawyers may seek out the leadership of others in the profession, regardless of the particular commitments or identifications their projects entail, for the experience of following.

International lawyers often seem to oscillate between a will to rule and abjection in the face of what they interpret as power. Looking back on the field over a century, the disciplinary will to disengage from power is striking. International lawyers coming into the field after 1980, on the other hand, often experienced their elders as having submitted far too happily to a kind of disci-

plinary detachment from the foreign policy apparatus, and opposition to this willed submission became a force of its own, producing an intense energy to perform as macho and entitled to rule.

International lawyers also participate in a range of political projects outside the field of international law on the basis of their expertise and seek allies in the profession for these efforts. Such projects can be associated with the broad party politics of the society. International lawyers in the United States have been active in supporting both the Democratic and Republican parties, as well as in promoting particular factions within them—Rockefeller Republicans, Stevenson Democrats, and so on. It might make more sense to organize international law in the United States in terms of the political affiliations of its members than in terms of either its internal professional associations or its intellectual commitments. At the moment, American international lawyers on the right tend to be formalists about American sovereign prerogatives and strict interpreters of the commitments of foreign powers, particularly to respect property rights, and the prerogatives of international institutions, but very expansive and policy-oriented when it comes to interpreting restrictions on U.S. power abroad. American international lawyers on the left are more likely to be rule-oriented when it comes to American obligations and far less worried about the formalities of multilateral or international institutional initiatives. Political affiliations of this type contribute to the argumentative instability of the profession's intellectual terrain and to the general sense that everyone is an eclectic or post-intellectual pragmatist. Political efforts of all these types will influence the distribution of ideas and professional affiliations within the discipline.

Commitment, Affiliation, Domination, and the Distribution of Ideas

In mapping the influence of power on the distribution of ideas in a field, it can be helpful to separate these three dimensions—commitment, identification, and domination—for they can operate independently of one another. In the simple case, a person who seeks to make a project out of promoting international law seeks allies among those who share an intellectual commitment to this idea and who share professional identification with others in the field. He or she then seeks to dominate those within and without the field who are less enthusiastic about this project.

But we can easily imagine more complex cases. A person might seek to translate his or her commitment to an intellectual proposition—building courts is better than building administrative agencies—into action as a project by seeking the support of others with whom he or she shares other commitments or identifications. A person or group might seek power by transforming its professional identity—say, those who know about defense policy or appreciate political science—into an intellectual commitment for the field as a whole, and so on.

We are now in a position to supplement the traditional account of the distribution of ideas in the discipline. We began with the constraints of the professional lexicon itself, the language within which professionals pursue projects. Professionals also embellish and transform the discipline's basic arguments in the pursuit of projects, for which they seek allies and resources. We might think of the discipline as a kind of force field animated by some combination of these three elements (fig. 13). There is a common disciplinary mission, viewpoint, and vocabulary. International lawyers share a range of commitments and aversions to particular intellectual propositions within that vocabulary. They affiliate and disaffiliate from a variety of professional identities, some expressing commitments of the field, others provided by the context of their work or by their broader social context. Lawyers pursue projects, efforts to promote intellectual, political, or personal objectives, deploying their expertise in the discipline's vocabulary, seeking alliances with others on the basis of shared commitments, aversions, or affiliations. The status of forces among particular ideas, particular modes of criticism or reform, will often depend on the distribution of forces among groups whose projects, commitments, and affiliations seem implicated.

We should see disciplinary change, then, in at least two different registers—

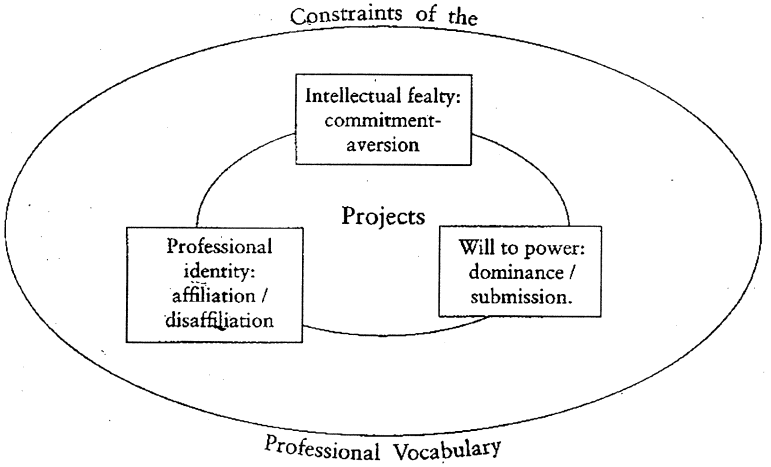


Figure 13

as a transformation in the professional vocabulary, and as a project of people located within the profession. I have looked in some detail here at changes in twentieth-century international law in the first register. Let me now look more briefly at one episode in that transformation as a set of projects pursued by a generation of people.

INTERNATIONAL LAW TODAY: ANXIETY AND THE SEARCH FOR A NEW CONSENSUS

The contemporary bid to establish a new consensus in the field and to end the post–cold war period of anxiety is not only a transformation of the field's professional vocabulary. It is also a product of various projects of affiliation and commitment by individuals and groups within the field. The transnational–legal process–liberalism proposals for a new consensus are all interesting, and many of the specific reform ideas being advanced as exemplars of this new vision may be great ideas. Given the plasticity of the justificatory vocabulary within which they are being proposed, I am confident that many could be implemented without consolidating the broader vision, just as the broad rearrangement of schools of thought being advocated could be achieved without implementing any of the particular reforms. Nevertheless, there are all sorts of alliances between those attached to particular reforms and these general ideas: those opposed to the ideas oppose reforms, reform opponents oppose the ideas, and vice versa. What is needed is a more basic understanding of the patterns of commitment, affiliation, and ambition within which these debates are occurring. Let me illustrate, at least in a loose way, the sorts of influences and engagements that would be part of such an account.

