David Kennedy

A WORLD OF STRUGGLE

How Power, Law, and Expertise Shape Global Political Economy
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INTRODUCTION
COULD THIS BE 1648?

As you drive up the mountain to Davos for the World Economic Forum, you can be forgiven for thinking this is where the world is governed: innumerable checkpoints, fancy cars, detailed instructions on what to do with your jet and where your chauffeur should park. My first time was in January 2009 as the global economy teetered. It was an extraordinary moment of uncertainty for these titans of finance, industry and government. Much seemed up for grabs and nervousness permeated the air. The Forum had just launched a Global Redesign Initiative to support what they called a “fundamental reboot” of the “global architecture” as part of their “commitment to improving the state of the world.” I chaired a new Global Agenda Council on Global Institutional Governance and had been asked to consult about the global political and economic order’s travails and who could do what to right its course.¹ The Forum was clear the project would not be a new Bretton Woods: no one was proposing new intergovernmental institutions. The goal was a renewed commitment to bend the tools at hand to the urgent issues of the day: rebooting the global system to strengthen “global governance.”

This book is about the stories people tell themselves and one another in places like Davos and the power they exercise in doing so. Their stories are important: stories about what an economy is, what politics can accomplish, the limits and potential of law in establishing a well-ordered world. Stories make some problems visible and some actors central to their resolution. Stories are also tools of struggle, assertions about who is entitled to what, whose desires legitimate and whose do not. The technical work people undertake in the shadow of these stories arranges the world, distributing wealth, status, and opportunity.

In a world where so much is open to debate and conflict is all around us, how can it be so difficult to contest and change the things that matter? Things like the distribution of wealth and opportunity or honor and shame. Or the
pattern of environmental destruction. Or the ubiquity of kleptocratic rule. The answer is not a mysterious constitutional settlement, the obscure workings of a disaggregated public hand or global value consensus. The answer lies in the strange alchemy of expertise and struggle through which our world is made and remade. The alchemy is strange because struggle and conflict have seemed inimical to expertise: matters of political difference and clashing interests that experts aim to calm, mediate, and replace by sweet reason. The world experts know is more constituted order than distributional struggle, their expertise a way of knowing what to do rather than struggling about who will win. And yet, as the world has come to be managed in the language and practice of technical expertise, expert knowledge has itself been transformed. Adopted in crude vulgate by laymen and statesmen alike, expertise has become embroiled in struggle and come unhitched from the promise of decisive clarity, the usefulness of its indeterminacy more appreciated than its analytic rigor. In our world, indeterminate language and uncertain knowledge distribute wealth and power. That is strange—and hard to render visible, let alone contest.

In studying the role of law in economic development and global order, I have been fortunate to be able to meet with all kinds of experts, listen to their stories, and observe their professional practice: international lawyers and government policy makers, factory owners, entrepreneurs and financial analysts in emerging markets, human rights activists, corporate leaders, general counsels, and risk managers from around the world. I have tried to understand the world from their perspective: what are their projects, their powers, their vulnerabilities? When they tell you about their work, they place themselves on a terrain of competitive struggle and assess their powers, vulnerabilities, and strategic options. They are proud of their strategic prowess and creative in mobilizing their knowledge and institutional or social power to defeat their opponents. But if you ask them about the larger world, this terrain of struggle fades as they imagine a world that might be ordered and governed, a system that might be reformed. If you ask them what they do, they tell you about struggle. If you ask about their world, they tell you about order and system, institutional limits and appropriate procedures.

I draw on these experiences to explore the role of expertise and professional practice in the routine conflicts through which global political and economic life takes shape. I have tried to steer between bird's-eye accounts of the structure of the world system, the operations of the global economy or the constitution of the global legal order, and ground-level anthropology of people and things as they move in the world. The result is a series of midlevel observations
and hypotheses for research into the role of expert conflict, knowledge and professional practice in the reproduction of an unjust world.

I use the terms “expert” and “expertise” with some hesitation because they focus attention on a class of people and a kind of knowledge rather than a characteristic role and mode of speaking, deciding and acting in struggle. As I imagine it, “expertise” is not the exclusive province of specialists or professionals, however much it may draw on ideas and reservoirs of legitimacy built up by such people. Although experts routinely imagine their work as a technical and pragmatic practice at least aspirationally removed from conflict and political contestation, the idea that “politics” is somehow different is its own kind of expert fantasy. Technical specialists shape the meaning of ideology and interest while political leaders and citizens have learned to speak the technical languages of policy. All are equally prone to irrationality, confusion, conflicting desires, and ambivalence. Criticism of the “technocratic” nature of global decision making, as I hear it, is simply a way of arguing that the wrong interests and ideologies and technical arguments have won out.4

Politicians, citizens and so-called experts share the experience that what they say and do expresses either their special knowledge and skill or the sum of the vectors pressing upon them rather than their discretion or decision. They are not ruling or distributing; they are advising, interpreting, informing. It is not the politician who decides, but the voice of the people, the urgency of the moment, or the interests of the nation. It is not the expert who speaks, but her expertise; it is not the layman who demands, but his rights that entitle. Expertise dictates in the name of the universal, the public good, the general will, the practical necessities of reason, or the objective truths of scientific knowledge. Sometimes it seems no one is deciding—everyone is arguing about and interpreting decisions taken elsewhere at another time by someone else. However common and appealing these ideas may be, expertise in the fields I have encountered does not operate this way. The work of legal and policy experts is all about struggle, a form of struggle in which the saying and the doing blend into one another, the knowing is partial, the universal up for debate, while the technical, the ideological and the partisan are everywhere linked together.

It is also common to overestimate the rigor of expert analytics. Ideas and analytics rarely dictate results. Experts disagree sharply with one another and are only too aware of the gaps, conflicts, and ambiguities in their analytics. Their work in law and policy is more argument and assertion than reason. Expert work is positioned and strategic, a matter of posturing as much as persuading. The voice of sweet reason is just that: a voice. A role to be occupied, a style to be
deployed, a legitimacy to be claimed. As experts come to inhabit their expertise strategically, they become doubled: asserting the rigor of their analytics while embracing their indeterminacy. In this way, expert conflict and uncertainty seem to strengthen rather than weaken expert authority and significance.

I also hesitate to use the term “expert” out of respect for the enormous literature about the role of experts in governance, a literature whose concerns are largely distinct from my own. Where expertise studies have focused on what makes expert knowledge distinctive, I focus on the continuities between their modes of work and those not marked as specially qualified. Focusing on continuities also softens worry about just how to keep experts and political leaders in their respective places within a system of government. Despite the emergence of transnational technocratic rule, these concerns are also less pressing at the global level where there is no constituted political alternative and it really is expertise all the way down. I am more interested in the how of global expert rule: the modes of global public reasoning that arise and the significance of knowledge practices in forms of governance. My objective is to bring knowledge practices and power practices into the same frame. I see expertise as the crossroads where they intersect.

I have nevertheless found the literature on expertise in anthropology, sociology, and the sociohistorical study of science instructive for understanding the knowledge practices common in global political and economic affairs. The work that lies closest to my own preoccupations stresses the performative dimension of expert practice: expert work constituting the space of its own expertise. Economists, for example, do not merely study markets, they “make” them by articulating what markets are and how they function. My approach has been most directly influenced by scholarship in sociology and science studies that stresses the context within which expertise arises and is practiced, from the laboratory to the boardroom, and the components of expertise that operate in those spaces, from “tacit knowledge,” through shared ethics of perception, to modes of reasoning and argument.

To focus on the middle space between big systems and ethnographic study, I return repeatedly to law. Law is the global knowledge practice I know best and it is certainly a visible example of the contemporary role of expertise, both as a tool in global struggle and as a promise of a reformed world. There are two further reasons to focus on law. The rise of what might be called “technocracy” or “managerialism” or “rule by experts” in global affairs has been accompanied by the legalization of ever more questions that might once have been debated and settled in other terms. The legalization of military conflict may be the most
dramatic example: targets poured over by lawyers and belligerents on all sides legitimating their cause and denouncing their adversaries in legal terms. Economic policy is routinely transformed into debates about the competence or mandate of institutions with divergent ideas about what to do. A friend recently described Brazilian telecommunications privatization policy as the rapid displacement of political and technical considerations by law as ministries, foreign investors, local utilities, and citizen groups lawyered up for engagement with one another.

With the legalization of issues across the globe has come a change in law itself that may be exemplary for other globalizing modes of expertise. As legal expertise has become ubiquitous, it has become increasingly plural and fragmented. Modes of legal thought and legal reasoning have become less formal and less analytically rigorous, if also ever more complex and interdisciplinary. Legal experts have become ever less invested in the determinacy or even "legality" of their modes of analysis and advocacy. Usefulness in struggle trumps analytic rigor and formal legal status. With law's expansion has come a professional sensibility of sophistication and disenchantment. The experience of legal expertise over the past century raises the question whether this may be the destiny of global rule by expertise more generally.

By examining rule by expertise, I aim to grasp both the centrality of conflict and the importance of knowledge practices in global political and economic life. The distributive outcomes of the struggles experts undertake make expertise worth studying. The puzzle is how so much struggle fades from view as experts embody the voice of reason and outcomes are assimilated as facts rather than contestable choices. I am interested in the way experts forget their struggles and their role in distribution to celebrate their knowledge as universal, their world as ordered, their path forward aligned with progress. Modern expertise knows and it forgets—or refuses to know—its powers and its limits. When they forget—and we forget—it becomes all the more difficult to understand how this world, with all its injustice and suffering, has been made and reproduced. And more difficult to identify levers of change or experience the place we stand as a fulcrum of possibility. The result of continuous struggle is an eerie stability it is hard to imagine challenging or changing.

PART I: THE STRUGGLES OF GLOBAL POLITICAL ECONOMY

The key to expert rule is the interaction of two forces: a seething struggle for advantage undertaken everywhere at once and the operations of professional knowledge practices enlisted as tools in those struggles. People pursue projects,
pushing one another around on an uneven terrain of powers and vulnerabilities, often using law to solidify their gains, expose others to risks, or exclude competitors from opportunities. As they struggle with one another, people transpose parochial objectives into ostensibly universal matters of agreement, blunting the experience of responsibility for distributional outcomes. Worlds are made and unmade, organized and disrupted—and we are governed—by the outcomes of a thousand battles waged simultaneously among firms, consumers, workers, and financiers over the distribution of gains from economic activity; among communities, families, religions, media, and political figures over the morality to be embedded in social institutions; among military planners and politicians, humanitarians, and civilians over the desirability of this war, the targeting of this village, the imprisonment of these people. Along the way, the costs and opportunities generated by climate change come to fall unevenly across the planet. The costs of economic crisis are distributed between generations, between global investors and local communities, and among workers in different sectors and different parts of the world. Risks and vulnerabilities are allocated among national economies, between families and faraway financiers.

I introduce these themes with an account of contemporary rule by expertise in global political and economic life. The territorial state and the global economy are everywhere entangled with one another. The details of that entanglement are managed, struggled over, and adjusted by experts—including politicians—working with interpretive tools that rest on a more or less conscious set of background images of their natural distinctiveness. I develop a preliminary model of expertise as a stack of ideas from general and untested propositions about the world to the more visible technical and ideological debates through which experts engage one another in managing the complex boundaries of political and economic life. The vocabularies of expert management translate social conflicts into expert disagreements that may be expressed in technical or more broadly ideological terms.

More familiar models of global conflict that begin with an identification of the larger scale actors—states, nations, economic classes—and structures—the state system, global capitalism—too often naturalize the actors and structures they identify when the most significant work of expertise can be the making and unmaking of actors and of the game to be played. More traditional models also encourage the notion that conflict is exceptional: normally, the world is at rest. Economics gives this impression with its “invisible hand” and “general equilibrium.” So does law with its “legal process” and “constitutional settlements,” or political science with “world systems” and “balance of power.” In
such a frame of mind, it is easy to conclude that most outcomes emerge from a "system logic" or reflect a kind of universal interest or nature. Such images align with a common tendency in expert struggle itself: to frame positions and projects as expressions of a universal rather than a particular interest. By stepping back from this kind of model, I hope to resist the temptation to treat the hegemonic outcomes of past struggle as a fixed terrain for new engagements.

The centrality of coercive struggle does not mean there are no opportunities for mutual gains, collaboration, alliance, or win-win moves. There often are: although such wins also need to be enforced and defended. Nor does it mean the pie can only be divided and never expanded through cooperation or competitive struggle. But when the pie does expand—perhaps particularly when it expands—those gains will accrue to someone. That can also be contested and will need to be defended, perhaps successfully, perhaps not. Nor does the ubiquity of struggle mean everything is always up for grabs. Most struggles have already been won and lost, their outcomes matters of accepted fact, patterns of past struggle woven into the fabric of stability. Persuasion and consensus also rest on a status of forces and are the product of coercive struggle. Struggles whose outcome can be predicted need not be undertaken to be lost or won: some struggles need only be referenced to be won decisively. It takes courage, energy, and imagination to open what has been settled for reconsideration. If we understand the ubiquity of struggle—past and present—in global political and economic life, it should be easier to summon that courage and display that energy strategically.

**PART II: EXPERTISE**

Expert rule mobilizes knowledge as power. The knowledge part combines commonsense assumptions about the world that may be neither conscious nor open to debate with technical and more broadly ideological material that is often disputed. But expertise is not just knowledge learned in professional study or downloaded from the culture at large. It is also a mode of work. Expert work provides the interpretive links between decisions about what to do and the context within which those decisions are made. In my simple model, experts interpret the context for decision makers and interpret the decisions taken for implementation. Controversy in this "background work" is recognized as practical reason: figuring out what to do, what is appropriate, what will work, or what is right. It takes background work to advance and justify particular positions in universal terms and to dull the experience of responsibility for those
who do so. With work, it can come to seem that it really was not me: it was our policy, the will of the world, the requirements of science, the obligations of law, the requirements of sound economic management or institutional process or universal ethics and sound judgment.

