

**Remarks on International Legal Scholarship
Law Reviews Dinner
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Harvard Law School
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Many thanks for the invitation to kick off this discussion – and this series.

You ask “what legal scholarship should become?” What should be written, what should be published – and in particular, where does the future of *international* legal writing lie?

I should start with an observation that writing is a deeply personal affair. To write is to wish. To wish to understand the world, to change the world – and also sometimes to submit to the world, or to withdraw from the world.

Writing is also a project. Sometimes a project of understanding – or deceiving -- the self. For some scholars, writing expresses projects of affiliation and disaffiliation, or of commitment and aversion. Scholarship can be part of projects that spring forcefully from the will to power – and also of projects expressing the most abject intellectual submission.

To my mind, too much legal writing today aspires to technical mastery, cognitive control. It is the work of experts, combing out the strands of their expertise, confident that their work reveals no wish, no desire, no project. But dispassion is, of course, also a wish – its expression also a project.

Let me briefly sketch an agenda for international scholarship – the scholarship *I* wish were being written and published. The projects I would like to see scholars pursue.

First, a project of understanding -- how are we governed? Too much legal scholarship is written *as if* we knew already, as if one could simply add up the structures of public and private, national and international law and see a functioning transnational regime. But the situation is not like that at all.

Rather, we find all manner of incompatible legal regimes, institutions and perspectives, colliding and overlapping. Who decides in the exception? What is sovereignty today? We don't know. It is hard to realize when getting started in this business just how little we do know.

What is private power – perhaps the Delaware law of corporations is our global constitution, allocating power between the two branches of global government – shareholders and management. Perhaps we are governed by experts, by economists and lawyers and policy mavens – to whom do they report? Where can their power be contested?

Answering begins with a sociological project – to draw a picture of the mentality and machinery of the global establishment. Just how do global industries maneuver for advantage in a networked world of rules and institutionalized policy management? To know, we will need a better sociology of regulation.

We need better maps. An Atlas of heterogeneity. Charts of the dislocations and ruptures among overlapping regimes and intellectual disciplines – the lack of fit between our legal and institutional imagination and the unfolding of social life.

On such a map we could isolate – celebrate – sites of resistance and fortuity -- moments of decolonization *by* the life world, rather than the enhanced capacities and machinery of regulatory management.

Attentiveness to heterogeneity. An antidote for the rationalizing tendency to interpret everything in functional terms, *as if* it had been designed or could be seen to work as a *response to a problem*.

I worry that so much scholarship today is written in the intellectual style I call “as if pragmatism” – writing and speaking *as if* things had been designed by a benign spirit responding to general needs and expressing general will.

Do we know what scoundrels rule? How cynical the machinery of state and private power has become? I would like to see scholarship attentive to the dark sides of benevolent power and right order.

Were we to start with cartography, we’d find that the global order looks quite different if we look from Europe or from the United States, from Mexico or Monaco, from the automotive or entertainment industries. If we look with the eyes of a Chinese textile worker or Nebraskan Walmart shopper. [It looks different if we focus on free trade, on development and poverty, on diplomacy and interstate politics, or on individuals and human rights.]

[What are the powers of large and small states, of leading and lagging sectors? What is the nature and future of American power in the world system? Is hegemony rising? Falling? Fallen?]

So that is my first wish --- better maps – but also different maps.

But we are also living in startling times, internationally. During the first 35 years of my life, by and large, nothing happened. We thought nothing ever would – nothing serious.

But serious things do happen – and my second wish, is for a scholarship of engagement. Offering the rough draft for a new politics, a new law, a new order.

To write scholarship as a project, we need an analysis of our situation and a desire --- for change, for continuity, for reform.

If we take things one century at a time, we can see a series of quite different global *modes of governance* – each offering new meanings for “politics,” new identities for subjects and rulers, for law, for the state, and for things like “culture.”

Modes of global governance – for the 19th century or the 20th or the 21st – have to be thought up. Once they are made, they have to be understood, their power wrought into knowledge.

Sometime between 1789 and 1900 – and as late as 1960 for much of the colonial world – governance was consolidated across the globe around the national sovereign state. People were organized into territorial states --- became “citizens” -- and government was defined as what national public authorities did. Building a national public politics across the planet had an emancipatory dimension – slaves, women, workers, peasants, colonial dominions, all obtained citizenship in relationship to the new institutional machinery of a national politics.