Scholars bidding for mainstream status customarily present dissensus in the field as "methodological." Although this formulation takes the emphasis off the struggle among affiliations and ambitions in the rearrangement of the field's intellectual terrain, it has a certain benign pluralistic feel. Given the arrival into the legal academy of various "methods" for studying law (feminism, policy science, political science, cultural studies, law and economics, public choice, literary theory), it is not surprising that methodological diversity would show up in international law. As long as the goal remains building the machinery of international governance, and the measure remains pragmatic use value, the more methods are brought to bear, the more tools we are likely to have in pursuing our disciplinary project. Of course, it is customary to recognize that these methods sometimes carry with them loose political affiliations, but these differences simply contribute to the field's pluralist or eclectic breadth. In my own experience, however, international lawyers are not blank slates, committed to a broad disciplinary objective and searching around for a useful method to get there. They are people with projects, commitments, and

affiliations. They seek and reward allies, punish enemies, and contend with one another as if their differences mattered, both for the field and for themselves.

Proposals for a new consensus in the field uniformly present themselves as broad efforts to help the field achieve its broadest objectives, rather than as the projects of particular individuals or groups. They are so written that all professionals of good sense might share their commitments and affiliate with efforts to realize their implementation. Still, it is easy to distinguish among these scholars those with one or another more specific commitment or affiliation. There are people who want to promote international economic law as a field, who want to affiliate with law teachers in other "tougher" fields, who want to reinterpret international economic law as a somewhat public or constitutional legal order amenable to at least some socially responsible regulatory initiatives. Being seen to be a person who knows about economics or who consorts with law and economics scholars might well advance such a project. Similarly, there are people who want to redeem public international law as a possible partner in managing American foreign policy. To make it a worthy participant in statecraft, they feel they must demonstrate a certain hard-boiled understanding of power, and a rapprochement with the political scientists who have staffed the Democratic party foreign policy establishment might be a good strategy.

The same sort of interpretations might be made of those outside this new mainstream, among those who insist upon the formal entitlements and autonomy of national traditions as expressions of the field's own good sense. There are people who want to redeem the possibility of a Third-World nationalist position, who are drawn to affiliate with people involved in scholarly enterprises drawing on all sorts of postcolonial literary, historical, or cultural theory—not because of a clear idea about how such a "methodology" will advance international law, or even their particular project, but because the milieu seems a productive one for pursuing the project, filled with people with whom they seek affiliation. And there are people who were propelled by deracination to international law, only to begin working out their identity as Latino or Asian or Jewish or gay, and so on. We might recognize scholars opposing transnationalism–legal process–liberalism in the lexicon of "public choice" as vaguely right-of-center people, morally upright, tolerant but scandalized by the messy compromises and seamy deals of political life, who would be horrified by the idea of taking power in either a struggle of identities or a liberal governance regime, within the discipline or in the society. Rather than become a participant in a "regime," such a person might prefer to replace the corrupted world of politics with a more sensible and rational expertise. Where humanitarian values need protection, better a nice clean rule or right.

The most significant projects, affiliations, and commitments moving the international law profession at the moment are generational and political. Both

are easy stories to sketch. The generational account picks up as the long engagement between my own generation and our predecessors ends. The displacement of the Yale-Columbia axis by the axis of support for and opposition to transnational–legal process–liberalism is an event in the development of ideas. But people in the field easily recognize it as also a generational phenomenon. The 1960–1989 generation was an extremely cohesive one that entered the field early in the Kennedy administration and only began to lose its grip after the elections of Reagan and Thatcher. Since the end of the cold war they have retreated with remarkable generosity and grace or have reinterpreted themselves as participants in a new generational wave of renewal and engagement for the field. The leaders in the field are now largely my contemporaries, whose formative experiences in the field came after the disappointments of 1968 and Vietnam. At the same time, the field is expanding rapidly, and a much larger and potentially more diverse generation is coming on the scene.

Generational change within a field is rarely smooth. A field can be dominated by people who understand themselves to be part of one generation for thirty or more years, and they can quite suddenly be displaced by another group of people who might differ in age among themselves by as much as twenty years but still see themselves as a single generation. In American international law, this has been extremely pronounced, providing an opportunity to examine how a generation coalesces, announces itself, and displaces its predecessor.

If we are to place this generational story in a social and political context, we might start with the observation that for international law in the United States the 1990s have been like the 1950s. There are certainly contextual similarities: long economic expansion, newly unchallenged global role, a period of national cultural retrenchment, reaffirmation of conventional "family values" against the periodic cycles of modernist sexual and political opening. International lawyers again find themselves defending the machinery of multilateralism against a conventional isolationism translated by hegemony into a unilateral internationalism. We find again a displacement of public law aspirations by the priorities of free-trade economic expansion on the one side, and a creeping tendency to idiosyncratic humanitarian interventions on the other. It is not surprising that we find leading international lawyers today returning also to the ideas and practices of the 1950s—antiformalism, legal process, transnationalism, universal humanism, embrace of international relations, postwar liberal triumphalism, worry about the viability of humanism in a divided and decolonizing world, talk about a liberal world public order, defense of the universal in human rights. For international law, the 1950s were also a time of disciplinary doubt, of postwar anxiety about the viability of collective security, multilateralism, even international law itself, in the new world of "totalitarianism," "ideology," and the cold war. The 1950s saw deep methodological division in the field as scholars trained in the world of cultural modernism, sociological jurisprudence, functionalism, and legal realism struggled to reinvent their field on these new terms in new conditions—people like Hans Morgenthau, Pitman Potter, Josef Kunz, Leo Gross, Hans Kelsen, Myres McDougal, and Philip Jessup.