The work of expertise takes place within the professional roles, entitlements, and obligations that expert communities imagine they have. With whom are they in conversation? How do they position themselves in relation to one another? These role sensibilities differ by profession. To explore these differences and suggest the range of possibilities, I contrast the position “economic development experts” imagine for themselves with that of international lawyers and human rights advocates. The development policy professional occupies a space between scientific and more popular ideas about economics, about society, history, and culture, and about law and governance. His professional posture is a kind of mediation between scientific knowledge and political practice. The lawyer’s imaginary role is different, referencing the status of the material over which he presides rather than its links to scientific accuracy or political effect. Even among international lawyers, specialists in “economic law,” “public international law,” and “comparative law” imagine the world and their work quite differently: different histories, different projects, different worries, alliances with different neighboring disciplines.

The focus on background work underscores the co-constitutive relationship between the apparatuses of power and those of cultural narration, imagination, myth, professional argument and public reason in global political and economic life. Power is everywhere legitimated by knowledge practices that rationalize, explain, interpret and associate exercises of power, powerful people and powerful institutions with myths, ideologies, and other large ideas about values and interests. At the same time, ideals and values are rendered persuasive, enforced and trained into people through the institutional machinery of power and the mechanics of force. Foreground decision makers and background workers are engaged in a parallel and reciprocal interpretive process about what the context requires, what past decisions mean, how they ought to decide, and what should follow in consequence. Precisely because it is a two-way street—my ideas legitimate your power, your power enforces my ideas—the exercise of power, even as brute force, occurs within a discursive world of meaning. Ideas, ideologies, and myths are able to legitimate only when they are hegemonic across people with the power to halt or support that exercise of power. Understood in this way, the operations of power are expertise all around.
All expert work is contentious because it is uncertain power that needs asserting, uncertain law that requires interpretation, disputed science that requires proof or demonstration. Because their work is interpretive and communicative, experts rule by articulation. Expertise governs when their articulations are performative: when what is articulated comes to pass. To capture this process, I propose a set of tools for modeling expert articulation rooted in my experience with international lawyers, human rights advocates, and policy professionals specialized in economic development. In each of these fields, the basic unit of expert articulation is an assertion about what to do, why that seems sensible, and what will happen as a result. Experts differ with one another about each and contest the links between them. By tracing patterns that emerge, I propose hypotheses about the operations of sophisticated expertise in global management.

Background work is less a game of tight analytics than of contested vulgates. You do not have to be a specialist to play. Although often carried on by lawyers and diplomats, media pundits and politicians, it has also become something far more general, animating discussion among grassroots organizers and grandmothers, financiers and confidence men. Nor must you “believe” the language you speak. Experts routinely deploy arguments and analytics long after—perhaps particularly after—they have been disabused of their analytic rigor and persuasiveness. This is part of what makes these modes of expert practice available for global deployment, colonizing discussion among people with diverse interests, projects, and background cultural priors. With use in dispute comes the internalization of differences within the expert vocabulary and with great influence comes great plasticity and indeterminacy. A kind of agnostic flexibility has come to characterize professional fields as they become more flexible, open, and available for disputation.

I think of this kind of expert practice as at once sophisticated and jaded or disenchanted. In sophisticated and disenchanted fields, the vocabulary deployed to make, defend, and interpret decisions is composed of arguments that accommodate sharp disagreement and subtle compromise and in which people seem both to be invested and to have lost faith. There are sharp differences between alternative theories, factual diagnostics, and political commitments, and people disagree about the entailments of each theory, each political position, and each fact. As people argue, schools of thought rise and fall, mainstream and heterodox traditions clash, and subtle differences take on dramatic significance. The most accomplished experts are not surprised—or troubled—by the uncertainty of their expertise. Often they seem emboldened. People make strong arguments but seem to have lost confidence in the determinacy of their
analytics. The odd thing is that it does not seem to matter. Indeed, the uncertainty and ambivalence of professional knowledge may be the subtle secret of its success. What stabilizes their argumentative practices seems to be the argumentative practice itself: a collective sensibility about what would “go too far” or fall outside the horizon of plausible expert argument. Within those boundaries, a potentially infinite terrain of dispute opens up, stabilized by commonsense wisdom about the world and the field of knowledge. This takes the discussion back to the world-making work of shared assumptions about the world to be made.

**PART III: LAW**

The final section of the book brings the analysis back to law, concluding with an examination of modern law in the practice of warfare as an example of sophisticated modern expertise in action. The extent to which law has become a transnational language of entitlement and disputation should not be surprising. Law of one or another kind has a privileged status in every society as a repository of that alchemy of prestige and fear we call “legitimacy.” Legal ideas structure and legitimate forms of authority, and those authorities enforce and deepen law’s own claim to predict and state the conditions under which coercion will back up assertions of entitlement. The same is true transnationally. The ubiquity of law as an instrument and stake in struggle owes less to lawyers than to the appetite of all kinds of people for a common—and malleable—language of engagement. Legal norms, institutions, and professional practices are the building blocks for acting and being powerful, as well as for interpreting, communicating, celebrating, and criticizing power. Legal arrangements take us inside the operations of globally distributed power as it is brought to bear in the capillaries of society.

The role of law in struggle is easy to overlook or underestimate when the focus is law’s potential to tame politics into a manageable process or constitute the world as a legal order. Accounts of law’s distributive role in struggle are few. In global governance discussions, law figures rather as the sinews of a constituted order, privileged tool for global problem solving, or expression of universal values. Struggle over distribution seems the opposite: a place of disorder and force, a refutation of consensus value. But the legalization of global life has succeeded: the domain outside the nation is neither an anarchic political space beyond the reach of law nor a domain of market freedom immune from regulation. The international world is the product of intense and ongoing
projects of regulation and institutional management. The basic elements of
global economic and political life—capital, labor, credit, money and liquidity,
as well as power and right—are creatures of law. Law not only regulates these
things, it creates them. They could be put together in lots of ways that would
alter the distribution of power and wealth and the trajectory of the society.

People struggle over these legal arrangements because they matter. Because
law consolidates winnings, translating victory into right, legal entitlements are
often the stakes as well as the tools for political and economic struggle. The sta­
tus of forces or balance of power between groups and social interests—debtors
and creditors, importers and exporters, state traders and multinationals, local
labor and global capital, military powers and their insurgent opponents—is
written in law and the relative leverage of economic or political competitors
is rooted in the background legal and institutional structures within which
people bargain and compete. “Statehood” and “sovereignty,” for example, are
at once realist descriptions, a recognition of the powers that are, and an allo­
cation of bargaining power among groups with conflicting projects: religious
and secular institutions, majority and minority communities, local elites and
foreign economic interests or local populations, and so on. As an instrument
for asserting power over others, law is also a tool of struggle. I claim a legal
privilege to put you out of business; you claim the legal authority to prevent
me from combining with rivals to do so. I claim the right to overfly your ter­
ritory and protect your minorities—or you may claim the right to shoot down
my plane and attack my humanitarian convoy.

To highlight law's distributive significance, I place David Ricardo's ideas
about the legal allocation of “rent” in conversation with his well-known analy­
sis of the gains from trade. The allocation of gains from trade depends on legal
arrangements in the sense Ricardo identified when he focused attention on
the role of property law in permitting landlords to extract rent by excluding
others from the gains generated on land. Legal entitlements make visible a
promise of coercion to exclude others from gains they might otherwise hope
to enjoy. When I place a no-trespassing sign on my blueberry patch, I express
my expectation that the local police will help ensure that I enjoy the full ben­
efit of the crop. Gains from trade likewise accrue to those with the power to
exclude. Conflict over those powers also takes legal form. When the legal en­
titlements people assert are confirmed in practice, the powers and vulnerabili­
ties of people in struggle are defined. As conflict continues, law consolidates
gains and losses, solidifying relations between winners and losers. Over time,
patterns emerge and inequalities can be reproduced or deepened. I illuminate
that process borrowing Gunnar Myrdal's analytic framework for understanding dualist dynamics between centers and peripheries.

The distributive significance of law also illustrates the power of articulation. Law offers people a way to do things using words. Entitlements and powers enable when they are successfully "asserted." Law expresses power as right, and its effective assertion translates right into coercive enforcement. Law offers a language for disagreement and analysis, available for advocacy, compromise, and resolution. It provides a language of both technical distinctions and ideological assertions for debating whether this or that activity should properly be allocated to one or the other. Over time, law has become a repository for disagreements of principle, opposed ideological positions, and definitions of interest associated loosely with alternative doctrinal or institutional arrangements. Self-determination and humanitarian intervention, human rights and cultural difference, free trade and national economic development, financial austerity and growth: all these cross swords in legal terms. In specific struggles, people link these large differences to alternate interpretations of specific entitlements.

All this often comes as something of a surprise to international lawyers—or at least to the scholars who theorize their practice. It took more than a century of technical and intellectual innovation and internal struggle for international law to become a sophisticated vocabulary for contemporary global management. Practitioners and scholars were central to that development. But when they stepped back to reflect, this is not how they saw their work and their special expertise. Their work promoting the substantive expansion, fragmentation, and deponentization of international law had another purpose: to respond ever more adequately to doubts about the distinctiveness and usefulness of international law in a world of sovereign power. As theoreticians worked on that problem, technicians expanded law's scope. As they struggled with one another, they brought their differences into the materials of their shared discipline. The result is a case study in sophisticated—and disenchanted—expertise. International law today is an extremely plural and contingent field that combines a diverse technical practice with a multiplicity of orienting theories about how international law works and where it is going. What holds it all together is a kind of professional faith.

International lawyers can hardly avoid coming face-to-face with the diversity and analytic porousness of their expertise. Such an experience of legal pluralism might open the way to exploring law's role in distributive conflict and the responsibility of legal experts for the outcomes of struggle. By and large, however, this has not happened. Instead, international lawyers have transformed
pluralism into another tool for technical managers, bypassing its radical potential. The fragmentation and pluralization of the field have focused the attention of experts forward on the future world-ordering potential of law and the prefigurative quality of its current institutional expressions without noticing its implication in contemporary dysfunction and injustice. The attitude that results, at once ethically confident and practically disenchanted, is inhabited in a way reminiscent of sensibilities for accommodating both belief and doubt within a practice of faith in Protestant religious traditions with which I am familiar.

The lost opportunity to engage expertise as a doorway to responsible decision rather than as a substitute for ethical reflection and political choice is dramatically on display in the increasing legalization of military conflict. The last chapter explores the practice of contemporary legal expertise among military strategists and humanitarians in warfare as a case study of sophisticated expertise run amok. Warfare has become an expert practice illustrating the role of assertion in struggle, the emergence of ever more sophisticated, if indeterminate, modes of expertise, and the loss of the experience of responsibility that so often goes with their exercise. The examination of the strange dance that arises between opponents arguing over the legality of death and destruction in war with which I conclude this study illustrates the triumph and the tragedy of global rule by expertise.

REMAKING AN EXPERT WORLD

In recent years, the appetite for rethinking has faded in the World Economic Forum's discussions of global policy, risk, and governance. My Global Agenda Council has turned to more routine questions, drafting best-practice procedures for selecting and evaluating leaders in intergovernmental organizations and developing criteria for establishing successful multistakeholder arrangements to address global problems. What the world needs, my colleagues seem to feel, is a mustering of the will by global elites to take on the challenge of global management in new configurations, using new tools and attuned to new dangers. This doesn't mean they now think the world is well ordered. They see how uncertain and anarchic things are, how unpredictable the outcomes of their efforts, how powerless their institutions often are in the face of global economic, political, and social change. But they have confidence in the promise of institutional reform and in themselves as managers, technocrats, and leaders. They shy away only from embracing their work as a positioned
exercise of power rather than management of global welfare, technocratic advice in the public interest or the articulation of universal values.

My first year at Davos, I also saw lots of demonstrators and barbed wire—one friend came back through security to the conference hall proud to have collected some rubber bullets. After returning home, I visited the Occupy Wall Street protests, participated in a teach-in at Occupy Toronto. Over the years, I've visited prisons from the West Bank to Latin America, met professionals for whom refugee protection has been a life's work, taught and interviewed human rights professionals and experts in poverty, economic development, and community empowerment. People who feel they are on the receiving end of global power are more likely to perceive a malevolent system than an open-ended terrain for enlightened leadership. Someone—probably the people at Davos—must have wanted things to turn out this way. Many people you meet at Occupy—or are likely to meet in Darfur—have wild ideas about the specific institutions or groups that are to blame. Economic instability and poverty are not problems that escape governance; they are the byproducts—or even the intended consequences—of current governance arrangements. Better management by today's elites would not help: they would have to be swept away.

Both Davos titans and Occupy activists have a point. The world is uncertain and open to elite management. It is also unjust, and that injustice is a byproduct of technocratic—and often enlightened and humanitarian—management. A great deal would need to change to turn all this around. In some way, insiders and outsiders are speaking the same language, inhabiting opposing roles in a common theater. From both perspectives, the ways power operates across the world remain obscure. The missing piece, I've come to believe, is the way expert ideas and professional practices of assertion and argument construct and reproduce a world of inequality and injustice. In world affairs, expertise is the coin of the realm. Whether you occupy the commanding heights or have occupied Wall Street, the work of routine reform and resistance will be carried out as a practice of expertise.

I routinely ask my students how they see their generation's project in the world. Is today like 1648 or 1919, when it seemed everything needed to be rethought? Is it like 1945 when the international order seemed to need reforming rather than remaking? Tweak the League Covenant and you have the United Nations, add lots of specialized intergovernmental institutions to coordinate and strengthen government action, replace European empire with self-determination under American hegemony and continue. Or is this like 1989, when the demand was more modest still? With communism defeated,
the solutions put forward a generation before could finally be implemented. Student positions seem to reflect their background and aspirations. Those who hope to inherit the commanding heights typically split between 1945 and 1989. Those who feel their interests, politics, or national projects have been stymied by forces beyond their control opt for 1648.