Global governance – called “*government*,” was centered on national Parliaments, on the diplomatic and institutional relations among them, and on the interactions of their national public and private laws. This new global mode of governance offered new identities for sovereigns and subjects. In the old cliché, status was dissolved into nation and contract.

All this had to be thought up – the state, the political party, the citizen, the sovereign.

Or take the twentieth century. National politics was remade. Some key words: administration, management, the rise of policy and a policy class, technocracy, expertise -- private ordering, public/private partnerships, social partners, Keynesianism, countercyclical macroeconomic management. Corporatism, in all its varied forms.

And a new international law --- law infiltrating the political, sovereignty disaggregated into a bundle of legal rights. Governments replaced by governance, by management, by administration, by networks, by courts and by the machinery of public advocacy.

These things also had to be thought up. And when they were made, their power also needed to be pounded into knowledge.

Although it is easy to think of international affairs today as a roiling sea of politics over which we have managed to throw but a thin net of rules, in truth the situation is more the reverse. There is law at every turn, and only the most marginal opportunities for engaged political contestation.

As a result, the new governance challenge for the 21st century resemble those of the 18th and 19th more than

the 20th. Not how will law be made, applied, defended – but how will politics be built?

I wish for a scholarship about *that* – rather than quotidian adjustments in the machinery of 20th century regulation and management. How will people again become political citizens -- transnationally? Where – transnationally -- will we contest decisions affecting the distribution of wealth and status? How will decentralization, democracy, citizenship be made, and made meaningful.

What could a transnational public capacity mean? Some players do mobilize the international regulatory regime more effectively than others – how might this power and competence be more widely shared?

I wish for a scholarship about that – but looking forward, what does one write *toward*?

When you look out the window – is everything all right? Are we moved by poverty, by exclusion, by the astonishing differences in wealth and status, differences of life and death among people -- each of whom is human?

Were we to focus only on the West – we would still see some pretty daunting challenges. There is an internal demographic challenge, particularly in Europe and the ex-Soviet Union, which will force a reckoning with immigration or security or both. And there are the twin challenges posed by the rest of humanity.

There is the challenge of economic success in the third world – the hundreds of millions of Chinese and Indian individuals who have emerged from poverty into our industrial present. Speaking loosely, and to put it in the starkest terms, with economic globalization and the continued loss of public capacity, large swaths of the world will, in twenty years, have whatever social security system, whatever environmental regime, whatever labor law, whatever wage rate prevails in China.

And there is the parallel challenge of economic failure in the third world – the revolution of rising frustrations among the hundred of millions of individuals who can see in, but for whom there seems no route through the screen except rebellion and spectacle.

If you put these threats together, we confront an accelerating social and economic dualism – a

rumbling fault line between two global architectures, between an insider and an outsider class, between leading and lagging sectors, both *within and between* national economies and political units.

This is not a clash of cultures, of modernity and tradition or secular and religious, still less of Weberian Protestantism and Islamic fundamentalism. At war are two modes of being – of human being -- in a culture of economic, political and social management, also within the West, within the Protestant, the Catholic, the Islamic traditions.

It is true -- I wish for a scholarship of engagement. Of thrust and parry in this war for the future. So much contemporary scholarship simply embroiders the habits of the technical class, decorating their regulation and management with intellectual filigree, offering them an institutional pedigree. What a waste, when we know so little, when the challenges are so urgent.

So much in our journals seems vulnerable, tentative – or hermetic, briefs for the significance and vitality of a narrow professional culture and sensibility. Or for a soft political rapprochement within the policy class between a center-right attuned to market failures and a center-left that has lost faith

in its own nostalgia for what it remembers as the potent regulatory and administrative state of New Deal days.

These political tendencies are status quo parties, timid about social conflict, hesitant about distribution, resigned to poverty but insistent about dignity and “representation” and participation.

In short, the legal literature of my dreams would aim toward a more effective global politics. How might the forces affecting people’s lives be rendered more visible and contestable to the world’s citizens? How might the human experience of *decision* – of responsible freedom --- be encouraged throughout the worlds of corporate, private and technical expertise?

How might the revolutionary force of the democratic promise – of individual rights, of economic self-sufficiency, of citizenship, of local community empowerment, [of respect for human rights and of participation in the decisions that affect one’s life] --- be carried to the sites of global and transnational authority?