It was only in the 1960s that a methodological and political consensus settled on the field: the internationalist liberalism of people like Richard Falk, Louis Henkin, Oscar Schachter, Tom Franck, Louis Sohn, and Abe Chayes who consolidated a new mainstream way of thinking against the backdrop of the Yale alternative. In a way, the old public international law simply foundered on the rocks of legal realism and policy science. The new generation hitched their wagons to the foreign policy of the Kennedy era, and to an American-style liberalism with an internationalist and cosmopolitan perspective, at first promised by Kennedy's New Frontier, then by Hammarskjöld's revitalized United Nations. As the liberal consensus on American internationalism dissipated, the field became increasingly marginal, isolated from both the cosmopolitanism of Republican free traders and the increasingly interventionist cold war liberalism of the Democratic party, in Vietnam and elsewhere. Their commitment to the formal rules necessary to criticize American hegemony or to build a regime of coexistence with the Soviet Union isolated them further from American legal scholars in other fields eagerly embracing the world of "policy." There was Ford, there were spurts of energy in the Carter years around human rights and the law of the sea, and then came Thatcher and Reagan and Bush.

Nevertheless, the disciplinary hegemony of the Hammarskjöld liberals in the field of public international law was surprisingly complete and long-lasting. It also had an enormous echo outside the United States, in many ways more than here at home for generations of young lawyers from the Third World, as well as from our industrialized allies and colonies, looking for a safe space between socialism and embrace of the American empire. The international legal scholarship of the 1950s was simply swept away. After 1960 it was routine to assert that all those who had come before had missed the most significant political developments: superpower convergence, decolonization, the emergence of development as a central substantive issue, the existence of cosmopolitan space between the superpowers. The field had been in urgent need of renewal, had suffered from an unhealthy methodological extremism when the practical problems of a newly interdependent world called out for an eclectic *via media*. The discipline's marginal status discouraged dissident voices within the field, even as it established a practice of professional dissidence. A call for "new ideas" in 1959 rather than 1999 would have had many takers—all proposing one or another version of the liberal humanism that would dominate the field for a generation. Their program would have rekindled the modernist and cosmopolitan recipes of the 1920s, enthusiasm about international administration, a chastened collective secu-

rity, a critique of sovereignty, an embrace of political science, of expertise, a call for renewal.

By the time Clinton was elected, this vision had broken apart—exactly as the isolationist consensus of American international lawyers before the Second World War collapsed after 1941—and for ten years we have been in a period of contestation and disciplinary anxiety. The context in which my disciplinary colleagues urge renewal of the field is one in which international lawyers have fallen far from power. For most in my generation, this is a problem, not an opportunity. The central project common to the new mainstream is an urgent effort to permit international lawyers to return to a position of authority within the American political establishment they have not had in almost a century. The leaders of the field are no longer content to criticize power—they are anxious to exercise it. New ideas are necessary if the field is to give policy makers a workable set of myths and methods, or is to imagine itself into the same social frame as the new governing establishment.

In this sense, the leading "new" scholars of my generation are to the Clinton era of renewed, if chastened, Democratic party foreign policy what the Hammarskjöld generation were to the Kennedy and Johnson administrations. Their shared political project is the defense and development of a benignly hegemonic foreign policy of humanitarian interventions. They share with the Clintonites a way of thinking about markets and human rights, share with Clinton's World Bank appointees a skepticism about neoliberalism, an earnest faith in modest interventionist development policy, and so forth. They seek a more humane (if only marginally more open) immigration, refugee, and asylum policy. Inside American legal culture, they are internationalist about the foreign relations law of the United States, favoring an expanded federal authority in foreign affairs and an increased role for international law in United States courts, even as they favor chaining the State Department to law when it acts abroad. Thus they favor decentralization of judicial adherence to international law—and the use of national, or even local, courts to enforce human rights norms. Anyone and everyone should try Pinochet, for example. But they do not favor decentralization of American executive power in the foreign affairs field—allowing Massachusetts to use its purchasing power to sanction Burma, for example—at least as long as the Democratic party remains in control of the national administration.

There are differences within the group, of course, about this or that intervention, the viability of a criminal court, and so on, but everyone wants U.S. courts to pay more attention to the International Court of Justice, wants the United States to "use" the institutions of multilateral dispute resolution more sincerely and more often. This is not the party of Buchanan or Helms or Perot or Nader—and also not of Rockefeller or Bush Republicanism. It is certainly not the party of Reagan, with his belligerence on cold-war interventions, bilateral or unilateral enthusiasms, his obsession with the Contras, and all that.

For international lawyers to be players in this new political climate, the leaders of my generation concur that the discipline must dump the rule piety and policy skepticism inherited from the Columbia School. A dose of political science would obviously be a good idea, and the transnational–legal process–liberalism school has embraced a strand of the political science academy whose vocabulary converges with their own, worrying about "governance," "regimes," "global management," and so forth. After all, recent Secretaries of State or National Security Advisors have been political scientists or Wall Street attorneys, but none have been international lawyers. These people are skeptical of human-rights dogma—far too unrealistic and formal—but extremely supportive of the human-rights ethic, process, procedures, machinery, just as they are empathetic about culture and poverty and other humanist commitments and enthusiastic about all sorts of efforts to dialog and understand. Unlike some Catholic figures in the field, however, raison d'état rather than social justice is their first commitment. But it is a soft, embedded, humane raison d'état.

The transnational–legal process–liberalism school recognizes that the real players behind globalization are economists or international economic law specialists and understands that an appreciation for economics alongside political science wouldn't hurt. Still, its proponents tend to be people who share the idea, common in the broader liberal intelligentsia, that economics is in some sense bloodless, or has a tin ear for ethics. As members of the governing establishment, they certainly support free trade, but these are not neoliberals of the Washington consensus. They are modest interventionists, interested in tempering free trade with appropriate regulations, sympathetic to the concerns raised by nongovernmental organizations (a new term for labor unions) about the social impact of trade. And so on.