I am pleased that an increasing number of young students and aspiring professionals say this is their 1648. They often have a strong, if idiosyncratic, sense that they know how the world works, who is in charge and who should be resisted. Unsurprisingly, however, many go for the middle position: reform. Add Brazil to the Security Council, sort out the democracy deficit and currency travails in Europe with another round of treaty drafting, and continue. There were reformers like this at both Occupy and Davos. The reforms they discussed were not markedly different, if expressed with a different tenor, emphasis and sense of engagement. Like many commentators, both groups tend to overestimate the potential for “global governance,” the structured rationality of the global “system,” and the harmony between their own perspective and world public interest.

For the reformers, the world is neither a manageable anarchy nor an unjust iron cage. On the one hand, it seems reasonable to propose reforms to global institutions like the Security Council or the World Trade Organization as if they were central to global order. On the other, it also seems obvious such institutions are not that central—things are more plural and open and confusing than that. This oscillation is repeated in countless settings. People propose institutional reforms, norms and regulations from environmental law to human rights, corporate social responsibility, or international criminal law as if a lever to move the world had been identified, while remaining intensely aware that this is more aspiration than reality. This doubled sensibility—at once earnest and jaded, committed and cynical—is also a mark of disenchanted expertise. Since the economic crisis, the European Union has attracted this kind of ambivalence. More Europe, recursively reformed Europe, seems the only way out other than seizing the gunnels and steady ahead. And yet none of the reforms seems remotely responsive to the loss of confidence and open resistance of publics across Europe.

As the plausibility of narratives about governance waxes and wanes, people on the inside and on the street enter a kind of echo chamber of reciprocal ambivalence. Experts manage in the name of analytics in which they have lost faith: protesters assemble in the name of reforms they doubt will suffice. The new language of “sustainability”—a term detached from its origins
in environmental science—suggests the anxieties of the situation. An ambivalent manager class reframes their uncertainty as a matter of social-political risk management: how long can we play for time while those outside demand more before we are swamped by social unrest? Global fiscal imbalances are “unsustainable,” for example, if they will lead to political rupture before they can be turned around. Global warming threatens the “sustainability” not of life on the planet, but of the economic and political arrangements people have come to think are natural.

On the outside, the forces of “social unrest” are also in the sustainability game: calculating and communicating in a parallel universe, prophesying the apocalypse in the shadow of the same ambivalences. All they need to do is hold out, hold attention, until something cracks. But no one knows what it would mean for something to crack, for an alternative to arise, for a different political economy to be constructed. There are only the usual reforms. Meanwhile, a political economy of poverty, inequality and ill health continues to be all too sustainable, reproduced through a strange collaboration between the ambivalent projects of a managerial class and everyone else. My project is not to foretell collapse, but to explain the strange resilience of arrangements so many intuit to be nearing their end.

This uncertainty and ambivalence about the world is widespread. People everywhere now understand that they are vulnerable to the decisions and actions of people far away. Their own national state is rarely able—or willing—to defend their interests or support their economic, social, and political aspirations in a globalized world. Something global must be done. There are all kinds of reforms on offer. Many seem attractive, worth mobilizing around. My students find innumerable projects to champion and worthy organizations to join. But it remains unclear, also to them, if they are remaking the world or rearranging the chairs.

The most coveted projects and proposals in my own field of international law are illustrative. It is abundantly clear that they are inadequate to the tasks they purport to address. The International Criminal Court could triple its budget and jurisdiction, the United Nations could redouble its peacekeeping efforts, the international human rights community could perfect its machinery of reporting and shaming without preventing the outbreak of genocide, the collapse or abuse of state authority. Every American and European corporation could adopt standards of corporate responsibility, every first world consumer could be on the lookout for products that are fairly traded and sustainably produced, and it would not stop the human and environmental ravages of
an environmentally destructive global economic order. America could ratify the Kyoto Protocol, could agree with China and India and the Europeans on various measures left on the table at Copenhagen or Paris and it would not be enough to prevent global warming. The United Nations’ Millennium Development Goals could be implemented and their post-2015 agenda realized and it would not heal the rupture between leading and lagging sectors, cultures, classes. The Security Council could be reformed to reflect the great powers of the twenty-first rather than the twentieth century, but it would be scarcely more effective as a guarantor of international peace and security. Global administrative action could be everywhere transparent and accountable without rendering it politically responsible.

Each of these efforts might be salutary. Some may be terribly important. At best, however, the implementation of these schemes would kick things down the road, manage expectations, and, by rendering the problems sustainable, reaffirm the current distribution of powers. Completing the program of international law would not renew the political economy of the world—any more than finally “completing” the European Union would resolve the dynamics of dualism that have rocked the project from Brussels and Frankfurt on down. The project of continuing the project is part of how those dynamics are sustained. In Europe, a permanent transition toward an ever-receding goal of a “political” union sustains the technocratic separation of economic and political imperatives—and reinforces the divide between leading and lagging regions. Globally, the permanent transition toward a universal legal order of equal sovereigns sustains one after another project of hegemony. As a result, rather than a toolkit of policy solutions that might be adopted in the global public interest, it would be more accurate to see international law as a legitimating distraction from the effort to remake the politics of war or reframe economic struggle, institutionalizing an uncertain and ambivalent ideology as universal.

Over the past decades, many books and articles have been written about “global governance” to explain how the world works and how the world’s institutional machinery might be strengthened. Their authors tend to think like reformers, aspire to address people in places like Davos, and worry about the rising tide of social disillusion with the way the world works. They aim to explain how a disaggregated world is—and might be—governed. The phrase “global governance” signals a dream that the disorganized terrain on which people routinely struggle for advantage might one day become something more orderly, a place where problems would be solved, conflicts moderated, shared values made real. Although those who speak of global governance understand
that we can't have—and wouldn't want—a global government, they share the very reasonable conviction that the global capacity to solve problems and contest outcomes ought to be improved. Somewhere and somehow, somebody could be doing for the world what governments do for the people they govern. It is this wish that has driven the substantive and geographic expansion of struggle—and rule—by expertise. And it is also this wish that sustains the viability of disenchanted rulership.

Unless today is your 1648, this does sound reasonable. When the problems people worry about cannot be addressed by local or national government, it is only natural to say that they are “global problems” demanding global solutions. When people seek global solutions, it is understandable that they would look for the kind of interest-aggregating, problem-solving competence they associate with the public hand at home. Addressing climate change, ensuring reliable and sustainable sources of energy, preventing and responding to pandemics, ensuring adequate food and clean water for an expanding population, enabling economic development, resolving cultural conflicts, addressing the threats posed by transnational terrorist networks, fighting corruption, ensuring the stability of financial system and the integrity of the Internet, protecting privacy, combating money laundering: people understand that such things cannot be solved by one city or one nation or one corporation alone. But it is also clear that they are unlikely to be resolved by the United Nations and the routines of global summitry. There is a governance gap.

In the absence of a global government, reformers have looked for functional substitutes. It is easy to think of institutions that might have something to do with ruling the world: the World Trade Organization, the European Union, the U.S. government, the major banks and global corporations, big nongovernmental foundations and advocacy groups, big governments in the developing world. Perhaps the World Economic Forum through their Global Redesign Initiative. Any or all of these might somehow participate in making and enforcing rules or resolving disputes that affect the world. As actors in all these sites reach out to engage one another, they search for a common vernacular—of common hope and personal advantage. Expertise—economic expertise, scientific expertise, legal expertise, social and political expertise, institutional and managerial expertise, expertise in the lessons of history and the universal practicalities of everyday life—fills the bill. Those who exercise the powers of expertise rarely think they are “governing the world.” Their mandate and project is always far more specific, their language more universal. As a result, their powers remain obscure, the opportunity to identify and contest their rulership vanishing point rare.
To think of the "global governance" that results as the distributed action of an ersatz public hand is also an understandable dream. Lots of people have the power to change things for other people, empower them, constrain them, humiliate or honor them. Many who take my course about global law and policy are eager to find tidbits of governance in all kinds of places: in corporate social responsibility programs, civil society organizations, philanthropic initiatives—in their own summer internships. They are right to find power in all these places. But when people imagine this adding up to a system of governance, they are dreaming, reinterpreting their field of struggle as something nobler and more promising. Or they are strategizing: reframing their objectives in the language of common purpose.

To identify dispersed activities undertaken for different purposes as a functioning, if imperfect, "global governance" system is so creative an act of interpretation that one cannot help wondering about the motive for it. Calling it "governance" could be a call for accountability or responsibility. Your powers are like those of a sovereign, a sovereign for the world: wield them wisely. It could be an effort to empower: wherever two are gathered in its name, there is global governance. Go forth and govern. It could be the assignment of blame: if you are dissatisfied, knock on this door. To call something an act of "global governance" singles something out—and leaves a lot of other powers in the shadow. They are not governance, need not be exercised with the global public interest in mind, and ought not be contested by the dispossessed. To identify "global governance" is an effort to do something with words, to make order by assertion, as much strategy and intervention as description.

In this book, I replace the search for "governance" with an effort to map the operations of power through which our world distributes. With a better cartography of power in the world, it will be a matter for contestation and debate whether this or that actor should be honored or saddled with the label "governance." My story focuses on struggle and inequality rather than consensus and problem solving. Through the work of expertise, order and disorder—even "worldliness," if we can call it that—are distributed unevenly, even inadvertently, among nations, economic sectors or classes, issues or problems through struggles about other things. When the dust settles, some people live globally, others locally; some problems are global, others local. I have written the book with those of my students in mind who embrace the possibility that their generation could transform this world through the slow hard work of remaking the terms by which struggles are carried out, gains and losses distributed, and the status of forces consolidated as order.
The book ends by returning to the question of 1648 with which I began. Roberto Unger once described late twentieth-century expert rule as the work of "a priesthood that had lost their faith and kept their jobs." "They stood," he said, "in tedious embarrassment before cold altars." This misunderstands the contemporary practices of faith among those who manage our world. Governance by expertise is rule through ruthless struggle among experts who have retained their faith and expanded their jobs. Theirs is an ecumenical, eclectic, and disenchanted faith. It is also astonishingly appealing: at once practical and promising, recognizing the world as it is with its eyes firmly planted on the world to come. Its altars are anything but cold. Its practical power and hopeful promise make every year an opportunity for modest reform and no year likely to be our 1648. It should be no surprise that those most eager to change the world would be harnessed to its reproduction. For those of my students who wish it were otherwise, this faith is the seductive obstacle. To turn back from reforms we know to be inadequate will require a refusal to take our eyes off the dynamics of struggle through which injustice is mysteriously reproduced by so many who intend just the opposite.

This, after all, is the legacy we associate with dates like 1648. That year did not transform the politics or economics of the world, although a long war in Central Europe came to an end and new commercial opportunities beckoned. Nor was it a moment of institutional reform, although the Holy Roman Empire never fully recovered. The architects of the Peace of Westphalia did not have a plan to reorganize politics for the next four centuries. If they had, it was not their plan that came to pass. Nevertheless, people remember 1648 because they associate it with the origin of the complex process of intellectual and institutional reinvention through which it came to be a matter of common sense that the politics of the world would be organized around sovereign states: a transformation that took more than three hundred years to achieve. Indeed, that was achieved only after the nature of statehood had been completely redesigned and rebuilt.

For today's generation to remake the world will be equally difficult. Uncertain expert practices and the routine aspirations for a better world that accompany them help to reproduce a world of unending struggle and unrelieved injustice. If this is your 1648, you will need to do more than nudge the managerial class to wise leadership—or protest the powers that be. To rethink and remake the world will require a thousand struggles on the plains where knowledge and power are forged and parceled out. Perhaps I will see you there.
CHAPTER 7
INTERNATIONAL LEGAL EXPERTISE: INNOVATION, AVOIDANCE, AND PROFESSIONAL FAITH

Across the twentieth century, as law expanded its reach into global political and economic life, legal professionals transformed their understanding of what law is and how law works. As legal expertise became sophisticated, plural and eclectic, law became an ever more powerful strategic tool for people struggling for advantage on the global stage. Today, a map of legal exposure, risk, and opportunity is part of the basic toolkit for political and economic actors operating transnationally. Yet when people reflect on the role of law in global affairs, they rarely focus on law as an instrument of distribution or cause of inequality. They may use legal argument and assertion ruthlessly for political or economic gain, but they think about international law more benignly as a sign of the potential for order and justice in global affairs. This chapter explores the relationship between these two sides of contemporary international legal expertise: an expanding practice of struggle wrapped in the promise of justice. It is a relationship sustained by a kind of professional faith or practice of fealty that strengthens law's authority while weakening the profession's sense of responsibility. The chapter ends with a suggestion for turning the internal diversity and pluralism of contemporary global legal activity toward a more responsible professional practice.

A possible explanation for the profession's aversion to exploring law's engagement with conflict, distribution and inequality might be a disconnect between the hard-boiled view of practitioners and the preoccupations of scholars arguing for international law's larger significance and potential. In the late nineteenth and early twentieth centuries, for example, as practitioners were
expanding law's role in transnational commercial affairs and building new public institutions, many scholars were focused on clarifying and limiting the norms that would count as legally valid, shrinking the corpus of international legal rules just as practitioners were pushing the boundaries in all directions. Practitioners engaged in global struggle today are also more likely to think of law first as a strategic tool or frustrating limit to what are academics focused on legal activity as constitutive of global legal order. Military professionals understand law as a tool for shaping the battlefield, businesspeople have become strategists of regulation, harnessing public and private standards to define their brand, defend their market, and distribute gains across global value chains, and lawyers promote their skills to anyone with an international project who might find it useful to assess the status of forces affecting its realization. Scholars do tend to see something else: a fragile and virtuous legal order of imperfect rules foreshadowing a future cosmopolitan order for a world of political conflict and economic competition.

But the relationship between practical savvy and scholarly vision is more complex. Scholars routinely adjust their ideas with an eye to their practical impact. They work hard to reinterpret what might be visionary as practical and what works as visionary. This double agenda is useful and reassuring for people who use legal assertion in struggle. Their legal assertions are also visionary, linked to order and justice. When you ask international lawyers, academic or practical, about their ongoing projects, proposals, and engagements, they readily describe the immediate terrain of their struggle with clarity. If you ask them to reflect on that experience—what it says about law and the world—they interpret their activity in a vocabulary that foregrounds a larger purpose for law as a contribution to order and justice rather than as a tool of distribution and instrument of struggle. To realize the promise of an ordered and just world, today's tentative shoots must be nurtured and honored. Increasingly, these perspectives have merged: people struggle technically for particular projects by making arguments about law's larger purpose, promise, and destiny and see its larger purpose prefigured in their ongoing technical projects.