Within the nation state -- even within the European Union – we struggle for a rich political life of legal, economic, social and cultural solidarity. We

think of international life more harshly – a world of military power and economic competition, in which all we can hope for is stability, ameliorated by modest humanitarian initiatives.

The legal scholarship of my dreams would aim to change all that.

In economic affairs, it would ask – who will inherit the failure of the Washington Consensus? The collapse of state socialism was inherited by the banks, the Americans, the international financial institutions. But after neo-liberalism, who? Might the nation-state – or the global city -- be strengthened as a shield for the weak, be made reliable as a guarantor of policy diversity, as an arena for democratic political life?

Globalization can sever links – supply chains, social networks, traditional patterns of credit. In a world increasingly divided -- between rich and poor, leading and lagging economic sectors, regions, social groups --- how can new links be forged? Might the flow of capital and goods be managed alongside the flow of labor? Could we imagine a grand bargain linking the free movement of labor, capital and goods. How can borders be secured without disrupting the productive flow of migrant labor, of

remittances, of social bonds, of technological and economic know-how?

When we *do* write in political terms, we focus on crisis, on conflict, on disaster – we design short term emergency interventions. But how might we strengthen our capacity to address the quotidian, the background worlds of ongoing injustice?

I should say that even in my dreams, I am not much for constitutional reform, or structural revision. Nevertheless, let me close by offering a couple of utopian heuristics to suggest what a new global governance might mean --- at least to suggest the scale of the effort required, and the bravado demanded for our scholarly voices.

Imagine a generalized promise of political, social, economic and cultural inclusion, along the lines of the trade regime's promise of Most Favored Nation or National Treatment. The EU has made an open promise to societies on its borders for a generation, changing regimes in Germany, in Greece, Spain, Portugal, Ireland, the DDR, and now the 10 new states to the East. The World Bank tells us that nothing concentrates the mind or facilitates development as surely as promise of inclusion in a rich man's club.

What if the EU had responded to the challenge of terrorism as they responded to the fall of the Berlin Wall -- offering to change regimes from Eastern Turkey to Western Pakistan the European way? What would accession negotiations mean to Morocco, Jordan, Tunisia, Israel and Palestine, for Egypt? Does Darfur have a future in the European home? In NAFTA, in the United States – what is the right response to genocide beyond criminal courts and humanitarian aid and transitional justice? Why not inclusion?

What if every national and regional unit made an open-ended offer of inclusion – statehood in Brazil, in the US, in Mexico. Or if statehood were no longer exclusive – if Massachusetts could do some kind of a deal with Canada, Alberta with Montana, New York with Dubai – or Rye, and so on.

Or imagine that every human was born not only with a national passport, but with a once-in-a-lifetime five year non-renewable residence permit for any country of his or her choice? It could be regulated, managed, limits could be set --- but imagine the global recognition of a birthright to mobility.

Imagine, that each person on the planet were allocated three votes, and could cast them in any election they cared about in the world – again, it could be managed, regulated. But it would be a new politics, without even departing from the democratic preoccupation with voting or the 20th century identification of politics with the institutional sites of public authority.

I'd like to see articles proposing to expand the grand jury from crime to global policy. It is customary now before war is declared – or before a cruise missile is fired – to ask lawyers to pore over the targets and scrutinize the justifications, and to ask foreign policy professionals to debate the implications in fancy journals and on Sunday morning television. The boldest proposals on the table suggest we publish the agenda, or invite the experts of the military industrial complex, the financial class, the human rights community, to join in the discussion.

When it comes to *decision*, however, we debate the jurisdiction of various public institutions --- the Security Council, NATO, Congress, the Presidency.

But imagine empanelling a Grand Jury, a Policy Jury, of citizens, global citizens, not to consult or

participate or dialog, but to *decide*. If, behind closed doors, the experts could convince the policy jury by majority vote, let the missiles fly.

Well, I sketch these ideas not because they would work or even be good ideas, but to signal the scale of what would be required to remake global governance for the 21st century.

As writers, we can wish --- we can engage – or we can grind the routines of professional practice into grains of knowing.

But I have gone on long enough – we have food, we have one another, and I hope we share an avocation to exercise the powers of knowledge.

My message is short.

To write and publish is to live in the world as an intellectual – a legal intellectual, a political intellectual.

To write is to embrace thinking – and wishing -- as a vocation.

I look forward to our discussion.