What we have is a generational cohort proposing a new synthesis, animated by a set of overlapping political projects they are pursuing vigorously. They have sought out allies among those sharing one or another of their intellectual commitments—to interdisciplinarity in general, to the importance of economics and political science—among international lawyers, and among those in neighboring fields who have felt that international law had somehow gone astray, needed a cold hard look, a reengagement with policy science. They have cultivated friends among those of their elders who chafed most under the dominance of the Yale-Columbia axis—scholars at New York University, at Harvard, at Michigan, in the west. They have found support among those drawn to their intellectual and professional style, their hip sensibility and apparent political with-it-ness. They have mobilized institutional resources in universities, in law firms, in government. They have worked to mobilize professionals in a number of subdisciplines to generate operational examples of their general ideas—environmental law, refugee affairs, arms control. They have written broad reinterpretations of the field's most basic

doctrines and institutions—judicial review, the power of the security council, the role of courts, the function of international institutions. They have sought out and supported mentees and followers, have appealed to the desires of others in the field for energetic leadership. They have presented their suggestions for doctrinal and institutional reforms to one another's practitioner-beings in the hope of confirming adoption. All this is quite normal—had they not done so we might have wondered about the usefulness of their ideas or the depth of their professional commitment and competence.

This emerging professional consensus has been criticized in numerous ways, by people within and without the field, by international lawyers from the United States and elsewhere. Critics have made efforts to mobilize constituencies in opposition, just as the transnational–legal process–liberalism proponents have sought to do on their own behalf. Some of this opposition comes from people proposing other ideas to reorganize the field, some from people opposing one or another of the pet projects of the transnational–legal process–liberalism cohort. This opposition effort has generated two broad types of criticism, neither of which strikes me as terribly convincing, but both of which have been rather effective tools for mobilizing people in the field to opposition.

Some opponents have focused on the broad ideas themselves—the antiformalism, the emphasis on an embedded civil society rather than sovereign autonomy, and so on. The idea here is to demonstrate that something about these ideas is bad for the field as a whole—will drag it too close to politics, blunt its claims to universalism, ignore the continuing importance of states. We might think of this as an effort to develop a "high" church position opposite the new low church of transnational–legal process–liberalism. Where they are antiformal, be formal; where they emphasize community, focus on the continuing value of sovereign autonomy. At the same time, these voices are very concerned not to be mistaken for even more formalist identity and human rights fundamentalists. The result is a vigorous, if rather familiar debate. The difficulty, of course, is that once one places these schools on the broader spectrum from the political science realism/formalism opposed by the new mainstream through the sovereign autonomy/identity fundamentalism opposed by the new dissident voices, the difference between the mainstream and the counterpoint seems less and less one of principle. Indeed, it would not be surprising for the mainstream scholars to find it difficult to understand how what the dissidents are proposing actually differs from what they are proposing—or to hear their dissent as a willful misreading of mainstream intentions.

In arguing about the proper limits of the field—its relations with commerce, the base, politics, and so forth—the new high and low church have developed roughly parallel and opposing accounts of how only their solution can save the field's broad project. The idea here is to find some element in the

opponent's broad vision that invalidates the entire project. Doing so often takes the form of associating the ideas of the transnational–legal process–liberals with a set of political consequences and affiliations. Thus, one might argue that antiformalism about international law is inexorably associated with American hegemony or imperium—it was in the 1950s and it is today. In an extreme version, one might say that the Nazis were antiformalist, and so were the colonialists, so it's just bad stuff. The problem with arguments of this type, of course, is that antiformalism has had a quite varied political career in international law—associated with the Left in 1919–1939, with the Right in 1960–1989, and today's transnational–legal process–liberals are quite insistent that it is the perfect set of ideas for a moderate center-left program.

A second strand of criticism takes the emphasis off the ideas altogether and focuses on the association of the transnational–legal process–liberals with a variety of reform efforts, dear to the American political establishment, that these critics oppose. Thus, it is argued that the new American international lawyers are somehow (and the somehow is often rather mysterious) implicated in a broad American plot of domination. Now it is true that these people want to participate in American governance and in America's participation in global governance—but being part of a right-wing conspiracy of global domination could hardly be further from their own intentions. There is no question that the transnational–legal process–liberal group has been assisted powerfully by this association with the American political establishment in their struggle within the American intelligentsia, just as they have often paid a cost for this association abroad. But this association should be understood (and, if you like, opposed) as an alignment, an alliance, an association, rather than as an entailment. For one thing, these people understand themselves to be strident opponents of American adventurism of this sort, themselves critical of American pop-cultural dominance, firmly empathetic to the developing world, supportive of the ethic of human rights everywhere but above all sensitive to the difficulties of cross-cultural understanding and dialog. Theirs will be a regime of differentiated rights and responsibilities—that's the whole point. It might turn out that their ideas had nevertheless been captured by practitioner-beings with completely different agendas, and they had become the unwitting accomplices in a set of political initiatives they did not understand, but this is extremely difficult to demonstrate. The fact that the ideas originate among Americans who want to participate in American government does not, at least to me, suggest that the ideas are tainted, any more than the fact that some idea arose in the colonial encounter taints it always in all contexts. Americans come up with good ideas sometimes, as do colonialists, and ideas turn out to be rather flexible as they migrate about. Nevertheless, a rather successful opposition to transnational–legal process–liberalism has emerged that blends these two strands of criticism. These people are Americans, they propose to strengthen the American foreign policy machinery and

participate in it, they are antiformalist about international law and willing to relax commitment to universalism. They are either evil or unwitting accomplices in a project of hegemony.

In my own view, criticism of this sort is at once too sweeping and too wedded to the discipline's own vocabulary. As an intellectual matter, given the instability of the professional lexicon, the effort to uncover political biases in a new school of thought requires going beneath the charges and countercharges that simply deploy arguments across the spectra of the profession's established vocabulary. And the effort to connect ideas in the discipline to political projects requires a more sociologically focused inquiry into the projects of domination, affiliation, and commitment by which ideas are captured by one or another group at a given moment. This will probably require more attention to the particular context and political motivations of the idea's proponents. Efforts to identify the dark side of disciplinary common sense and its capture by groups are important, but they seem unlikely to be accomplished by a silver bullet. Rather, opposition of this type requires an ongoing performance and counterdemonstration, an effort to uncover and make visible the blind spots and political projects firmed up on the more neutral vocabulary of disciplinary renewal and pragmatic persuasion. The audience for this sort of demonstration consists of people in the field who might be mobilized one way or the other. The distribution of ideas in the field will be determined, in large part, by the relative success of various groups and individuals in mobilizing younger people to seek career paths thought to instantiate one or another set of ideas about where the field should head.