Both activities are undertaken in the shadow of faith, a faith that precludes some kinds of self-reflection. Law's role in distribution, inequality, and conflict are leeches out: they belong to politics or to economic competition. Law is a nobler thing. Perhaps this explains the strange professional attachment to the idea that law remains a weak overlay on a political and economic world for which it has no responsibility. Both the profession's strategic pragmatism and its ethical self-confidence are on the line. To focus on law's role in conflict and
injustice not only tarnishes law's usefulness in particular struggles but may compromise a noble promise for humanity. As a result, although the imagination and methodological inventiveness brought to legal work opened the door to understanding law’s ubiquity as a mode of power, international lawyers—scholars and practitioners—have not stepped through.

The turn to faith emerged as scholars grappled with two intellectual puzzles that plagued their efforts to retheorize an ever more expansive, diverse, and plastic legal practice and corpus of legal materials: the problems of international law’s “legality” or normative authority and of its enforcement or practical power. After a century of intellectual work in the shadow of a proliferating legal practice, these puzzles are no closer to resolution. The result is a kind of disenchantment with explanation and a merger of technical and intellectual work sustained by professional faith rather than confident theory or compelling sociology. The modern international legal profession is a case study of sophistication through disenchantment.

I tell the story here from an American perspective, although it took different forms in different places. Scholars have been divided among themselves about how best to light the path by which practical work might promote the legalization of international affairs. Their differences have defined schools of thought and national traditions, divided the profession within the United States, distinguished it from European thinking about the field, and affected the shape of national traditions everywhere.1 Theoretical differences within the field have sometimes become linked with doctrinal or national positions and been articulated in political struggle. In the run-up to World War II, the Roosevelt administration proposed to think about international law more flexibly to abrogate or avoid what had seemed to be clear obligations of neutrality, and their Republican opponents fought back in the name of the international legal order as a whole.2 The Manhattan and Yale schools of public international law disputed the wisdom and legality of the Vietnam War and other American Cold War interventions in methodological terms: was international law a matter of limiting rules or fundamental values?3 Differences in legal theory divided supporters and opponents of the Iraq War both within the United States and internationally. The academic debate between European constitutionalism and the distinctly American blend of “policy pragmatism” and neoformal “rule of law” tracks closely the broader ideological debate between European social democracy and American neoliberalism. The association of theories with opposed political projects has diversified the field and given all theories a tendentious and overdrawn feel. These differences continue to offer a repertoire of
moves for people in struggle. For the discipline, a shared sense that none of the theories emerged triumphant from a century of debate has become prevailing wisdom. To be a sophisticated international law scholar or practitioner anywhere today is to be an eclectic and jaded borrower, enlisting arguments from across the spectrum of ideas about international law's legality and power to sustain its promise.

Not every international lawyer or legal tradition is comfortable with this new sensibility. Periodically, anxiety about the effectiveness or existence of so plastic a medium arises and new theories and empirical studies are brought forward to demonstrate that international law really does bind and is effective and that people do comply with it "as law." The fragmentation of international law has also raised anxieties about its integrity and coherence as a constituted legal order. When this happens, new constitutionalist visions and projects arise alongside new interpretations of law's coherence and new techniques for managing a fragmented corpus of materials and arguments. From the other side, neoformalists push back against international law's creative expansion, consigning ever more activity to the political or the economic. These bursts of renewal and attack are increasingly short-lived. A sophisticated and disenchanted professional sensibility no longer needs them: technique has embraced the plurality of theory as it harnessed the fragmentation, deformalization, and reformalization of norms. This is not the only destiny for legal pluralism, but it seems to be where we are. The chapter ends with a suggestion about what else might be imagined.

THREE INNOVATIONS: PRACTICAL INNOVATION AND SCHOLARLY REINTERPRETATION

The eclectic sophistication and disenchantment of the contemporary international legal profession were hard-won. They arose in part from a century of technical innovations wrought in struggle as people grappling with one another wrestled with the legal fabric, extending its reach and internalizing their differences within it. The contemporary professional sensibility is also the product of scholarly reflection and theoretical innovation: the disenchantment that comes with a century of unsatisfactory answers to foundational questions. Although I focus on the theoretical side of the story to draw attention to the turn from unsatisfactory theory to practices of faith, it is worth recalling the drama of law's engagement with world historic struggles.

The expansion of law's reach in global affairs and the breadth of practical innovation since the late nineteenth century are difficult to overstate. The
dispersion and globalization of economic life have made the legal arrangements that hold it together a focal point for struggle everywhere. Colonialism was a complex and diverse legal institution that became ever more institutionally and doctrinally nuanced as empires transitioned to mandate supervision and self-determination. Decolonization and the integration of imperial dominions into the global political and economic order have turned out to be more complex still. The spice trade, slave trade, and opium trade all generated legal innovations. Trade during and after industrialization sharply expanded the density and diversity of transnational legal forms. The global mobilization of commodities from sugar to oil, waves of expansion in the territory available for capital investment, and the integration of global labor markets into world production process each required new legal doctrines and institutional arrangements. New institutions and bargaining arrangements, a body of common principles and precedents to draw on, and a proliferation of new topics and new actors, both public and private, have made the contemporary law of trade more complex still. Consular and diplomatic life in the nineteenth century was the site of great innovation: special statuses, new remedies and modes of dispute resolution, specialized courts and tribunals. The institutional transformation of diplomacy in the aftermath of the world wars, decolonization, and the end of the Cold War produced an institutional terrain for global political conversation that crisscrosses governments, corporations, and civil society, all of which search for a common language of engagement. The story has been told many times: new kinds of law, new actors, new subjects, new institutions. And every year more of each.

This was not the result of a smooth global reform extending the role of law across new problems and territories. It was the result of struggle: of colonial expansion and resistance, of Cold War decolonization and nonalignment, of hot and cold conflicts between contending ideologies, commercial powers, and political blocks. Wars were fought and victories enforced in legal terms. There were, after all, Soviet and Nazi theories and practices of international law, just as there were Western liberal ones. For elites in the world's semiperiphery, international law was a tool of self-invention and promotion just as it has been for Republicans and Democrats in the United States. People promoting and opposing labor rights, environmental protections, or civil and political rights have done so in legal terms. The war on terror has harnessed the legal architecture of global finance to pressure outlier nations, individuals, and groups. Global financial institutions and wealthy investors have expanded their power
over cities and nations alike. Industrial sectors have battled for dominance as corporations have struggled for exclusive access to resources and markets. In each of these struggles, people have pulled and pushed on the legal fabric, searching for ways to expand their quiver of powers and open chinks in their opponents armor.

At the same time, "internationalists" associated with global legal and institutional arrangements have also had projects: to secure the peace by collective security; to complete the state system through self-determination and the management of national minorities; to strengthen global regulatory and administrative authority; to advance the project of legalization by promoting the use of legal precedents, principles, and institutions by new actors in new fields of endeavor; and to promote things like free trade, human rights, or international criminal law and the institutions built to implement them in the name of universal values. It should not be surprising that people promoting legalization would find opportunity in the diversity of legal arrangements and arguments thrown up by ongoing struggle and seek to internalize them within an ever more comprehensive and sophisticated legal field. In one sense, of course, law reflects winners. The UN Security Council affirms that there were five great powers in 1945, although Germany and Japan had only recently almost been more powerful than all of them. The internal diversification of the legal fabric, however, reflects not only wins but games played. Whether global struggles are won or lost, each side had something to say that drew on, expanded or reframed law's vocabulary. The sophisticated eclecticism and internal diversity of the field reflect this history of arguments and assertions made.

The expansion of the international legal world was accompanied by a century of innovation in the field's vision of what international law is and how one should reason within it. From the mid-nineteenth century, as "law" came to be associated with national sovereignty, "international law" became an act of imagination and argument by analogy. A scholarly profession developed rapidly to undertake and promote that imaginative construction, developing theories—arguments, really—for the existence, scope, and content of international law in a world of national sovereigns. Over the next century, scholars urged an ever more realistic understanding of law diffused through the fabric of interaction and communication among all the actors on the global stage, reinterpreting the legal order in functional terms. This way of thinking about law further expanded international law's scope. Once law could be identified by its functions—as a technique of reciprocal enforcement, advocacy,
dispute resolution, norm generation, consensus building, problem solving, or administration—wherever those functions are performed, there is law. International lawyers expanded their field’s aperture to include national law and private law rules that affect transnational economic activity as well as informal or customary arrangements that function as law in global society. In a world where anything could be an avatar of law, much will depend on what people interpret law to be: law will become whatever people treat as if it were law. This sociological and interpretive expansion opened the way to grasping law’s constitutive and distributive role in global political economy as well as its social power, legitimating and delegitimizing as people denounce and defend global action in legal terms.

In the process, international law became a more dispersed and fragmented affair. The expansion of law’s range was matched by an internal proliferation of legal principles, arguments, and doctrinal materials. The possibility to say ever more things in legal language increased the number of people who found it a useful vocabulary for self-assertion. As international materials multiplied, they became increasingly flexible. Rules were displaced by principles and differences in kind were reinterpreted as matters of degree. An ever more plural legal vocabulary embraced contradictory principles and purposes more readily. Nor were all legal rules of equal value or validity: some were more persuasive than others. Soon it became possible to use law both to make and to unmake familiar distinctions—war and peace, public and private, politics and economics, international and national—and to express a range of sharply different political viewpoints, enhancing law’s potential as a tool of struggle. Law offered a way to do things with words: to denounce and defend, legitimate and delegitimate, define and redefine the battlefield or the market. Awareness of law’s internal flexibility also increased the significance of professional interpretation. As international law came to embrace broad principles and require the balancing of conflicting interests, more would depend on the wise judgment of those who use legal tools.

Although these innovations might have made it easier to see the role of transnational legal arrangements in conflict and injustice, most averted their eyes. International lawyers and scholars did understand that disaggregating the legal order, merging it with social forces, loosening its claims to coherence and encouraging its strategic mobilization by people with all kinds of projects at various levels was a gamble: will legalization tame political and economic forces or be tamed by them? The answer, they could see, is as much a matter of interpretation as of fact, and ultimately, where one cannot know, one must choose to
believe. The decision to embrace a disaggregated law as a functional cosmopolitan order is an affirmation of faith that now demands professional fealty.

It has the advantage of being a convenient faith, affirming the virtue of the professional project while strengthening individual claims made in its name. The idea that simply using international law contributes to a better world is an appealing thought for practitioners who frame their parochial claims as steps to a virtuous universal order. Scholars could imagine anyone using international legal institutions and arguments as a (perhaps unwitting) foot soldier promoting world peace through world law. Although many particular interests advanced in the name of international law might turn out to impede progress toward global order, international lawyers were hopeful. Practitioners might be transformed by using the tools of law and come to share the ambition for a better world. They might come to inhabit law as believers rather than use it as strategists, accepting law's limits for themselves as they urge them on others. Or it might turn out that as international law materials are used successfully, a legal order would sneak up on sovereigns, subordinating them to its limitations. Suddenly there would be institutional arrangements and argumentative paths it would be impossible to ignore. The profession was hopeful about a shared fiction: by interpreting the dispersed entanglements of law with everyday struggle as if they were or would become a global public order able to solve global problems, express shared values, and implement humanitarian aspirations, that day may be brought ever nearer.

This double project—making international law diffusely useful while lauding the results as ethical progress—requires careful interpretation and strategic skill by both practitioners and scholars. No longer the jurist waiting to be asked what is and is not legal, the international lawyer has become a strategic partner for businesspeople, civil society advocates, politicians, and military commanders, while also thinking strategically on behalf of international law. International lawyers play for gains and for rules—and also for a better world. Even the most focused advocate is rarely indifferent to international law's future. The tools work and the arguments persuade only when they can be linked to a future order that will civilize conflict and implement universal values. Whether you are prosecuting a war criminal or drafting a code of corporate responsibility, you are playing a long game for the legal order as much or more than you are struggling for victory in the case. Their eyes on a long game, international lawyers have a powerful motive not to investigate law's role in conflict, injustice, or inequality. These are better seen as stubborn facts to be addressed by a revitalized cosmopolitan law in the hands of inspired practitioners.
FAITH AGAINST DOUBT: THE ORIGIN OF A PROFESSIONAL RIDDLE

To believe in international law’s future you need to accept its existence. To see the hand of law in so diverse a practice of global push and pull you need to believe that people would not have fought, won and lost in the same way without the normative pull of legal obligation. Unfortunately for international lawyers, just as their field was expanding dramatically, doubts on this point were at their peak. How can a legal order be built on the horizontal political interactions of sovereign states? In what sense can we say that international norms, institutions, arguments, and assertions are really “law”? Perhaps they are just power in a pretty dress, “compliance” nothing but lipstick on interest. A hundred-year rearguard action against such doubts turned out to be a blessing in disguise, however, propelling the emergence of the sophisticated and disenchanted professional sensibility we encounter in the profession today.

The classic formulation of the philosophical problem was by the English legal theorist John Austin in The Province of Jurisprudence Determined. As the title suggests, his intellectual project was to understand the distinct nature of law by determining its boundaries and limits. Law, he maintained, is the command of the “sovereign,” a power whose authority is backed by sanction, is routinely or habitually obeyed, and is itself not subject to the command of another. Sovereignty, for Austin, is outside of, above, or before law.

Whether a given government be or be not supreme, is rather a question of fact than a question of international law. A government reduced to subjection is actually a subordinate government, although the state of subjection wherein it is actually held be repugnant to the positive morality which obtains between nations or sovereigns. Though, according to that morality, it ought to be sovereign or independent, it is subordinate or dependent in practice.

As Austin saw it, the absence of a higher sovereign power meant that international law was not law “properly so-called” but a matter of morality called “law” only by analogy.

The so called law of nations consists of opinions or sentiments current amongst nations generally. It therefore is not law properly so called. The positive moral rules which are laws improperly so called, are laws set or imposed by general opinion: that is to say, by the general opinion of any class or any society of persons. Some are set or imposed by the general
opinion of persons who are members of a profession or calling; others, by that of persons who inhabit a town or province; others, by that of a larger society formed of various nations. . . . And laws or rules of this species, which are imposed upon nations or sovereigns by opinions current amongst nations, are usually styled the law of nations or international law. Now a law set or imposed by general opinion is a law, improperly so called. It is styled a law or rule by an analogical extension of the term.\(^{11}\)

Had international lawyers not started with Austin, they might have interpreted the nineteenth-century expansion of sovereign power differently: not as a threat to the existence of international law, but as a permissive shift in the content of the rule system from mutual restraint to an order more respectful of autonomy. To see the autonomy of sovereigns instead as a matter of political and historical fact excused international law from responsibility for what was permitted or possible in its absence. Even after international law’s dramatic twentieth-century expansion, it remains common to associate it only with constraint, rather than to acknowledge its role in privileging what sovereigns do, whether despoiling the environment or making war.

Austin’s conceptual challenge to the “legality” of international law has animated international law practice and thought ever since. Not because international lawyers agreed with Austin, nor even because they felt he was particularly significant. Some did, many did not. Rather because international lawyers and scholars were determined to reconcile their own acceptance of national political sovereignty with a passionate dream of a better and cosmopolitan international order achieved through law. Austin gave voice to an anxiety they felt. Modern international law was born in the paradoxical relationship between the dream of an international legal order and a sense that both the practical reality and conceptual significance of “sovereignty” stood in the way.\(^{12}\) Resolving the tension between the “fact” of sovereignty and the promise of law gave international lawyers a common intellectual and practical project.

There was a lot of work to be done. By the end of the nineteenth century, international law had worked itself into a corner. An international law handbook for diplomats in 1800 would have contained a wide range of sensible strategic advice and information about what to expect when representing your country: part Machiavelli, part Robert’s Rules, and part Emily Post.\(^{13}\) The law of nations was as much a part of the accepted background for global political and economic life as the common law was for Americans at the same time. Lots of people asserted “rights” rooted in the law of nations: sovereigns, property
holders, diplomats. Sovereign rights were exercised by aristocratic authorities, corporations, and private parties: privateers could exercise rights of war, the East India Tea Company could exercise sovereign powers, and the world was divided into all manner of overlapping political entities with varying degrees of autonomy. What we now distinguish as international public and private law were all mixed up. King Leopold of Belgium was said to "own" the Congo in what would later seem a strange fusion of property and sovereignty. Moreover, far from a uniform terrain of homologous states, the world itself was understood to be divided among civilizations and between those who were and were not "civilized." Legal powers and players were different within and between these domains.

By the end of the nineteenth century, the situation was altogether different. Within the legal field, distinctions had sharpened between law and politics, law and morality, national and international, and public and private international law. The domain for "international law" kept getting smaller and more conceptually distinct. Diverse arrangements of "sovereign rights" gave way to the idea of a single type of actor: the "sovereign" nation-state. This was a novel and not altogether persuasive proposition when most of the world remained part of various colonial and imperial dominions. Nevertheless, echoing Austin, the unique authority of "sovereigns" was understood to be more than the sum of their legal entitlements: it resided in history and expressed the priority of politics over law. As late as 1924, British legal scholar Percy Corbett gave expression to this idea in analyzing the League of Nations' authority over the Saar, where it exercised all the rights of sovereignty without qualification but did not possess what he called the nuda proprietas of sovereignty. That remained with Germany. The absent nuda was not simply another legal interest—the right, say, of reversion—but a more elemental form of political power that an artificial creature of law like the league could not possess. The consolidation of "sovereignty" in the imagination as a singular and absolute kind of political figure placed international law under suspicion and opened rules long understood to be valid to suspicion and challenge. In response, international lawyers developed theories about—and arguments for—the "legality" of international law just as the global normative order was expanding.

The explosion of innovation that launched the renewal of international law and opened the door for its modernization took place in percussive bursts. Martti Koskenniemi focuses on the emergence of a cosmopolitan liberalism of a generation of international lawyers in the Europe of the 1870s. World War
I sparked another remarkable period of intellectual and institutional innovation in Europe among political scientists and international lawyers. The two dozen years after 1945 saw a further expansion of international legal materials, legal institutions, and professional communities fueled by decolonization, the United Nations, and American hegemony. The scholarly center then was the interdisciplinary discussion in the United States—in New Haven and New York—that interacted with the world of the United Nations and legal intellectuals from the postcolonial world. The proliferation of sites for international adjudication and advocacy that began in the 1970s and exploded after 1989 with the rise of the human rights movement gave another generation the opportunity to reimagine the field.

As each generation faced a wave of technical innovation and expansion demanding interpretation, people found new ways to blend the reality of sovereign power and the promise of law’s normative power. As people reimaged the field, they also extended its reach and added to the toolkit available for people in struggle. The projects that followed considered both the normative and the enforcement side of the legality problem: how could legal norms be distinguished from other norms, and how could legal enforcement be distinguished from the exercise of unrestrained political power? Any number of scholars might be chosen to exemplify the kinds of intellectual moves that reinvigorated the field in the shadow of Austinian doubt. For Koskenniemi, Hersch Lauterpacht’s centrality to the technical practice and academic sensibility of midcentury international law makes him exemplary. I have always associated this set of moves with Hans Kelsen, whose turn from sociological realism to faith is right on the surface.

Kelsen begins by rejecting the notion, familiar from Austin, that law has behind it the absolute power of “sovereignty” or the “state.”

The assertion that back of the legal order is a power means only that the legal order is by and large efficacious, that its norms are actually observed. . . . The state as a power back of law, as sustainer, creator, or source of the law—all these expressions are only verbal doublings of the law as the object of cognition, those typical doublings toward which our thinking and our language incline, such as the animistic presentations according to which “souls” inhabit things; dryads, trees; nymphs, springs. . . .

Reasoning about law on the basis of mental images and abstract concepts should be replaced by a more realistic assessment of law’s actual effectiveness. The “state” we imagine is “only a picture.”
The state is conceived of as having existence in space, and, accordingly, 
events are distinguished as happening within the state and without the state. 
We speak of internal and external affairs of the state. The object of national 
law is within the state; the object of international law is without the state . . . 
[however] the idea of the state as a body in space having an “inside” and 
“outside” is only a picture. 21

The key to law’s validity is the fact of coercion: “Law . . . is a coercive order 
or because the idea of the legal norm induces men to proper behavior, but 
ecause the legal norm provides a coercive measure as a sanction.” 22 When 
national legal order successfully harnesses sanctions to normative proposi­
tions, Kelsen imagines it resting on a grundnorm articulating the law that is 
efficacious.”

Turning to international law, Kelsen asks whether the same might be said. 
Here the importance of interpretive articulability is front and center: can it be 
told that international law is efficacious in the same sense?

International law is law in this sense if a coercive act on the part of the state, 
the forcible interference of the state in the sphere of interests of another, is 
permitted only as a reaction against a delict and the employment of force to 
any other end is forbidden—only if the coercive act undertaken as a reaction 
against a delict can be interpreted as a reaction of the international legal com­

unity. If it is possible to describe the material which appears in the guise of in­
ternational law in such a way that the employment of force directed by one 
state against another can be interpreted only as either delict or sanction, then 
international law is law in the same sense as national law. 23

What began as a turn from abstraction to the real world of coercion becomes 
matter of interpretation.

Kelsen acknowledges, moreover, that interpretation is a matter of choice. 
Var, he reflects, has been interpreted in two ways: as outside of law—“neither 
delict nor a sanction”—and as “forbidden in principle” by international law and therefore either delict or sanction. 24 “It would be naïve,” he says, “to ask 
which of these two opinions is the correct one, for each is sponsored by out­
tanding authorities and defended by weighty arguments.” 25 The interpretive 
choice is a political and ethical one: do we choose law or a world unrestrained?

The situation is characterized by the possibility of a double interpreta­
tion. . . . It is not a scientific, but a political decision which gives preference 
to the bellum justum theory. This preference is justified by the fact that only
this interpretation conceives of the international order as law. . . . From a strictly scientific point of view a diametrically opposite evolution of international relations is not absolutely excluded. That war is in principle a delict and is permitted only as a sanction is a possible interpretation of international relations, but not the only one. We choose this interpretation, hoping to have recognized the beginning of a development of the future and with the intention of strengthening as far as possible all the elements of present-day international law which tend to justify this interpretation and to promote the evolution we desire.26

The result is a professional project: to affirm and "promote" the significance of law in international affairs. If you—and others—chose to look at international law as an order, it would be one. Anything less would be to choose a world of unrestrained conflict.

A turn away from concepts to reality, a confrontation with the pluralism of that reality and the indeterminacy of interpretation, and a renewal of the will to interpret for order and to promote a future of ever more effective international law: across the twentieth century, generations of scholars and practitioners made these Kelsenian moves in one or another way. As they did, they came to see law everywhere, dispersed throughout global society and available for people with projects of all types and to reinterpret power as law made visible. In 1989, for example, the Harvard Law Review reexamined the relationship between jurisdiction and statehood to encourage courts to consider transnational solidarities and interests alongside national interests in assessing assertions—and refusals to assert—national jurisdiction outside a state’s territory:

Rethinking jurisdiction . . . requires rethinking the state itself. It requires envisioning a state not as natural, bounded, and enclosed, but as constructed, boundless, and open, a constellation of authoritative behavior, or authoritative exercises of jurisdiction over individuals, events, and property. The "state," in this view, is the ever-changing snapshot emerging from these jurisdictional assertions, the very pattern of assertions of jurisdiction, not an entity that ponders whether to assert jurisdiction or not. It has no permanent inside and outside, no identifiable interests. In short, the state does not define the scope of its jurisdiction; rather, it is the jurisdictional decisions themselves that define the state.27

Nevertheless, the need to "promote the evolution we desire," in Kelsen's words, remained acute. The dream that legalization would enable a global
humanitarian and cosmopolitan consensus, restrain self-interest in the name of global objectives, or offer effective tools to address global policy challenges remained on the horizon. Fealty to this dream would blunt recognition of what might otherwise be obvious: if people everywhere use law in struggle, it must be implicated in outcomes, just and unjust.

THE PROBLEM OF RULES: THE LIMITS OF CONSENT

For the international law profession, the scholarly road to agnostic eclecticism can be seen in changing answers to two central theoretical questions: how do we identify binding rules, and how are they made effective as law in the world? The late nineteenth-century solution to the first problem was consent. The distinction between law and policy or morality was sovereign intention of the sort expressed in treaties. Yet nineteenth-century international law contained many rules not established by treaty: it would be necessary to determine which could be said to rest securely on sovereign will. Even treaties would need to be assessed to ensure consent had not been vitiated by things like mistake, fraud, duress, or changed circumstances. The result was a new doctrinal tool—"sources of law"—for assessing the provenance of rules, codified in the 1924 Statute of the new Permanent Court of International Justice to guide the justices in their search for law. Unfortunately, the validity of norms was hard to prove and easy to challenge.

The 1900 US Supreme Court decision in *The Paquete Habana* illustrates the problem. After a very lengthy and detailed historical investigation, the Court found that seizing "fishing smacks" as prize in war was contrary to customary international law. The recitation of sovereign practice was remarkable in its extent—page after page—and in the consistency of state practice. For many centuries, no sovereign seems to have seized a fishing smack. After affirming the rule, the Court applied it to the American Navy, striking a blow for the legality of international law more generally: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana* is routinely cited as a textbook example of sources doctrine at work, illustrating the proper way to demonstrate the validity of a customary rule, and as the leading American authority on the binding power of international law itself. Prior to 1900, no authoritative ruling on this point was needed. It was simply obvious that international law, like the common law, was part of the nation's legal system. The
need for articulation marked the beginning of the end for customary international law in American courts. More importantly, if every customary rule would now need historical proof as elaborate and uncontradicted as that in *Paquete Habana*, there would be very few norms of customary law. Much that had been legally regulated no longer would be.

International lawyers tried all kinds of things in the following decades to flesh out the normative catalog. Some launched private projects of "codification" to restate the norms in force with clarity and precision. They promoted codification by treaty, despite the limitations this placed on the norms that could be articulated. They worked to articulate a default rule to permit resolution of a dispute where no legal norm could meet the new pedigree requirements.

Perhaps a court could decide on the basis of equitable criteria, *ex aequo et bono* in the words of the Permanent Court Statute. Perhaps a solution could be deduced from the nature of sovereignty itself. In 1927, for example, the Permanent Court held in the *S.S. Lotus* case that the territorial bonds of sovereignty are superior to bonds of citizenship because sovereignty was by nature territorial, while admitting there was no rule of custom or treaty to this effect. Once it was possible to reason from the nature of sovereignty, the door was open to finding duties as well as rights, and looking to the nature of the international legal system as a whole to find principled means for settling disputes. In 1974, United Nations sought to clarify these background entitlements of sovereignty in the Charter of Economic Rights and Duties of States, whose multiple and conflicting terms further widened the scope for international legal argument and assertion.

Already in the Hague Conventions, a move from legal rules to broad principles was under way. It was difficult to come to agreement on rules of war beyond the prohibition of a few weapons and protocols for the treatment of medics and prisoners. Such narrow rules seemed to affirm that the rest of war was outside law all together. Perhaps the few rules we had could be seen to embody underlying principles of more general application. Or perhaps agreement could more easily be reached at the level of principle. A principle might also slide more easily into the reasoning processes of military professionals. The principle that military force must be "necessary" and "proportional" to its objective brings the entire battlefield into law while mirroring the military's own logic: concentrate your force, no wasted effort. It echoes the kind of moral distinction soldiers and citizens will want to make: no wanton destruction or unnecessary killing. Over the next decades, as hundreds of "codifying"
treaties were adopted, the search for multilateral consensus generated ever more broadly framed provisions, often of uncertain normative status or meaning, which might be useful but require interpretation.