My own hope is that as the field rushes to embrace a new consensus, there will remain some who keep doubt alive. It would be better, as I see things, if we could wallow in dissensus and uncertainty a while longer rather than rushing to develop either enthusiasm for the transnational–legal process–liberal project or for its opposition. Both seem unpersuasive except as they have come into power in the field through political activity and alliance, and both seem to share the blind spots and biases of the discipline's professional lexicon. It has been my project while this new consensus has slowly emerged to open a space for a range of critical initiative and alternative voices: to seek alliances, affiliations, power, to permit the development of ideas that did not fit the lexicon of high and low. The point was not to develop an all-points criticism of transnational–legal process–liberalism, nor to propose an alternative, any more than it was to support this emerging mainstream project. The idea is simply to sidestep the preoccupations that generate this sort of transformation in a disciplinary vocabulary that needs to be rethought in a far more daring way.

I have come to this project myself partly by following the energy of younger international lawyers who seem charismatic and whose political and social projects I admire, partly by longstanding aversion to many of the projects of other international lawyers and skepticism about the commitments and projects of the field as a whole. My intuition is a critical one—that in some way the international legal profession has often made the very things it claims to care most about less likely, that the professional discipline is part of the problem, and that the established professional argumentative practice in the field repeatedly places its speaker in a posture of bad faith—overestimating small differences and over-promoting broad arguments about which one is also professionally ambivalent. This intuition, I'm afraid, applies to those of my generational cohorts now proposing a new political and intellectual synthesis for the discipline as well as it does to their most notable opponents.

Unfortunately, this remains, after close to twenty years of collaborative work, a very un-worked-out intuition and a comparatively unsuccessful project. We have started to figure out how the discipline participates in keeping a terribly unjust international order up and running, even as it seeks with great passion to be a voice for humanitarian reform, even as it renews itself constantly to be more effective. But we are just getting started. The difficulty is to figure out how to get beyond rearranging the discipline's own points of reference. This is not just an intellectual difficulty, however. Transforming the discipline, just like reinforcing it, is a project that requires the mobilization of affinities, the building of groups, the staging of controversy, the announcement of opposition, and seductive appeals of recognition, engagement, play. In my experience, thinking against the box the field has built for itself is a performance in a particular context, a project of affiliation and disaffiliation, commitment and aversion, dominance and submission.

A FIRST ALTERNATIVE PICTURE: THE LIMITATIONS OF PROFESSIONAL CONSCIOUSNESS; OR, THE DARK SIDE OF EXPERTISE

One element in that extravernacular effort has been an attempt to map, in a more systematic way, the biases and blind spots that accompany the discipline's vocabulary across a range of efforts to renew or reorient the field. For some years I have been working from the intuition that the discipline's store of professional commitments, practices, and ideas do have very deeply rooted blind spots and biases that are not likely to be overcome by movement among schools of thought in the field of international law, nor by borrowing from the neighboring international disciplines of comparative law, international economic law, or political science. My starting point has been the observation that while international lawyers are largely very nice people, socially quite liberal, committed to making things better, something about the way they conceptualize problems and possible solutions, including their best ideas about how to renew the field and their most critical observations about how things have gone astray, seems nevertheless to strengthen rather than weaken what

seems inhumane in our current international arrangements. The blindnesses and biases of the disciplinary vocabulary have been enhanced rather than eliminated by the current generation of enthusiastic renewalists.

One way to describe the limited nature of the professional vocabulary would be to focus on the widespread tendency to disregard what seem background conditions and norms. One might identify across several generations of disciplinary innovation common but mistaken ideas—like the idea that international governance is separate from both the global market and local culture, or is more a matter of public than of private law—that narrow the sense among foreign policy professionals of what is possible and appropriate for foreign policy. Although we know professional disciplines have blind spots—some emphasize public at the expense of private order, governance at the expense of culture, economy at the expense of society, law at the expense of politics—we hope these run-of-the-mill limitations can be corrected by aggressive interdisciplinarity. Unfortunately, blindness to the background can be maintained, even reinforced, in the face of interdisciplinary work. Specialists in all internationalist fields share a sense that governance means the politics of public order, while a background private order builds itself naturally through the work of the economic market. As a result, these specialists underestimate the possibilities for political contestation within the domain of private and economic law and overestimate the impact of globalization on the capacity for governance.

The specific effects of this sort of disciplinary limit will differ over time. Since the cold war, international lawyers in the United States have come to share a diagnosis of the changed conditions for statecraft: international politics has fragmented, involving more diverse actors in myriad new sites; military issues have been tempered, if not replaced, by economic considerations, transforming the meaning of international security; a new politics of ethnicity and nationalism is altering the conditions of both coexistence and cooperation. Despite this interest in context, in expanding the boundaries of the field, in an antiformal or embedded law, they share with their more formal opponents and with their predecessors across a century of disciplinary renewal a conception of what governance *is*, of the distinction between law and politics, and so forth; and these conceptions have consequences for their assessment of today's political possibilities.

For example, international lawyers in the United States today overestimate the military's power to intervene successfully while remaining neutral or disengaged from background local political and culture struggles. They tend to overestimate the technocratic or apolitical nature of economic concerns, including the independence of economic development from background cultural, political, and institutional contexts. A shared sense that cultural background can be disentangled from governance leads specialists to overemphasize the exoticism of ethnic conflict as well as the cosmopolitan

character of global governance. The result is a professional tendency to overlook opportunities for an inclusive global politics of identity—for working constructively on the distributional conflicts among groups and individuals that cross borders.