The turn to principles brought political and ideological differences into the legal fabric, softening the line between law and policy or morality. Rather than a threat to the legality of law, jurists saw confirmation of law's increasing strength and usefulness as a kind of principled gravitational field for sovereign interaction. It could serve as a general vocabulary of statecraft and toolkit for innovative solutions rather than simply a checklist of obligations, limits, and entitlements. Oscar Schachter put it this way in 1962, praising what he saw as UN Secretary-General Dag Hammarskjold's skillful use of international legal principles in diplomacy:

Hammarskjold made no sharp distinction between law and policy. . . . He viewed the body of law not merely as a technical set of rules and procedures, but as the authoritative expression of principles that determine the goals and direction of collective action. . . . [He felt] the fundamental principles of the Charter and international law embodied the deeply-held values of the great majority of mankind and therefore constituted the moral, as well as the legal, imperatives of international law.30

The technique of fusing these opposing elements into workable solutions cannot be easily described; it is more art than engineering and blueprints are not likely to be available. Certainly, an essential feature lay in the nature of the general rules which guided him. They were, in the main, principles derived from Articles 1 and 2 of the Charter; in that basis they already commanded, in a psychological and political sense, high priority among the values formally accepted by the governments of the world. They were flexible in that they did not impose specific procedural patterns or detailed machinery for action; they left room for adaptation to the particular needs and the resources available for a given undertaking. . . .

It is also of significance in evaluating Hammarskjold's flexibility that he characteristically expressed basic principles in terms of opposing tendencies (applying, one might say, the philosophic concept of polarity or dialectical opposition). He never lost sight of the fact that a principle, such as that of observance of human rights, was balanced by the concept of non-intervention, or that the notion of equality of states had to be considered in a context which included the special responsibilities of the Great Powers. The fact that such precepts had contradictory implications meant that they
could not provide automatic answers to particular problems, but rather that they served as criteria which had to be weighed and balanced in order to achieve a rational solution of a particular problem.\textsuperscript{31}

Schachter was correct: the abundance of principles—very often in tension with one another—greatly increased the usefulness of international law in diplomatic struggles. Parties on all sides of conflict were increasingly able to articulate their political positions in legal terms.

Whether this would lead to a "rational solution of a particular problem," however, was at best uncertain. The ability to express interests in legal terms may also strengthen everyone in the belief that their cause is just and compromise uncalled for. It may encourage weaker parties to overplay their hand—or stronger parties to press beyond what makes long-term sense. Schachter had confidence that the flexibility afforded by the "dialectical polarity" of law would be in good hands with Dag Hammarskjold because he shared faith in the promise and objectives of international law.

He regarded himself as a man of law, in part because of his formal legal training, in part, it seemed, because of his intellectual delight in the subtleties of legal analysis. There was also perhaps an element of personal sentiment in his attitude, for he had a manifest pride in his family's legal background and especially in the contribution made by his father, Hjalmar Hammarskjöld, and his brother, Ake [Ake Hammarskjold, registrar and later judge at the Permanent Court of International Justice]. Much more important, however, than these considerations was the conviction, which he increasingly expressed, that the processes of law, and, as he put it, the principles of justice were crucial to the effort to avert disaster and to achieve a secure and decent international order. That this conviction went far deeper than the conventional homage paid to the rule of law soon became evident to one who shared his professional interest. It was more than a belief in a distant goal; it inspired and influenced his actions from day to day, and it is not surprising that one of the first tributes paid him by an ambassador who knew him well was to describe him as "imbued with the spirit of law."\textsuperscript{32}

In the hands of the faithful, a flexible legal fabric that embraces ethical and political differences opens the way for a forward-looking diplomacy that is "more art than engineering."

Meanwhile, a half century of reasoning and arguing had shifted the terrain for thinking about law and sovereignty. In 1949, Justice Alvarez of the
International Court of Justice had positioned himself at the cutting edge of the shift in his Corfu Channel Case opinion:

By sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States. Sovereignty confers rights upon States and imposes obligations on them. . . . This notion has its foundation in national sentiment and in the psychology of the peoples, in fact it is very deeply rooted. . . . This notion has evolved and we must now adopt a conception of it which will be in harmony with the new conditions of social life. We can no longer regard sovereignty as an absolute and individual right of every State, as used to be done under the old law founded on the individualist regime, according to which States were only bound by the rules which they had accepted. Today, owing to social interdependence and to the predominance of the general interest, the States are bound by many rules which have not been ordered by their will. The sovereignty of States has now become an institution, an international social function of a psychological character, which has to be exercised in accordance with the new international law.33

If a sovereign was a social function constrained by rules beyond its consent, the “legality” of legal rules and principles had floated free of any Article 38 pedigree. The terms of Article 38 could still be used to argue for and against particular rules. Indeed, it would be an impermissible and unprofessional tactic to assert that the line between law and politics, rule and preference, did not matter or could not be drawn. It could be drawn in lots of ways. But there was no right place, no compelling theory, no ultimate juridical test of just where it should be drawn. As a tactic in struggle, everyone could insist that their preferred rule had a more solid pedigree and reject their opponent’s position as a mere policy preference. This practice could now be undertaken more lightly, lawyers on all sides understanding that the line between legal rule and preference was fluid in their hands. Arguments about the status of rules could be effective, but less because they were persuasive than because they fit with professional habits and expectations. A sophisticated discipline had arrived.

In the years after the Second World War, argument in this spirit moved the goalposts for assessing the legality of international law; “legality” would now be a matter of social and political fact rather than an analytical conclusion. A determination by jurists that a norm is valid is, when you think about it, just another argument. The real question is whether the argument persuades, whether the norm functions to change behavior. This could be answered only
in practice, not by analysis of Article 38. Take the definition of customary law as “evidence of a general practice accepted as law.” Lots of questions arise: How much practice? What evidence shows a practice to be “accepted as law”? Is the practice of important states more significant? States directly affected by the custom? Dissertations could be written in response, but in practice, they would just be fuel for further argument. In diplomatic practice, however, lawyers readily intuit the evidence that will be most compelling: recent practice of the state you are trying to persuade, practice of similar or allied states, and so forth. As a lawyer evaluating evidence to put in the diplomat’s speech, one does not think “valid/invalid” but “useful/less useful” or “more persuasive/less persuasive.” The result will rarely be the absolute confirmation or repudiation of a possible rule, but something more nuanced, a matter of more or less. Some people would be persuaded, others not.

This approach sharply expanded the number of actors whose responses to legal claims would be significant and who could be understood to carry a brief for international law as a whole. If nongovernmental actors could argue successfully that major corporations violated an “emerging international principle” requiring a “precautionary” approach to environmental damage, they could be understood as part of the legislative and enforcement arms of the international community, contributing to the growth of the normative fabric. Through “naming and shaming,” the human rights movement would simultaneously strengthen and enforce international norms. When using international law, moreover, it often makes strategic sense to bracket the question of what is in the normative catalog. Although General Assembly resolutions themselves are not “binding,” they may be authoritative in a softer way, persuasive and useful reference points in disputes about what is and is not appropriate sovereign behavior. Oscar Schachter went so far as to catalog the legal and political significance of “nonbinding international agreements,” finding parallels with binding arrangements and acknowledging their usefulness as diplomatic tools. If enough people argue for a sensible principle and bring their collective power to bear, they might get a result, even if the norm they proposed could never make it through the sieve of the doctrine of sources. As actors embraced this possibility, the normative material proliferated and legal arguments were increasingly part of global political practice.

Environmental activists were among the first to seize the initiative, promoting new principles only loosely tethered to international documents, reports, and scholarly tomes. Philippe Sands noted the still “limited implementation and enforcement” of international environmental law, which he felt “suggests
that international environmental law remains in its formative stages.” One thing it did have, however, was a catalog of principles. “Although no single international legal instrument establishes binding rules or principles of global application, several general principles and rules of international law have emerged, or are emerging in relation to environmental matters.” He notes that the principles “temper” one another, as in the case of the principles of “sovereignty over national resources” and “not to cause damage to the environment.” Other principles that “emerged” in various international instruments and activities included “the preventive principle,” “the precautionary principle,” “the polluter pays principle,” as well as the principles of “good neighborliness and international cooperation,” “sustainable development,” and “common but differentiated responsibility.” Sands’s principles rest on a smorgasbord of binding and nonbinding texts. To his mind, their emergence in the practices of advocacy and diplomacy are more relevant than their pedigree and might well be a matter of “more or less,” depending on how far the principle had so far “emerged.” To argue that norms culled from this material rose to the level of “general principles of law recognized by civilized nations” remained a heavy doctrinal lift. Nevertheless, arguments by analogy were often successful: a legal principle that worked over there might be a reasonable approach over here. Where these arguments are effective, law’s march forward continues.

This shifted attention to the process by which the persuasiveness of norms could be encouraged. For Sands, that meant transforming them into workable and more specific “standards” and harnessing them to innovative “legal techniques” that might encourage their implementation. He had in mind reporting requirements, impact assessments, attaching liability to environmental harm in national legal systems, and “improved enforcement procedures and dispute settlement machinery.” The field had shifted from making norms to enforcing and implementing them. In that work, one could remain agnostic about whether they really were legal norms.

For the contemporary international lawyer, the problem of rules is not a problem. The legality of international law is not inherent in the norms but created in their use. As a result, everyone now speaks a loose jargon of principle and policy. The distinction between law and politics has blurred along with that between legal science and political science. Has international law devoured the political, or has politics turned international law into another language of interest? It is impossible to tell. To look at this situation with late nineteenth-century eyes is to lament the loss of law’s special status. The contemporary international lawyer has simply outgrown such questions. As a
sophisticate, she realizes rules have no pedigree and law has no special province to be determined. Acting as if law had normative power sometimes works and, if we believe, may yet bring us a better world.

THE PROBLEM OF POWER: LEGALIZATION WITHOUT LIMIT

The turn from validity to the persuasiveness or effectiveness of rules presented a different problem of legality: identifying the machinery of specifically legal enforcement. A century ago, it was obvious the machinery for enforcement was weak. Experts bemoaned the still primitive stage of international society and yearned for courts and other institutions to implement the normative catalog they were composing. Over the years, they imagined other enforcement possibilities. The horizontal interactions among sovereigns might be reinterpreted as acts not only of “auto-interpretation” but of reciprocal enforcement. Together, they could be understood as a primitive functional equivalent for the vertical systems of interpretation and enforcement found in “mature” national systems. The enforcement pressures brought to bear would be not only military power or direct sanctions, but a wide range of social pressures that are part of “legitimacy.” If we attribute these powers to law, we could conclude that the legality of international law resides in its social power to legitimate and delegitimate.

The picture that emerged is of a self-reinforcing legality blending normative creation and enforcement. People make assertions about what law requires. Their assertions go into the world armed with a backpack of social, political, and economic power. Where the assertions are met with acquiescence or agreement, the norms were legal. At the same time, assertions of power carry little backpacks of legal authority. When they are successful, they were legitimate. In both directions, the (successful and persuasive) use of law strengthens the legal fabric as a whole.

This is an elegant, if analytically somewhat circular approach to the problem of legality. It is hard to see how one could disentangle the social or military force brought to bear on behalf of a norm from the additional effect of law’s legitimating power. If the power of law is merged with the powers that make law effective, it is hard to know whether the result is marvelously juris-generative or wild overreaching by international lawyers. If you approach international law with an attitude of suspicion, in the tradition of Austin, it would be easier to conclude that what is going on is simply the assertion and pursuit of sovereign self-interest. The legal language is nothing but a convenience to fool
whoever may be taken in. But if you are a believer, someone who chooses, following Kelsen, to see the world in legal terms, you will witness the wonderful process by which civilization rises from the plain of brute force.

Once the legality of international law attaches to the power of social sanction, international law is an expression of power and an effect of coercion. It is difficult to see how this could avoid opening the door to a consideration of law's role in injustice or the violence and death of the wars it legitimizes. But it has not. Rather than seeing the hand of power in the glove of law, mainstream international lawyers focus on the glove. They see law acting everywhere in the world and celebrate the ability of civil society organizations, individuals, or national judges to participate in global rule making. Where the outcomes are not desirable or when bad things happen in the name of law, they prefer to see the misrule of power dressing itself in legal justification.

One result of this professional posture is a kind of winner's logic. Whoever makes legal claims successfully has not only vindicated a parochial demand but contributed to the enforcement of a collective vision. Claims validated through enforcement must have had the wind of legitimation behind them. This idea has striking parallels in many seventeenth-century views of natural law. This also makes it very difficult to imagine law implicated in injustice or distribution: when legal claims succeed, everyone benefits. Those who “won” were successful agents of the whole. When George Bush challenged the United Nations to enforce international law against Saddam Hussein—or stand by passively while the United States took matters into its own hands—we can imagine a legitimation calculus whose outcome could be known only after the campaign was completed. Had the United States brought democracy to Iraq and beyond, the United Nations would have been delegitimated as the oracle of legality. If, as it happened, the campaign was widely perceived as a failure, the United States would be delegitimated in their claim to act on behalf of global order. One might untangle the legality from the success of the venture, but it would be hard to ignore their impact on one another. At the extreme, this can lead to the kinds of claims one heard when NATO attacked Serbia in defense of Kosovo: the action was legitimate, even if not, strictly speaking, legal. One would expect the law to catch up.

In 2003, Anne-Marie Slaughter analyzed the Bush administration’s legal and political position in these terms in the *New York Times*:

> With the news that the United States was abandoning its efforts to get United Nations approval for a possible invasion of Iraq, yesterday looked to be a very bad day for staunch multilateralists. . . . That view is understandable,
but incomplete. . . By giving up on the Security Council, the Bush Administra-
tion has started on a course that could be called "illegal but legitimate," a course that could end up, paradoxically, winning United Nations approval for a military campaign in Iraq—though only after an invasion. . . . In 1999, the United States, expecting a Russian veto of military intervention to stop Serbian attacks on ethnic Albanians in Kosovo, sidestepped the United Nations completely and sought authorization for the use of force within NATO itself. The airwaves and newspaper opinion pages were filled with dire predictions that this move would fatally damage the United Nations as the arbitrator of the use of force. But in the end, the Independent International Commission on Kosovo found that although formally illegal—the United Nations Charter demands that the use of force in any cause other than self-defense be authorized by the Security Council—the intervention was nonetheless legitimate in the eyes of the international community. So, how can United Nations approval come about? Soldiers would go into Iraq. They would find irrefutable evidence that Saddam Hussein's regime possesses weapons of mass destruction. Even without such evidence, the United States and its allies can justify their intervention if the Iraqi people welcome their coming and if they turn immediately back to the United Nations to help rebuild the country.