The proliferation of sites for international public policy that contemporary international lawyers embrace has a dark side about which they are more overtly ambivalent. The erosion of the state they see to be transforming the methods and objectives of public policy, eroding the ambitions of public law, expanding private law and private initiative, withering the welfare state under conditions of globalization, inaugurating a democracy deficit, governance by experts, technocracy. Law fragments political choices, spacing them out in bureaucratic phases structured by proliferating standards and rules. Political interests become factors to be balanced in an apparently endless process. In a technocratic private market, the locus for political choice is not so much opened up as rendered invisible. The idea of a "government" promoting a "program" has been replaced by the enlightened management of prosperity, dramatically narrowing the field of participants whose interests are understood to be in contestation internationally—exactly as today's international lawyers celebrate an opening of the policy process to civil society.

Mainstream international lawyers have greeted this trend with a tone of tragic resignation. Something called "globalization," interpreted as a natural fact, has rendered public intervention in the emerging global market more difficult than it was within the welfare state, whether for the environment, labor standards, consumer protection, or redistributive taxation. Although international lawyers often bemoan the weakening of traditional public policy levers in the face of newly mobile capital, their relative resignation contrasts starkly with their enthusiasm for a newly open international political process, as if enthusiasm about new participants were linked to confidence that they can now do little mischief. The link here is a familiar liberal one between democracy and a disempowered state, between strong markets and weak governments. The common theme is a disempowering of public law and the disappearance of background private and commercial affairs from the jurisdictional domain of politics.

My intuition is that we could reject both enthusiasm about the fragmentation of international political life and resignation before the shrinking ambitions of public policy in the face of a growing private sector. But as a policy alternative this is extremely difficult to express or hear in the discipline's conventional lexicon regardless of the school to which one belongs. Rebuilding politics as an alternative to law, or developing a domain of contestation that is *not* law-not-politics, between-not-within states-nonstates, is not part of the discipline's problem set. It is extremely difficult to articulate an opposition to antiformal enthusiasm for a weak global governance system in terms that are not understood to revive the state or disestablish the international market

in the name of formal entitlements. But the welfare state often did entrench class, race, or gender privilege within its borders while preventing movement of people, ideas, and capital—all in ways that buttressed inequitable resource distributions across the globe and shrank the global imagination. In some cases a more technocratic politics has been a counterweight to the corrupt tendencies of mass politics and the capture of the welfare state by rent seekers of various sorts. And treating the state apparatus as the *sine qua non* of decolonization has often entrenched gruesome practices in the name of sovereignty. My own suggestion is that resignation about the demobilization of a vigorous public policy indicates that even as welfare states erode, the notion of public policy they exemplified is alive and well: public policy as territorial intervention by "public" authorities against a background of apolitical private initiative. This resignation refuses to treat as political, as public, as open to contestation the institutions and norms that structure that background market.

If we think of the private domain as political, it is not at all obvious that the current situation is one of fragmentation rather than concentration. Global governance may simply have moved from Washington to New York, from the East Side to Wall Street, from Geneva or the Hague to Frankfurt, Hong Kong, and London. Where factors of production are relatively immobile, a locality or private actor may have more capacity to conduct global public policy than either the welfare state or the institutions of international economic law. The question, in other words, is not *whether* politics or *where* politics, but *what* politics. International lawyers, in my view, should care less about whether the state is empowered or eroded, or whether the law is autonomous or embedded, than about the distribution of political power and wealth in global society. Because mainstream international lawyers accept that the political and economic results that flow from a particular system of private initiative are outside the legitimate bounds of contestation, they can be enthusiastic about a disaggregation of the state and the empowerment of diverse actors in an international "civil society" without asking who will win and who will lose by such an arrangement. As a consequence, the turn to political science too often illuminates the structure of the regime without adding to our understanding of its substantive choices.

Technocratic governance, a displacement of public by private, of political alignments by economic rivalries, the unbundling of sovereignty into myriad rights and obligations scattered across a global civil society—all this has transformed international affairs. Today's leading international lawyers stress that this has often meant an opening of international affairs to new actors and concerns, a democratization and proceduralization of international relations, and this may well be positive. But this transformation has also shriveled the range of the politically contestable, confirming as natural the geographic and economic distributions thought to be the inevitable consequences of "the market." Underestimating the political nature of private institutions and initiatives, many mainstream international lawyers have accepted the demobilization of policy making as they have lauded increasing access to its machinery. The result is a professional class unable to develop viable political strategies for the world it has applauded into existence, ratifying the political choices that result from the arrangements of private power to which the state has handed its authority, while still celebrating the expansion of participation in an emasculated public policy process.

If we think about military power, the refusal to engage background norms and conditions is equally striking. Of course, the question of who can project force abroad remains important, undergirding patterns of trade, prosperity, and emiseration. The current generation of renewalists has provided us with a new security vocabulary of budget surpluses or deficits and hard or soft currencies rather than throw weights and silos. We are urged to reimagine missiles as missives, their deployment determined less by Clausewitz than by Hayek or Keynes, their military function shaped more by CNN than by the Pentagon. Like the disestablishment of the state, the economization of security has largely been welcomed by Clinton-era international lawyers. If the liberal peace hypothesis proves correct, the disaggregation of the state into a global market has left the world more secure and free to worry about prosperity. At the same time, economic security seems achievable through technocratic means, sound management and trade deals, and a smorgasbord of alternative dispute resolution mechanisms. Trade wars promise to be friendlier than real wars: they cost less and can be won by lawyers.

In the meantime, today's foreign policy professionals have drummed up all sorts of new uses for military machinery. During the cold war, military interventions and proxy wars were hard-wired to the central problem of global security. Now they float more freely, drifting into limited police actions, humanitarian gestures, and stabilization at the periphery. The military has emerged from the collapse of the welfare state as the only bureaucracy broadly thought capable of acting successfully, so long as the mission does not bleed back into economic or political matters. Seen this way, the military is available for a wide variety of technocratic tasks, but it should be protected from the quagmire of political or social engagement. The military will stabilize borders and prop up states precisely as globalization renders state institutions marginal sites for public policy. International lawyers anxious for a role in the foreign policy apparatus assert that our national interest now coincides with the stability of global governance for a global market. Consequently, the military should become a national contribution to that international order, for which the United States should be thanked and probably reimbursed. At the same time, nothing is very urgent—we could do it or not, it is a moral question, a technical question, maybe we should send the Red Cross instead, or hold a

plebiscite, or enforce an embargo. We expect a police action, an air strike, force by permission, with limited objectives and clear avenues of retreat back to the cosmopolis.