The United States will now claim authorization under Resolution 1441. Most international lawyers will probably reject this claim and find the use of force illegal under the terms of the Charter. But even for international lawyers, insisting on formal legality in this case may be counterproductive. . . . The United Nations imposes constraints on both the global decision-making process and the outcomes of that process, constraints that all countries recognize to be in their long-term interest and the interest of the world. But it cannot be a straitjacket, preventing nations from defending themselves or pursuing what they perceive to be their vital national security interests. . . . That is the lesson that the United Nations and all of us should draw from this crisis. Overall, everyone involved is still playing by the rules. But depending on what we find in Iraq, the rules may have to evolve, so that what is legitimate is also legal.39

DISCIPLINARY RENEWAL AND PROFESSIONAL FAITH: THREE EXAMPLES

Hans Kelsen responded to the undecidability of theory with a plea for faith. Modern international lawyers who inherit a century of work on the problems of normative legality and enforcement remain in Kelsen's predicament. There
is no analytically decisive answer to the riddle of international law's legality. As Kelsen observed, to see the operations of a legal order is a choice. International lawyers make all sorts of arguments about the specificity of normative pedigree, the special persuasiveness of legal norms, the singularity of legal enforcement, or the special powers of law to legitimate. Ultimately, however, an international legal argument is just an argument; an enforcement action just an exercise of power. International legal theory is just a collection of arguments you can try in discussion with a skeptic, none of them watertight. What makes international law a sophisticated and disenchanted profession is the shared realization that this is the case and a determination to forge ahead.

As a result, international law is best understood not as a philosophical mystery to be solved, but as a profession: the work of people who animate the practices, norms, and ideas that have been gathered in its name. What holds the field together is a professional identity that is part shared faith in international law's usefulness and long-term potential, part practice of fealty and strategic engagement on behalf of that faith, and part shared sensibility or posture aligning these ethical commitments and pragmatic strategies. To illustrate the importance of belief in the contemporary professional style, I revisit the arguments of three American postwar international law innovators: Myres McDougal, Harold Koh, and Louis Henkin. The choice is idiosyncratic: the selection would look quite different in other national traditions. They exemplify three subtly different American modes of professional faith associated with different professional practices and engagements with statecraft. Like Kelsen, each asks those in the profession to choose faith, responding to the failure of theory with professional responsibility.

Of the three, McDougal may be the most well known through his work with the Yale Project on World Public Order. He and his colleagues imagined the world as an open-ended “policy process” through which law is created, interpreted, and affirmed through a constant give-and-take. In 1955, McDougal described norm creation “as a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation-states unilaterally put forward claims of the most diverse and conflicting character...and in which other decision-makers, external to the demanding state...weigh and appraise these competing claims...and ultimately accept or reject them.” It is possible to speak confidently about what the law “is” only after one has observed the outcome of the give-and-take.

At the same time, power is not an absolute prerogative backed by force: it is a more interactive and institutional effect that is often generated by people
using legal terms and legal institutions. McDougal criticizes those who fail to understand law's role in power as aggressively as those who deny power's role in law.

The process of decision-making is indeed, as every lawyer knows, one of the continual redefinition of doctrine in its application to ever changing facts and claims. A conception of law which focuses upon doctrine to the exclusion of the pattern of practices by which it is given meaning and made effective, is, therefore, not the most conducive to understanding. . . . Formal authority without effective control is illusion; effective control without formal authority may be naked force. A realistic conception of law must, accordingly, conjoin formal authority and effective control. . . .

Law offers, as we have seen, a continuous formulation and reformulation of policies and constitutes an integral part of the world power process.42

Would a law so closely allied with power still be law? If so, would it still be a good thing—the cosmopolitan law of the discipline's dreams? Many of McDougal's contemporaries thought he had both abandoned and undermined international law, confusing it with policy and great power prerogative. But McDougal disagreed. The key was to appreciate the significance of ethics in power itself, and to place confidence in the powers of free people to generate a law—and a world—worthy of their aspirations. In his view, to stand with virtuous power was a personal and professional choice, and to find law there the best path to law's own triumph.

The moral goals of people—demands for values justified by standards of right and wrong—are not mere "abstractions" without antecedents or consequences. Such goals are rather the most constructive dynamisms of conscience and character and, when shared with others, are not "sources of weakness and failure" but rather the most dependable bases of power and successful co-operation. The moral perspectives of people, no less than naked force, are commonly regarded as among the effective sanctions of law. . . . To reject these growing common demands and identifications of the peoples of the world for a "profound and neglected truth" from Hobbes that "the state creates morality as well as law" and hence, to conclude that it is moral perversion for a nation-state to clarify its interests in terms of a wider morality, is as fantastic as it is potentially tragic. Certainly it neither accurately reflects the aspirations of the free peoples of the world nor effectively promotes the clear interest of the United States in a more efficient organization of these
peoples to suggest that the issue between the free world and the totalitarian is simply one of "relative power" and that distinctions between aggressor and non-aggressor nations are mere moral illusions serving to protect vested interests...

It is urgently to be hoped that attacks upon law and morality which so profoundly misconceive law, morality and power... will not cause many of us to mistake the real choice that confronts us. People whose moral perspectives preclude the deliberate resort to violence except for self-defense or organized community sanction, have in the contemporary world only the alternative of some form of law. The choice we must make is not between law and no law or between law and power, but between ineffective and effective law. A choice in sum between illusory doctrines of "old fashioned" diplomacy, and spasmodic resorts to unauthorized violence, and, on the other hand, clear moral and legal commitments to freedom, peace, and abundance which are sustained by organized community coercion and which invoke, at both national and international levels, all the contemporary instruments of power, ideological and economic as well as diplomatic and military. 43

International law was a terribly serious business, neither irrational politics nor rational law, but an ongoing project through which the world's people have the opportunity to choose a world public order of freedom and justice. McDougal did not offer a resolution to the problem of the legality of rules and their enforcement. He modeled a posture forward from its nonresolution: to choose law as an expression of values and a mobilization of "all the contemporary instruments of power" to their realization. It is difficult to separate so bravura a profession of faith from the context of high politics in which McDougal imagined international law being made relevant. His was a voice of the post-war American political ascendency as it contemplated another global struggle against the ideologies of tyranny. The significance of international law could be seen in its relation to what he saw as the most significant political challenge of the day for which all the instruments of power would indeed be necessary. The values he had in mind were not enumerated in legal process or a catalog of rights. They were larger than that: the aspirations of the free peoples of the world. Law should be subordinated to so great a cause. It was fortunate that to choose law was also to align with that future.

A second American response to the inadequacy of theories of legality focused on the legal process across a period in which American ascendency and
world order seemed more stable and the work of law a matter of steady and often routine adjustments in commercial and government practice. The lineage for this approach runs to Philip Jessup’s midcentury articulation of a transnational law and is best represented today by work on adjudicative and administrative networks. Harold Koh, past US State-Department legal advisor and former dean of the Yale Law School, exemplifies the “transnational legal process” approach, although one might as easily focus on the rising tide of scholarship about “global administrative law.” Like McDougal, their focus is the socio-political process through which law is invoked, tested, and affirmed, but they have in mind the adjudicative and bureaucratic practices of commercial affairs and government. Philip Allott had famously asserted that the travaux préparatoires for legal agreements had no boundaries of space or time. Koh identified law with its professional expression in the legal institutions of adjudication and administration within and between states.

It took intellectual work to interpret judicial and administrative bodies across the world as a kind of “network” that could be constitutive of a global legal order. Where McDougal placed his faith in the moral choices people would make—and the powers they would exercise—in the name of freedom, Koh relied on more routine patterns of interaction that would “create patterns of behavior and generate norms of external conduct which they in turn internalize.” For Koh, the judicial function has a direction: the transnational legal process is normative, generative of its own legality.

Thus, the concept [of a transnational legal process] embraces not just the descriptive workings of a process, but the normativity of that process. It focuses not simply upon how international interaction among transnational actors shapes law, but also on how law shapes and guides future interactions: in short, how law influences why nations obey.

To summarize, the critical idea is the normativity of transnational legal process. To survive in an interdependent world, even the most isolated states—North Korea, Libya, Iraq, Cuba—must eventually interact with other nations. Even rogue states cannot insulate themselves forever from complying with international law if they wish to participate in a transnational economic or political process. Once nations begin to interact, a complex process occurs, whereby international legal norms seep into, are internalized, and become embedded in domestic legal and political processes.

To use international law is to strengthen it and to find oneself transformed. The long arc of international relations can be bent toward law if people accept
the responsibility to help it along. Wherever they may work, professionals can be agents of the international legal process, and Koh urges international lawyers to accept the professional responsibility that goes with this possibility.

[The theory of transnational legal process] predicts that nations will come into compliance with international norms if transnational legal processes are aggressively triggered by other transnational actors in a way that forces interaction in forums capable of generating norms, followed by norm-internalization. This process of interaction and internalization in turn leads a national government to engage in new modes of interest-recognition and identity-formation in a way that eventually leads the nation-state back into compliance. 49

It is sometimes said that someone who, by acquiring medical training, comes to understand the human body acquires as well a moral duty not just to observe disease, but to try to cure it. In the same way, I would argue, a lawyer who acquires knowledge of the body politic acquires a duty not simply to observe transnational legal process, but to try to influence it. 50

The legality of international law has no theoretical guarantor. The legalization of global political and economic life will be a victory to be won by professional commitment and personal acts of responsibility to put law to use. Legal professionals, in whatever setting they find themselves, should nudge government toward the use of legal procedures and vocabularies. 51 Although this might be done through external agitation—Koh cites the work of the international human rights clinic at Yale as one example—international lawyers in government or private practice ought also to think of themselves as a kind of fifth column within the establishment, loyal to the larger future of law alongside the interests of clients or governments, pushing clients toward law and encouraging them to push others toward law. 52

Working for law requires a suspension of disbelief in law’s dark potential. Were the legal fabric systematically implicated in violence and injustice, the orientation Koh advocates would make little sense. Koh’s exemplary outliers—North Korea, Libya, Iraq, Cuba—were doubtless chosen to emphasize that even for such states, the transnational legal process was now normative. His choice also sends the message that international law is aligned with the broad interests of the established order whose center is underwritten by American power. Work for the law and work for the client align.

The Kingsbury, Krisch, and Stewart manifesto for “global administrative law” arrives at a similar moment of affirmation. 53 They encourage us to imagine
a "global administrative space" stretching across all the diverse institutions that implement norms transnationally and to work to make that space more effective, responsible, and transparent by bringing the techniques of national administrative law to bear in one or another way on its procedures. In democratic national government, administrative law aims to link the bureaucracy to the democratic decisions of parliament under the legal control of the judiciary. Internationally, there is no democratic legislature and no controlling judiciary: global administrative law will be in some sense unmoored. Might it then become an instrument of tyranny, rendering undemocratic actors more effective?

Our espousal of the notion of a global administrative space is the product of observation, but it inevitably has potential political and other normative implications. On the one hand, casting global governance in administrative terms might lead to its stabilization and legitimation in ways that privilege current powerholders and reinforce the dominance of Northern and Western concepts of law and sound governance. On the other hand, it might also create a platform for critique. As the extent of global administrative government becomes obvious (and framing global regulation in traditional terms of administration and regulation exposes its character and extent more clearly than the use of vague terms such as governance), the more resistance and reform may find points of focus. . . . Confronting these issues in administrative terms may highlight the need to devise strategies for remedying unfairness associated with such inequalities. 54

That is the last we read about administrative law's dark potential. Kingsbury, Krisch, and Stewart affirm their confidence in its potential to improve the machinery of law making and application, and for the self-correcting operations of open global debate, a posture more plausible for people with long-term faith in the overall justice of the established order, whatever its current failings, than for outsiders beyond the circle of faith.

A third approach to professional faith in law's virtuous destiny focuses less on process than the remaking of consciousness among the world's elites. If people came to share an idea about the limits and direction for power, neither legal process nor all the enforcement powers of the free peoples would be required to compel it. Law could be taken out of the equation, replaced by a shared ideology of power. Although legal norms and institutions may point the way, a better world would require an awakening of spirit.

I first encountered this idea in a 1954 article by Wilhelm Roepke, a German ordo-liberal economist, reflecting nostalgically on the nineteenth-century
world order. He was an opponent of efforts to construct anything like a government at the European or global level: the very idea raised the specter of collectivism. But he marveled at the way he imagined the world to have operated in the nineteenth century.

We realize that the problem of international trade is to find for it a legal-institutional framework which is at least approximate to that which intra-national trade can take for granted within the national borders... But how has this been done in spite of the fact that there never was a world state? That is the capital question which we must answer.

The solution which the Liberal Age had found for the problem of international order was of a peculiar and complex kind, and we may characterize its main features if we call it the universalist-liberal solution... The functions of the non-existent but seemingly indispensable world state have been replaced by something else for which we may find the only parallel in the Res Publica Christiana of the Middle Ages... We may call this substitute of the world state the international “open society” of the Liberal Age. It was a sort of ordre public international...

The international “open society” of the nineteenth century may be regarded, in a very large sense, as a creation of the “liberal” spirit... We come here to a point of extraordinary importance without which we cannot understand fully the mystery of the international order of the recent past. What we mean is the genuinely liberal principle of the widest possible separation of the two spheres of government and economy, of sovereignty and economic exploitation, of Imperium and Dominium, or of “political power” and “economic power” (MacIver). This means the largest possible “depolitisisation” of the economic sphere and everything that goes with it.

Free trade was not the disciplining creed of international financial institutions and first world governments—it was the spirit of an age, enforcing itself in the minds of elites wherever they worked, in city governments, corporate boardrooms, local central banks, and dozens of national civil services. The shared commitment to the liberal principle—plus the gold standard—functioned as an “As-If-World-Government.” If institutions were to be constructed at the European or global level, they should be designed to encourage that spirit rather than to legislate or enforce it.

After 1989, legal intellectuals developed a similar picture of human rights. In this view, the peoples of the world are united in a common civilization whose normative consensus operates as a foundational limit on political life.
expressed in the canon of international human rights norms. In 2001, a leading American international law text introduced the chapter on human rights by reference to Louis Henkin's 1990 argument that we had entered an "age of rights."

The second half of the 20th century has been described as the "Age of Rights." That characterization reflects the view that, with the end of the Second World War, the idea of human rights became a universal political ideology and a central aspect of an ideology of constitutionalism. The ideology of human rights, of course, is a municipal ideology, to be realized by states within their national societies through national constitutional law and implemented by national institutions. But beginning with the promises made during the Second World War in the plans for a new world order, human rights became a matter of international concern and progressively a subject of international law. . . . What was once unthinkable had become normal by the end of the 20th century.57

This vision linked law's operations in the world directly to the common faith of the professional elites who govern in its name. The most significant law is not the law that is valid or persuasive or effectively enforced, but the law that is taken for granted; the law that needs no enforcement and raises no suspicion about its validity. The legality of this law is always already vouchsafed by its hegemonic position in the governing "ideology" of the global establishment. In Henkin's view, the "age of rights" has much in common with the world before Austin raised anxieties about legality in the first place. Following Henkin, we might say that when Ben Franklin packed himself off to Paris with Vattel in his satchel, international law was part of his "ideology" of what it meant to be a diplomat.

As I have argued in this book, elites do share many ideas about what governments are, what an economy is, what the appropriate objectives and tools of policy are, what problems demand attention, and which can safely be left unattended. They share ideas about law as well: what it is, what it requires, how it operates, where its limits are to be found. Their ideas are not all laudatory: a consensus that damaging the environment is a natural prerogative of sovereign power, that rules distorting economic activity ought to be withdrawn, or simply that the suffering and death caused in legitimate war is, well, legitimate. International lawyers have tended not to explore these possibilities, perhaps because it would complicate their veneration and jeopardize their effort to promote law as an ideology of governance.
The robust global machinery of advocacy and activism that has grown up around the promotion of human rights would not be necessary had they truly become axiomatic for people in power. In one sense, however, Henkin was correct. One rarely hears arguments against human rights. Governments routinely accuse one another of violating human rights and defend their own exercise of power on the global stage as a defense of human rights. As a vocabulary for the assertion of power, they have become hegemonic. People making assertions in their name customarily do so in a forceful style, as if the norms they represent were part of a settled global consensus that ought not to need to be asserted at all. The word “faith” is probably not the best description for the mental backdrop to these practices. Henkin does not ask his readers to “believe” in human rights or to choose law as the best interpretation of a global power process. He recounts the triumph of human rights as a historical fact: a new global political ideology has come.

The question is how to act in their name. Here, Henkin urges a complex professional posture on his followers. Where McDougal imagined international law professionals in Cold War statecraft while Koh imagined them in bureaucratic practice, Henkin imagines them as advocates bearing witness to a new truth. To act with zeal and fealty is certainly part of it. The human rights community fosters a habit of fidelity among the faithful, a shared commitment not to doubt or betray the human rights revolution before the unbelievers. But to play for ideological hegemony is also to play a long game that requires strategic and practical wisdom. One must take care: if you go to war in the name of human rights, you could both lose the war and disenchant the human rights vocabulary.

In his short 1990 book, *The Age of Rights*, Henkin offers a kind of epistle to the faithful. The book contains affirmations of faith alongside advice and possible arguments one might use when witnessing: what to say about competing “ideologies” like religion, socialism, or “development”; how to square so many violations with the existence of rights; how to handle the diversity of human rights practices in different nations; how to think about the false piety of the hypocrite; how to square the demands of an unreformed world with the fact of human rights triumph. These recall the concerns that moved Paul in his many letters to struggling communities of faith.

Ours is the age of rights. Human rights is the idea of our time, the only political-moral idea that has received universal acceptance. . . .

Despite this universal consensus, as all know, the condition of human rights differs widely among countries, and leaves more-or-less to be desired
everywhere. This may suggest that the consensus I have described is at best
formal, nominal, perhaps even hypocritical, cynical. If it be so, it is nonethe­
less significant that it is this idea that has commanded universal nominal
acceptance, not (as in the past) the divine right of kings or the omnipotence
state, not the inferiority of races or women, not even socialism. Even if it be
hypocrisy, it is significant—since hypocrisy, we know, is the homage that
vice pays to virtue—homage, that governments today do not feel free to
preach what they may persist in practicing. It is significant that all states and
societies have been prepared to accept human rights as the norm, rendering
deviations abnormal, and requiring governments to conceal and deny, to
show cause, lest they stand condemned. Even if half or more of the world
lives in a state of emergency with rights suspended, that situation is con­
ceded, indeed proclaimed, to be abnormal, and the suspension of rights is
the touchstone and measure of abnormality. 58

The result for human rights advocates is a subtle and shifting combination
of strong assertion and strategic calculation. In my experience, it would be
wrong to say that human rights advocates "believe" they represent a settled
ideology. They are committed to the practice of human rights advocacy as a
path to justice. They have confidence in the power of advocacy sans peur et sans
reproches. They are careful pragmatists about when and where to engage, and
how to preserve the authority of speaking in the name of norms whose legality
is not open to challenge. What holds them back from exploring the costs and
benefits or unanticipated consequences of their advocacy, their role in the legiti­
iation of conflict or the reproduction of inequality is less belief or faith than
a shared practice that arises for each professional as a personal identity—here I
stand—combined with strategic cunning. It is difficult not to be reminded of a
similar injunction to the believer:

Behold, I send you forth as sheep in the midst of wolves. Be ye therefore as
wise as serpents and as innocent as doves. 59

To associate human rights with injustice or bad outcomes both betrays the
community of the faithful—"I knew him not"—and is bad strategy. If you
bear witness, people will come to believe and act in the name of human rights.
To affirm the downsides can only delegitimate law and retard progress toward
a better world. The problem of legality—like the problem of faith—can be re­
solved only in the practice of a community of believers who balance pragmatic
awareness and strategic calculation with a calm ethical self-confidence in their
materials and their common work.
In the wake of twentieth-century efforts to renew and expand the field, the expertise of international lawyers is a combination of shared ideas and points of reference, shared projects and commitments, and a common sensibility. It is not ideas or doctrines that hold the field together—these are diverse and only rarely compelling. The faith required to inhabit and use them is part fealty, in the sense of a commitment never to deny or betray the field, the legality of international law, or the promise of its future. It is faith affirmed in community, through the shared experience of routine professional work as the faithful recognize one another and celebrate what sets them apart. This faith as practice is a habit of acting as if what is believed were true, a practical project in a fallen world: the common work of promoting, expressing—or holding one's tongue—as strategically necessary in a world that will only later be able to live fully the dream of cosmopolitan legality.

RESPONDING TO LEGAL PLURALISM

The modern sophistication of the international legal profession reflects an awareness of the diverse and contradictory quality of the available ethical commitments, legal norms, institutions and legal theories. The practice of professional faith—an orientation toward the virtuous future of law—makes this pluralism tolerable. As in any community of faith, however, people also struggle with belief. Doubts and anxieties arise. In periodic response, the discipline generates new theories about how it all fits together. These function as a kind of belt and suspenders on professional faith. We would expect these to come in at least two voices: the impatient idolatry of premature solution and the reassuring balm of prefiguration in a still fallen world. We should understand contemporary international legal theory in this way: a ministry to a doubting church.

If there could be a dispositive account of systemic coherence, we would not need so difficult a practice: what we believed might come could already be seen. For all the nuanced sophistication of practice in their shadow, images of a policy process, legal process, or universal ideology are meant to be reassuring in just this way. Diverse action, action taken in doubt, also somehow adds up. The whole is more than the sum of parochial interests struggling with one another. Debates about the "fragmentation" of international law or the "proliferation" of international courts and tribunals across the turn of the past century arose in moments of anxiety and doubt when worry about the integrity of the legal "order" as a whole weighed on the profession. The work of scholarship
was not to address the doubts they expressed: a dispersed and fragmented law cannot be put back together; a constitution for the world cannot be but a wish. When Austinian anxieties arise in these terms—Are we constituted? Is law whole?—all we can do is talk about it reassuringly, developing practical responses in particular situations, plowing the debate back into professional argumentative practice. Then we can again pick up the baton and return to the work of faith.

People theorizing coherence into a plural legal universe are sometimes tempted by the metaphor of constitutionalism. In public international law, scholars have encouraged the idea that the UN Charter provides a kind of "constitution," particularly when it comes to the use of force. Others have seen a "constitutional moment" in the emergence of human rights as a global vernacular for the legitimacy of power. Some have proposed the World Trade Organization as a constitutional order, perhaps in combination with the human rights canon. Specialists in comparative constitutional law sometimes find the key in relations among national constitutions. All testify to the wish that things were constituted—as well as the realization that there is as of yet no workable account of how the world's legal order coheres. In a sophisticated profession, coherence theories rarely stand the test of time. There are too many of them, they are too easily instrumentalized by people with parochial projects and the pressure of practical struggle continually reopens awareness of pluralism and returns the professional from the reassurance of theory to the practice of his faith.

Gunther Teubner's proposal for a transnational "project of constitutional sociology" is a particularly sophisticated constitutional theory. Rather than privileging one doctrinal or institutional regime, he proposes to deepen the sociology of transnational regulation, adjudication, and administration to illuminate principles, rules, professional practices, and institutional arrangements, whether "public" or "private," which affect the "division of powers" among actors, sectors, and values in transnational society. The goal is to unearth the constitutional underpinnings of everyday interactions across and within semi-autonomous systems, each loosely associated with industries or domains of social practice or belief, each with its own rules and procedures, each pursuing its own particular logic: a health system, a sports system, a media system, a trade system, a pharmaceutical system, a scientific system, and so on. Governments—or diplomacy—form but one system among many. The identification of "systems" is not just description. It requires interpretation. Is there a global pharmaceutical system and an entertainment system? Or is there an
international intellectual property system? Does the sports system stand on its own, or is it part of the diplomatic system or the entertainment system? Interpretations are strategic tools: this is a system, this is its logic. And now we have returned to professional practice, atop another sediment of theoretical sophistication. It would require a break with professional faith to harness the same analytic to make visible the coercive distributive struggles in which one or another professional practice is implicated.

In the United States, we are accustomed to thinking about the rules governing relations among the federal legislature, courts, and executive as “constitutional” because they are mentioned in the official Constitution and debated as such. If we think in more sociological terms, we may want to add other things: the distinction between public and private activity, the relationship between corporate and labor power, the relative prestige of coastal and midwestern or northern and southern culture, the distribution of power between cities and suburbs. Perhaps the enduring allocation of power between white and black citizens, between men and women or between rich and poor is “constitutional.” The distributonal consequences of treating one as constitutional and the other as a matter of history is hard to unravel, but it is likely to affect who feels empowered to contest or preserve which arrangements. The practice of constitutionalism—or systems analysis—is itself a space of distributive struggle.

In this book, I have advanced two responses to the experience of pluralism other than redoubling the practice of a doubting professional faith or embracing the idolatry of new coherentist theory. First is to lay down the burdens of faith and see law’s role in the ubiquitous struggles of global political and economic life and the injustice that results. Martti Koskenniemi expresses this shift in perspective:

Much of mainstream Anglo-American jurisprudence . . . approaches law in this way, as a hermeneutics of interpretation that aims to ensure the coherence of the legal order—and thereby the acceptability of the system of distribution of material and spiritual values that goes with it. There is much that is right in this jurisprudence. Law is an interpretive craft. But it underestimates the open-endedness of the interpretations and mistakes “coherence” as the point of legal activity. A better view is to take one step backwards, accept the irreducible indeterminacy of interpretation and the contradictoriness of legal argument (which, in any case, most lawyers accept), and build on the way legal argument brings out into the open the contradictions of
the society in which it operates and the competition of opposite interests that are the flesh and blood of the legal everyday.

Law is an argumentative practice that operates in institutional contexts characterized by adversity. . . . From this perspective, law is not a supporter of social consensus but a participant in its conflicts, giving form to social adversity in order to support some values against others, to affirm or contest prevailing distributionary structures.

A second and allied alternative is embrace of the experience that things don't add up, that coherence fails, that incommensurability must be acknowledged. This road opens whenever there is a personal encounter with incommensurate difference and a loss of confidence in the availability of resolution within the canons of acceptable professional discussion. Lawyers may experience it whenever there are conflicts, gaps, or ambiguities in the law and it seems, if only for a moment, that they cannot be reconciled or bridged. In chapter 5, I associated this with the professional experience of "yielding" to the argument or assertion of another. The personal experience of legal pluralism that comes with "yielding" unmoors professionals from the confident sense that their expertise grounds their action. Suddenly, there is a choice: a moment of vertigo and professional freedom.

People recoil from this experience of pluralism. Experts turn back to faith or reach rapidly for the reassurance of theory and prior practice. But there is also a long tradition praising such moments in religious and political thought: the moment when "unknowing" and "deciding" cross paths, when freedom and moral responsibility join hands. It is what Carl Schmitt had in mind by "deciding in the exception" or what Max Weber spoke of as having a "vocation for politics." It is what Kierkegaard described as the "man of faith," or Sartre as the exercise of responsible human freedom. This is what Jacques Derrida meant by "deconstruction." The sudden experience of unknowing, with time marching forward to determination, action, decision—the moment when the deciding self feels itself thrust forward, unmoored, into the experience. In that moment of vertigo, the world's irrationality makes plain the constructed nature of theories about how it all fits together and the tendentiousness of practices in their name. Professional practice suddenly has no progressive telos, and international law opens as a terrain for politics, rather than a recipe or escape from political choice. It is in such a moment that the world could look again like 1648: open to being remade.