The problem is this: our foreign-policy professionals expect a technocratic cosmopolitan governance to have no stakes in local disputes beyond stability, and therefore to deploy force in an unrealistically sanitary way, without political entanglement. But cosmopolitan governance does have stakes in local disputes. Although we should focus on securing prosperity, these new security concerns cannot be engaged without thought to the social and distributional context within which they occur, any more than by military force detached from economic cost and political risk. Economic security need not mean deference to the largest market actors; there are, after all, a number of possible markets, structured by different background values and distributive choices. Defending the stability of a political order necessary for investor confidence requires a set of political choices both among states and among groups or classes within nations, as among the transnational interests of labor or capital or women or men. Moreover, it calls for choices among economic sectors with stakes in different patterns of modernization, among investors with stakes in different patterns of production, trade, and consumption. It is commonly said, for example, that a global market "requires" an emerging market to enforce the "rule of law" to permit "transparency" and "predictability" in market transactions. It sounds very clean, egalitarian, procedural, just like apolitical background rules. But the alternative is neither arbitrary nor chaotic allocations, but a different and often equally predictable allocation of resources, perhaps to local rather than foreign investors, to domestic oligarchs rather than foreign shareholders or vice versa.

Such choices can only be engaged, can only be *seen* beneath the blanket insistence on technical "transparency" once the mainstream tendency to efface background cultural, institutional, or political structures has been overcome. In the recent Banana War between the United States and the European Union, there was a well-established institutional machinery to weigh the technical impact of one or another result on the balance between free trade and protectionism, to assess costs between American producers and European consumers, but no mechanism to examine distributional costs between African, Caribbean, and Central American labor.

The Clinton-era optimism that military deployment can be disentangled from ongoing local political judgment and risk is rooted in the notion shared by contemporary foreign-policy professionals, whether formal or antiformal in their orientation, that cosmopolitan governance projects simply *are* about law rather than politics, about the universal and the rational rather than the local and the passionate. But it turns out that humanitarian intervention and international community policing also require engagement with the distribution of power among groups, along with a political vocabulary for addressing

social and economic justice. It is as if the old coexistence mentality that left cold-war internationalists agnostic between liberal and totalitarian regimes had paradoxically reasserted itself as agnosticism between wealth and poverty, between this and that warlord, this dictator and those victims. But long-term economic security cannot be "managed" without attention to distribution, any more than long-term humanitarianism can be enforced without political choices. Humanitarian *aid* is one thing; humanitarian intervention is another. We saw the difficulty in Kosovo—in our odd oscillation between hands-off negotiation and pious criminalization. Both aspire to clean hands—but governance is a messy business, globally as locally.

Today's international lawyers have also placed "culture" center stage in foreign-policy debates, and in many ways rightly so. Cold-war ideological conflict obscured other differences and accentuated traditional modes of interstate politics. The medium for international affairs has become increasingly cultural: Coca-Cola has become more important than the Voice of America or the military establishment; CNN has replaced the embassy cable. Governance is less about norms or sanctions than about communication and persuasion. Like the economization of security and the disaggregation of the state, this cultural turn suggests a model of international affairs more amenable to expertise, a matter of texts and images rather than either guns or butter. Within the cosmopolis, at least, "culture" is about persuasion and communication, governance a matter of deposits and withdrawals from a legitimacy stockpile in an "international community" where everyone speaks the language of missiles and messages, sanctions and sanctimony. Outside the cosmopolis, however, for today's international lawyers of whatever school, culture means a set of local and particularist commitments altogether different from the secular, rational, and pragmatic communicative methods of cosmopolitan governance. Out there, religion and ethnic identity are back, not simply the handmaiden to market rationality and reasoned patriotism, but a range of more primitive, mystical, and irrational creeds.

My international law colleagues tend to take this two ways. Sometimes they reaffirm their cosmopolitan sensibility as a historic liberation from particularism. International economic law defends the liberal spirit of free trade against outbreaks of economic nationalism in the form of subsidies or protectionism. As nationalism "breaks out" or ethnic hatreds "reemerge," internationalists struggle to keep the superego in charge. This cosmopolitanism is tolerant of (if disengaged from) cultural differences, particularly those involving commercial preferences (Germans like beer) or "private" and "consensual" family practices (female genital mutilation). Sometimes the internationalist takes the opposite tack, affirming cultural specificity and insisting on a defense of the West against the rest or speaking for international civilization itself against all that shocks the conscience of mankind.

Either way, there is a problem. As international affairs come to be pursued

in cultural terms, both a culturally demobilized "international community" and an artificially unified "West" will find it difficult to govern, for "governance" means participating in the struggle among cultural groups. Cultural identities are at once more than preferences and less than iconoclastic alternatives to modern civilization. They require more than tolerance or exclusion, they must be engaged with more than the promise of participation in an eroding public life through minority rights and self-determination. Thinking about culture this way leaves the local and global groups and institutions that structure distributions of power and wealth outside the field of vision.

International lawyers in the United States today overstate both the contrast between local cultures and the global cosmopolis and the equation of cosmopolitanism with "civilization" and the "West." Internationalists are neither outside culture nor simply "Western." Cultures are not this solid or coherent. In fact, the most interesting issues arise *within* cultures, including *within* the culture of internationalism, often between groups presenting themselves as cosmopolitan or secular and a variety of new gender, race, national, or religious identities. Of course, people do pursue political projects in broad cultural terms, promoting "North" or "South", "Asian" or "Western," the "Islamic" or the "secular," and conflicts are likely to break out along imaginary boundaries of this type. But patterns of communication, migration, and economic development have also produced a Third World in the First and a First World in the Third, have proliferated "Western" sensibilities as well as nationalist resistances of various sorts in a wide variety of places. In short, our international legal establishment is fixated on differences *between*, just when differences *within* have become far more important.

The differences between men and women within both international and national cultures are more significant—also for foreign policy—than the difference between the international and national treatment of women or men, just as differences among men and among women are often more significant than those between them. We need not set these commonplace observations aside when we think internationally. Differences among possible "market" economies or among transnational groups in a global market are more significant than an imaginary line between the market and public life or between North and South. Differences among groups within developing economies are more significant than relations between developed and underdeveloped economies or between global and national markets.

In my view, our mainstream international lawyers across all schools have become too used to thinking that we have a robust international political order with only the thinnest layer of law. The reverse is more accurate—we have a robust process of global law and "governance" without a global politics. Real government is about the political contestation of distribution and justice. Governing an international order means making choices among groups—between finance and production, between capital and labor, between

these and those distributors, these and those consumers, between male and female workers. Some of these choices will be national, of course—between Thai and Malaysian producers, for instance—but most will not. Development policy means preferring these investors to those, these public officials to those, not the technocratic extension of a neutral "best practice." To make these choices we need a world that is open to a politics of identity, to struggles over affiliation and distribution among the conflicting and intersecting patterns of group identity in the newly opened international regime.

Putting this together, the suggestion is that our international policy professionals err when they sharply differentiate between national culture and global governance or between global economics and global politics. They err when they isolate politics within a shrinking public sphere, when they assume governance must be built while markets grow naturally, when they treat security as a technical matter, disengaged from social and political context. Our international lawyers, whether formalists or antiformalists, enthusiasts for sovereign autonomy or for a revitalized international community, have systematically underestimated the opportunities for engagement with the background worlds of private law, market institutions, cultural differences. From the fragmentation of international politics, specialists have too readily drawn an optimistic conclusion about global democratization and a pessimistic conclusion about the horizons for public policy. As military issues have been tempered by economic considerations, they have become unduly sanguine about projecting military force abroad without local political engagement, while simultaneously overestimating the amenability of economic security issues to technocratic measures. They increasingly see military force both as an expression of a national interest unwilling to place a single soldier in harm's way and as a technical tool for cosmopolitan governance, able to be extended abroad on the unrealistic condition that the cosmopolis lives up to its promise to govern without political, economic, or cultural entanglement. Whether they are thinking about economic stability among the wealthier powers or development at the periphery, they think of the global economy in strangely depoliticized and technical terms. These misinterpretations often reinforce one another. Only after accepting the attenuation of public-policy capacity in the face of globalization does it make sense to reinterpret security in economic terms turned over to technocrats indifferent to distributive concerns. The result is a decontextualized, deracinated, and depoliticized foreign policy amenable to international legal expertise.

By reinforcing the invisibility of background norms and private arrangements, mainstream international lawyers have taken important areas of political contestation out of the internationalist's vision precisely as the disaggregation of the state makes these norms and institutions the most significant sites for international policy making. They stress the naturalness of current distributions of global wealth and poverty, focusing our attention on partici-

pation in public structures precisely when questions of economic justice decided elsewhere become most salient. And they reinforce the stability of cultural identity at precisely the moment diasporic and hybrid experiences make contestation among and within cultural groups the central context for both politics and economics.

In my view, we could rethink the locus of international political contestation and public policy by invigorating debate about what have seemed to be the background rules and structuring institutions of private law, economic life, and local culture. The fragmentation of the state and the geographical expansion of the economy place local and global groups in complex and intersecting new relations. They invite a new global politics of identity. We should judge the global market, like the global political order, by the distribution it effects among today's overlapping cultural, political, and economic groups. The issue is not how to repress or manage national, ethnic, economic, race, gender, or religious claims, containing them within the private or the national domain, but how we can engage them internationally.

It is possible to resist and question this sort of disciplinary blind spot. But doing so often requires departing the discipline's own vocabulary. Stepping outside the professional discipline in this way, moreover, will often mean stepping beyond the easy partnerships of well-established interdisciplinary projects. If international lawyers share a blind spot to global governance that is not cosmopolitan, rational and detached, borrowing from the field of international relations will only help if that field is not also committed to the same idea about what global governance is and is not. Similarly, if international lawyers are blinded by the notion that markets grow naturally while governments must be made, they will get no help from international economic law, a field that shares this central idea. Where international lawyers are limited by their tendency to think of culture as a local phenomenon and of their own work as outside or after the particularities of cultural commitment, they will get no help from comparative law to the extent that discipline shares this vision.

This sort of reconceptualization is a messy and unfinished business that sidesteps the frame of the discipline's own problem set, vocabulary, and arrangement of schools of thought. The intense ambivalence and flexibility of the profession's own vocabulary makes it hard to imagine we will be able to escape professional limitations, assuming we want to, simply by reversing or reorganizing these conventional commitments. Although many people have tried to develop extravernacular projects, in my experience projects that resist this lexicon, that glimpse around its boundaries in various ways, seem to need to be performed, to happen, to be staged. We have a map, if a rudimentary one, of disciplinary renewal. If you seek to improve and update the ambivalent vocabulary with which international lawyers argue hyperbolically for modest reforms, we know where to send you. But new thinking, thinking outside the box, for that so far about all we can say is that sometimes we know it when we hear it.

NOTE

1 I have told the story of twentieth-century international law in the United States more comprehensively in Kennedy 1987, 1997, 1999, and 2000.

REFERENCES

Kennedy, David W. 1987. "The Move to Institutions," 8 *Cardozo Law Review* 841–948.

———. 1997. "International Law and the Nineteenth Century: History of an Illusion," 17 *Quinnipiac Law Review* 99–138.

———. 1999. "The Disciplines of International Law and Policy," 12 *Leiden Journal of International Law* 9–133.

———. 2000. "When Renewal Repeats: Thinking Against the Box," 32 *New York University Journal of International Law and Politics* 335–500.